



## Transfer Pricing Adjustment in relation to intra-group services deleted in the absence of justification of Nil ALP under CUP method

### Background

The Ahmedabad Bench of Income-tax Appellate Tribunal (the Tribunal), in the case of SABIC Innovative Plastics India Pvt Ltd.<sup>1</sup> (the taxpayer) for Assessment Years (AYs) 2009-10 and 2011-12 deleted the adjustment made by the Transfer Pricing Officer (TPO)/Dispute Resolution Panel (DRP) with respect to payment for intra-group services to associated enterprises of the taxpayer.

The Tribunal rejected the Nil Arm's Length Price (ALP) determined by TPO with respect to management services under Comparable Uncontrolled Price Method (CUP).

### Facts of the case

- The taxpayer is engaged in the business of manufacturing and trading of advanced engineering thermoplastics and trading of polycarbonate sheets.
- The taxpayer made the payment on account of intra-group management services in the nature of finance, environment health and safety, supply chain, sales and marketing, supply chain and information technology services to its associated enterprises.
- The taxpayer justified the ALP of the charge on the basis of the Transactional Net Margin Method (TNMM). However, the TPO/DRP rejected TNMM and proposed to benchmark the transaction separately by applying CUP.

- The taxpayer paid a mark-up of 10 per cent on the receipt of information technology services. However the same was not accepted by the TPO, and a mark-up of 3 per cent was contended to be at ALP instead of 10 per cent.
- The TPO/ DRP observed that the services availed were general in nature and there was no quantification of the services.
- Aggrieved, the taxpayer filed objections before DRP who confirmed the addition made by TPO. Thereafter the taxpayer preferred an appeal before the Tribunal.

### Taxpayer's contentions

- The taxpayer explained the application of TNMM for benchmarking the receipt of services on an aggregated approach basis and also put forward its contentions against the alleged application of CUP.
- The taxpayer explained the justification of the receipt of services by reproducing the evidence on a sample basis.

### Tax department's contentions

- The tax department contended that the transaction for receipt of management services should be benchmarked using CUP as the most appropriate method.

<sup>1</sup> SABIC Innovative Plastics India Private Limited vs ACIT (ITA No. 1125/Ahd/2014 - Assessment Year 2009-10 and IT(TP) No. 427/Ahd/16 - Assessment Year 2011-12)

- The tax department further contended that the taxpayer did not furnish evidences with respect to receipt of some services and the evidences furnished for some services were general in nature. Further, the tax department also contended that the no benefit was accruing to the taxpayer on account of receipt of these services and hence the ALP for the same should be determined as Nil.
- The DRP opined that the evidence of receipt of services does not lie in mere documents, such as agreements drawn in this regard or emails exchanged between the parties. However the same lies in the benefit derived by the taxpayer on account of receipt of services.
- The tax department proposed to apply a mark-up of 3 per cent on payment for information technology services as against 10 per cent mark-up paid by the taxpayer.

### Tribunal's decision

- The Tribunal relied on the observation made by the Delhi Tribunal in the case of AWB India<sup>2</sup> wherein it was upheld that CUP method cannot be applied in the absence of data pertaining to the price of the same product and service in uncontrolled circumstances.
- The Tribunal upheld that it was beyond the powers of the TPO to decide if a particular expenditure incurred by a business enterprise was commercially expedient.
- The Tribunal rejected the contention of DRP that the worth of the services can be correlated with the benefit of the services.
- The Tribunal based on the sample evaluation of the evidences submitted by the taxpayer opined that there were reasonable evidences to substantiate the rendition of services.
- Accordingly, the Tribunal deleted the adjustment with respect to receipt of management services for both the assessment years.
- The Tribunal also upheld that the mark-up of 10 per cent paid by the taxpayer on information technology service vis a vis the mark-up of 3 per cent applied by the TPO based on the premise that TPO did not provide any specific comparables for justification.

