



## TRANSFER PRICING ALERT

12 June 2023

### Assessee can resile from the Most Appropriate Method adopted in Transfer Pricing Study Report

#### FACTS OF THE CASE (AY 2015-16)

- Star India Private Limited ('the assessee') is a company engaged in the business of broadcasting and distribution of various satellite channels primarily in India and own general entertainment channels in India and outside India.
- ESPN Star Sports Ltd. ('ESS'), a US based associated enterprise (AE) of the assessee, had broadcasting rights for sports events with a well-defined year-wise consideration payable each year on the happening of the sports events.
- The assessee entered into a Master Rights Agreement ('MRA') with ESS dated 31-10-2013 for a period of 5 Years (For the period 2014 to 2019) for acquiring Bundle of Sport Broadcasting Rights ('BSB Rights').
- The transaction of acquiring such BSB Rights (rights to broadcast through television/ internet/ mobile various sports events like ICC Tournaments including Cricket World cup, Champion League T20 cricket, Formula-1 GP2 and Wimbledon Championships etc.) was concluded for \$ 1,211 million. The said price was determined by an independent valuer (DHC Consultants Pvt. Ltd) on 05-11-2013 by adopting Discounted Cash Flow (DCF) method for the period 2014 to 2019. Under this method, the value of finite period has been determined at \$663 million and terminal value at \$548 million using income based approach (such rights were acquired by ESS from International Sport Bodies (ISB) for \$ 1338 Million).
- The BSB rights were acquired by the assessee using two different means as under –
  - i. Sub-licensing of rights by ESS (for



\$326.56 Million) to the assessee in which the payment was agreed at 90.5% (after discount of 9.5%) of payment made by ESS to International Sport Bodies ('ISBs');

ii. Rights by means of novation (for \$ 1011.6 Million) of the agreements under which the assessee was liable to make direct payment to ISBs and recover 9.5% of such payment from ESS.

- During the captioned AY, the assessee filed Form 3CEB containing the above stated transactions amounting to Rs. 3,075.24 Crs and applied 'Other Method' as the Most Appropriate Method ('MAM') for benchmarking the payment to its AE.
- During the course of Transfer Pricing (TP) proceedings, the assessee changed the benchmarking method and applied the Comparable Uncontrolled Price (CUP) method as MAM for demonstrating the Arm's Length Price (ALP) of such transaction. Under the said method, the assessee contended that overall purchase price is lower than the price agreed by AE with third parties and hence the instant transaction is at ALP by applying CUP.
- Further, during AY 2014-15, similar transaction was entered with AE and for determining the ALP, assessee adopted comparable uncontrolled transaction of ESS acquiring such BSB Rights from ISB which was concluded for \$1,388 million vis-à-vis \$1,211 million paid by assessee to AE. Accordingly, it was contended by the assessee that the transaction is at ALP by applying CUP since the purchase price of assessee was less than the price agreed between ESS and ISB.
- However, the Ld. TPO made adjustment by determining the ALP of Finite period at \$ 411 million and Terminal Value at Nil. This resulted into variation between actual consideration and ALP consideration at \$800 million i.e., 66.06% of the actual consideration. Accordingly, adjustment of Rs. 669.36 Cr was proposed by the TPO for AY 2014-15.
- DRP did not object the contention of Ld.

TPO which culminated into making TP addition of equal amount in the final assessment order. Against the said order, the assessee filed an appeal before the Tribunal wherein it was held that the valuation of BSB Rights is a highly technical matter which could be done only by a person having expertise in the field. Accordingly, the assessment order was set-aside and the matter was remitted to the Revenue to ascertain the correctness of the assessee's valuation reports by getting the valuation done through its own expert.

