# Communiqué

## International Tax

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## TP Adjustment to be Done at Transaction Level; Cannot be Done at Entity Level

### Facts

The assessee is a company incorporated in India and engaged in manufacturing of filing and packing equipments for beverage, food, and non-food industries. The assessee manufactured complete lines and machines and parts for the beverage industries and provided support from the stage of specific operational requirement of the customer, application engineering, installation and commissioning to after sales service like training, maintenance and parts.

The AO made a transfer pricing adjustment of INR 12,39,23,444 to the international transaction of import of machine parts in the case of the assessee. Consequently, the assessee approached the Dispute Resolution Panel (DRP), which dismissed the assessee's contentions.

As such, the matter reached the tribunal.

### Ruling

The Tribunal ruled in favor of the assessee. They were in complete agreement with the counsel for the assessee and opined that "*adjustment of the PLI of comparables ought to have been made at the transaction level and not entity level.*"

It was found that judicial precedent supported the above, namely, in the cases, *CIT vs. Tara Jewels Exports (P.) Ltd. (2016) 381 ITR 404; CIT vs. Firestone International (P.) Ltd. 378 ITR 558 Bom; Thyssen Krupp Industries India Pvt. Ltd. vs. ACIT (2013) 55 SOT 497 (Mum-Trib); Hindustan Unilever Ltd. vs. ACIT (2013) 57 SOT 1 (URO) (Mum.).*

The Tribunal upheld the assesses contention that the adjustment to be made to the international transactions on purchase of spares and parts, was calculated by first applying ALP of comparables of 9.74% to the operating sales of the assessee, thus arriving at the ALP of the operating cost. This would then be compared with the actual cost of the assessee and the excess operating cost at the entity level was thus arrived at, and this figure was proposed to be adjusted to the value of international transaction of the assessee. The difference of estimated operating cost and the actual operating cost of the assessee was adjusted to the international transaction for purchase of spares and parts of INR 38.26 Cr. A such, for arriving at the ALP.

The Tribunal held, *"The ld. AO is directed to verify the computation now submitted by the assessee making adjustment at the transaction level and if the adjustment was arrived at falls within ± 5% point of the international transaction, no adjustment has to be made to the international transaction of the assessee."*

***Source: Tribunal, Ahmedabad in KHS Machinery vs. DCIT vide ITA No. 575/Ahd/2015 dated April 17, 2023.***

## Lower Authorities Wrong to Hold Existence of PE; No Artificial Split of Contract Done to Avoid Taxes in India

### Facts

The assessee, ALSTOM, is a foreign company incorporated in UK and is a tax resident of UK in accordance with Article 4 of the India-UK DTAA. The assessee is engaged in the business of designing, engineering, manufacturing and supply of electric equipment that help in the transmission and distribution of power, commissioning and servicing of transmission and distribution systems on turnkey basis. The case of the assessee was selected for scrutiny due to the large claim of refund against tax deducted source. The assessee had been awarded a contract by Power Grid Corporation India Ltd. (PGCIL) for setting up a 3000 MW HUDC Terminal in Chhattisgarh, India. There were three contracts of the following nature:

- 'First Contract', also called 'off-share contract' was for supply of plant and equipment including spares outside India, Type test and Training to be conducted outside India.
- 'Second' and 'third contract' were 'on-shore supply contract' and 'on-shore service contract' which were assigned to an associate enterprise M/s. GE T & D India Ltd. (Indian Associate).

Consequently, the AO having taken into consideration the mechanism to determine profit of PE in terms of Rule 10 of the Income Tax Rules concluded that the total receipt source in India should be taken and the tax paid.

The assessee then approached the DRP which had sustained the draft assessment order except to the extent directing the AO to exclude the receipts on account of off-shore supplies made by assessee to GE T&D and SFO, only if they were not related to the PGCIL contract.

As such, the matter reached the Tribunal.