### Our comments

Often in transfer pricing proceedings, TPO tends to apply CUP as the most appropriate method for benchmarking the intra-group services and determines a Nil ALP. This judgement can be referred to as a landmark judgment wherein CUP method has been rejected as the most appropriate method in the absence of a comparable uncontrolled transactions. However, due importance has been given on the need to maintain robust contemporaneous documentary evidences in support of inter-group services availed from associated enterprises.

The process of determination of ALP has to be done on the basis of a recognised method rather than on the basis of subjective perceptions. However, the Tribunal has not specified any detailed guidelines for determining ALP for such services. This means that in the absence of any guidelines the charge for intra-group services should be that which would have been made and accepted between independent enterprises in comparable circumstances as also envisaged in the OECD<sup>3</sup> guidelines.

Emphasis has been laid down by the Tribunal on the principle that the process of evaluating the worth of the services cannot be directly correlated with the benefit of such services. However, there should be a reasonable and sufficient evidence to demonstrate the rendition of services.

The Tribunal has also reiterated certain well-established principles of law such as a limit on powers available to the Assessing Officer or TPO to determine commercial expediency for the taxpayer.

Considering the payments in the nature of intra-group services are one of the most contentious issues in India, the ruling comes as a relief for the taxpayers facing transfer pricing adjustments on similar issues.

<sup>2</sup> AWB India Private Limited v. DCIT [2015] 152 ITD 770 (Del)

<sup>3</sup> The Organisation for Economic Co-operation and Development

[www.kpmg.com/in](http://www.kpmg.com/in)

#### Ahmedabad

Commerce House V, 9th Floor,  
902 & 903, Near Vodafone House,  
Corporate Road,  
Prahlad Nagar,  
Ahmedabad – 380 051  
Tel: +91 79 4040 2200  
Fax: +91 79 4040 2244

#### Bengaluru

Maruthi Info-Tech Centre  
11-12/1, Inner Ring Road  
Koramangala, Bangalore 560 071  
Tel: +91 80 3980 6000  
Fax: +91 80 3980 6999

#### Chandigarh

SCO 22-23 (1st Floor)  
Sector 8C, Madhya Marg  
Chandigarh 160 009  
Tel: +91 172 393 5777/781  
Fax: +91 172 393 5780

#### Chennai

No.10, Mahatma Gandhi Road  
Nungambakkam  
Chennai 600 034  
Tel: +91 44 3914 5000  
Fax: +91 44 3914 5999

#### Delhi

Building No.10, 8th Floor  
DLF Cyber City, Phase II  
Gurgaon, Haryana 122 002  
Tel: +91 124 307 4000  
Fax: +91 124 254 9101

#### Hyderabad

8-2-618/2  
Reliance Humsafar, 4th Floor  
Road No.11, Banjara Hills  
Hyderabad 500 034  
Tel: +91 40 3046 5000  
Fax: +91 40 3046 5299

#### Kochi

Syama Business Center  
3rd Floor, NH By Pass Road,  
Vytilla, Kochi – 682019  
Tel: +91 484 302 7000  
Fax: +91 484 302 7001

#### Kolkata

Unit No. 603 – 604,  
6th Floor, Tower – 1,  
Godrej Waterside,  
Sector – V, Salt Lake,  
Kolkata 700 091  
Tel: +91 33 44034000  
Fax: +91 33 44034199

#### Mumbai

Lodha Excelus, Apollo Mills  
N. M. Joshi Marg  
Mahalaxmi, Mumbai 400 011  
Tel: +91 22 3989 6000  
Fax: +91 22 3983 6000

#### Noida

6th Floor, Tower A  
Advant Navis Business Park  
Plot No. 07, Sector 142  
Noida Express Way  
Noida 201 305  
Tel: +91 0120 386 8000  
Fax: +91 0120 386 8999

#### Pune

703, Godrej Castlemaine  
Bund Garden  
Pune 411 001  
Tel: +91 20 3050 4000  
Fax: +91 20 3050 4010

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

© 2017 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.