- Against above, Writ petition was also filed before High Court wherein the Hon'ble High Court asked the Special Bench formed for AY 2015-16 to dispose the matter in 2 Months and the said time was further extended by 2 Months.
- During the captioned AY 2015-16, Ld. TPO relied on its own judgement for the preceding year and proposed TP adjustment of Rs. 2031.50 Crs (rejecting 66.06% of the consideration) and also stated that the assessee cannot resile from the method chosen in Transfer Pricing Study Report (TPSR).
- Also, no succor was provided by the DRP and the Ld. AO passed the final assessment order including an adjustment as made by the Ld. TPO. Against above, the assessee filed an appeal before the Hon'ble ITAT and the matter was taken up for hearing and during the course of hearing the Division Bench found itself unable to concur with the view adopted by the Bench in the assessee's own case for the preceding AY 2014-15. Accordingly, Special Bench was constituted for AY 2015-16 on account of reference made by the Division Bench.

## ISSUE BEFORE HON'BLE ITAT SPECIAL BENCH

- A 3 member Special Bench was constituted comprising of Shri R.S. Syal (Vice President), Shri Aby T. Varkey (Judicial Member) and Shri Prashant Maharishi (Accountant Member). Following were the issues raised before the Special Bench:



- **Issue I** - Can assessee resile from the MAM adopted in its TPSR?
- **Issue II** – Which is MAM in the transaction under consideration?
- **Issue III** - Whether ALP determined by assessee is correct?

## DECISION OF HON'BLE MUMBAI ITAT SPECIAL BENCH

### • **Issue I**

The three member Special Bench expressed similar views on the aforesaid question wherein it was held that the assessee can resile from the most appropriate method adopted in its Transfer Pricing Study Report provided that the new method confirms to the requirement of Rule 10C(2) of the Income Tax Rules, 1962. One of the members, Shri R.S.Syal (VP) duly stated that there shall be no estoppel for changing the method as long as the new method is, in fact, the most appropriate for determining ALP. The said view was supported by judgement of Hon'ble Delhi High Court in case *PCIT Vs Matrix Cellular International Services Pvt. Ltd*<sup>1</sup>

### • **Issue II**

The matter revolves around selection of the MAM between the CUP method and the OM. In this regard, decision of opting OM was taken on a 2:1 majority, wherein the Hon'ble VP determined CUP to be appropriate method, whereas, Accountant Member ('AM') & Judicial Member ('JM') voted for OM. The views of the Hon'ble members are as follows:

- On comparative analysis of both the price-based methods, the Hon'ble VP stated that the CUP method has an edge over the OM as it employs the actually transacted price exclusively over the OM which takes into account the probable price also. Accordingly, it was demonstrated that CUP method is MAM for benchmarking the transaction under

consideration and it was recognized that the payment made by ESS to ISB serves as valid CUP.

- However, Ld. AM & Ld. JM did not concur with view of VP and stated that CUP is not available in the instant case and payment made by ESS to third party forms part of MRA which is a controlled transaction. Also, the Ld. AM duly stated T&C of original agreement signed between ESS & ISB (2007) are not contemporaneous so far as the time and the market factors prevailing on 31-10-2013 (date of signing MRA) are concerned. Further, Ld. AM and JM also stated that various valuation report/opinion (Report from DHC Consultants Pvt. Ltd, Duff & Phelps, BDO LLP, opinion from Professor Shaked) adopted by assessee for benchmarking the transaction duly highlights that CUP is not available.

### • **Issue III**

The Ld. VP stated that CUP method is most appropriate method and deleted the TP adjustment made by AO. However, Ld. AM and Ld. JM refused to comment on ALP as no arguments were put forth regarding the manner of application of OM and remanded the matter back to Division Bench for determining ALP. Accordingly, the matter is directed to be placed before the Division Bench.

## Comments

- The said decision is a welcome move in Transfer Pricing Landscape and has affirmed the fact that assessee can resile from the MAM adopted in its TPSR. The said decision shall assist the case of various assessee who have changed the benchmarking method during assessment/appellate proceedings as long as the new method is, in fact, the most appropriate for determining ALP.

<sup>1</sup> (2023) 151 taxmann.com 77 (Mumbai – Trib.) (SB)



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