### Ruling

The Tribunal ruled in favor of the assessee. It relied upon the case of *Ishikawajma-Harima Heavy Industries Ltd vs DIT [2007] 288 ITR 408 (SC), also cited by the assessee*, and concluded,

*"Thus, the Bench is inclined to conclude that there was not an artificial split of bid into three separate contracts to avoid taxes in India. In the present case, the Indian Associate's non- involvement in off-shore transaction excludes it from being a part of the cause of the income itself, and thus there is no business connection. The Ld. Tax authorities below failed to appreciate the distinction between the existence of a business connection and the income accruing or arising out of such business connection, which is clear and explicit. It is established that assessee had no business connection or dependent agent PE or construction PE in India. The attribution of profit from off-shores supplies made to PGCIL to the alleged business connection or PE and application of Section 44BBB is not sustainable. The ld. Tax Authorities below have fallen in error to hold that off-shores supplies to PGCIL are taxable in India. The assessee was merely under liability for making off-shores supplies to PGCIL under the 'First contract' for which the revenue earned is not taxable in India."*

***Source: Tribunal, Delhi in UK Grid Solution Limited vs. DCIT vide ITA No. 2087/Del/2022 dated April 12, 2023***

## In the Absence of a Profit Related Element Receipt Cannot be Treated as Income; Reimbursement of Cost Not Income

### Facts

The assessee is a Project Office of a foreign company set up in India to provide engineering consultancy services and incurred expenses like rent, professional fee, travelling and conveyance during the course of business. The assessee filed return of income on 23.11.2018 declaring total income of Rs.28,07,203 and claiming a refund of INR 1,42,97,170.

The case was selected for limited scrutiny and statutory notice u/s 143(2) of the Income Tax Act, 1961 was issued and duly served upon the assessee. The assessee, during the year under review, had paid Professional Fee to Eurostudios India Private Limited amounting to INR 1,86,33,632 as against INR 2,01,34,000 as pointed out by the AO. The assessee had also paid Professional Fee to TPF Gentinsa Eurostudios S.L. Spain amounting to INR 2,31,56,815.

Additionally, the assessee had also paid certain bank expenses, salaries and other expenses to TPF Gentinsa Eurostudios S.L. Spain. In its entirety, the assessee had objected against the addition of INR 6, 78, 67, 973, being disallowance of payments of professional fee/salary made by the assessee to its AEs treating the same as FTS, on which TDS u/s 195 has not been deducted by the assessee.

The DRP upheld the order of the AO.

Consequently, the matter reached the Tribunal for conclusion.

## Ruling

The Tribunal ruled in favor of the assessee. With respect to the amount of INR 1,86,33,632, it held that since the provisions of TDS had been duly complied with by, no addition could be maintained on such account.

With respect to the amount of INR 2,31,56,815 being professional fee paid to TPF Gentinsa Eurostudios S.L. Spain, the Tribunal found that the nature of the payment was reflected in the MOUs between the head office and the Indian Service provider (ISP). The entire receipt from ISP was included under the head of other income as management fee. The Tribunal opined that, *"Since the aforesaid amount was only receipt from Indian service provider and further payment to head-off ice, whereby the entire receipts, received after deduction of tax at source, has been fully reflected as income on the receipt side, the forwarding payment to head-off ice deserved to be allowed as deduction."* Moreover, it was found that there was no default on part of the assessee when it came to TDS on *such remittance. Hence this addition was to be deleted as well.In the matter of salaries and other expenses, the Tribunal relied on the judgment of Hon'ble Supreme Court in the case of DIT vs. A.P. Moller Maersk A S 293 CTR 1 (SC), and concluded that, "it can be said that TPF Spain has incurred costs on behalf of the assessee in terms of the salary of the expatriates for assisting the Assessee in executing services to NHAI. The assessee had only reimbursed actual cost of such employees on the basis of time spent and time cost of such employees, which was incurred by head-office. No markup has been charged by TPF Spain and there is no prof it element in the said costs… It is submitted that in absence of any profit related element, a receipt cannot be classified as income in the hands of recipient of the money. In this scenario, any reimbursement cannot be treated as income, and therefore, cannot be subject to Income tax."*

***Source: Tribunal, Delhi in TPF Getinsa Euroestudios S.L. vide ITA No.2400/Del/2022 dated April 19, 2023.***

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