

## ALP of international transaction couldn't be determined by comparing price charged by other AE's

**Summary – The High Court of Bombay in a recent case of Audco India Ltd., (the Assessee) held that TPO ought to have arrived at ALP of assessee's sale to its AE by only comparing it with uncontrolled transaction of sale**

### Facts

- The assessee-company had exported finished valves and valves in kit form to its AE *i.e.* Flow Serve USA and also its group companies across globe.
- The assessee had considered two comparable companies *viz.* BHEL & KSB Pumps to determine the transfer pricing adjustment at cost of production plus 15 per cent. However, the TPO found that supply of valves and kits to other group companies was at a higher price. Therefore, the TPO adjusted the profit margin (average) of similar supplies made to group companies (AEs) to enhance/revise the sales price of valves and kits sold to Flow Serve, U.S.A. The Assessing Officer passed an assessment order in terms of the TPO's directions resulting in enhancement.
- The Commissioner (Appeals) held that the two comparables *viz.* BHEL and KSB Pumps were not accepted by the TPO without establishing, how and why they were inappropriate and selection of profit margins of the assessee transactions with Flow Serve with sales made/prices charged by the assessee to its AE's in other countries cannot be the basis for determining the ALP of sales made to other AE's in different countries as they were in different geographical location, *i.e.*, different from the USA, thus not comparable. Therefore, he allowed the appeal of the assessee.
- The Tribunal held that TPO had clearly made a fundamental error in determining the ALP of sales of valves and kits made to Flow Serve by comparing its margin with other sales by the assessee to its AEs in different parts of the world and in terms of the provision of the Act, comparison to determine the ALP cannot be done by comparing the prices charged to other AE's *i.e.* controlled transactions and the transfer pricing adjustment of transactions with AEs in USA had to be arrived at by making comparisons with uncontrolled parties in USA.

### Held

- Chapter X of the Act is a special provision relating to avoidance of tax. Section 92 deals with computation of income from international transaction having regard to ALP. It provides that any income arising from the international transaction shall be computed having regard to the ALP. The ALP is defined under section 92F(ii) to mean a price which is applied or proposed to be applied in transactions between persons other than AE's in uncontrolled transactions. This is further supported by rule 10A(d) where uncontrolled transaction has been defined as a transaction between enterprises other than with A.E's. whether resident or non-resident. In view of the above clear position in law, the TPO ought to have arrived at the ALP of the assessee's sale to its A.E. *viz.* Flow

Serve by only comparing it with uncontrolled transaction of sale in USA. Thus, the approach of the TPO was contrary to the clear provisions of law. Besides as held by the Tribunal the comparison has to be region/country specific, which in this case, the TPO has completely ignored.

- Therefore, the view taken by the Tribunal does not call for any interference as it is in accordance with the self evident provisions of law.