

# TransPrice Times

Edition: 1<sup>st</sup> – 15<sup>th</sup> June 2020

## Solar Turbines India Pvt. Ltd. – Bombay High Court

**Outcome:** In **favour** of the taxpayer

**Category:** Marketing Support Services

The taxpayer is an Indian resident which is engaged in the business of designing, developing, installation, commissioning and service of captive power plants. The taxpayer had entered into a contract with a Government entity i.e. Public Works Department for 'Common Wealth Games' ('PWD-CWG') on behalf of its Associated Enterprise ('AE') for supplying (including installation and commissioning) of gas turbine. The taxpayer contended that the turbines were not supplied by itself but were directly purchased by PWD-CWG from the AE.

The Transfer Pricing Officer ('TPO') sought a reason for no chargeability of service charges by the taxpayer to the AE when the liaising work for the purchase of turbines from the AE, was undertaken by the taxpayer and the contract for installation/ commissioning/ maintenance of such turbine was performed by the taxpayer. The TPO noted that the taxpayer raised invoices on its own behalf as well as on behalf of its AE; further noted that the correspondence by PWD-CWG was with the taxpayer and not with the AE which implied that the taxpayer was liaising with PWD-CWG on behalf of the AE.

The TPO concluded that although the turbine was supplied by the AE to PWD-CWG as per the contract, the taxpayer rendered a support service for sale, marketing and after-sale service on behalf of the AE as well as acted like an agent in selling the turbine in India. Consequently, the TPO proposed a transfer pricing adjustment as an indenting commission for providing such support services. Such an adjustment was upheld by the DRP and the matter was placed before the Tax Court.

The Tax Court observed that the adjustment was made on the basis of the supply of gas turbines to PWD-CWG by the AE. Taking into account the eligibility condition for participating in the tender which was VAT registration certificate and an original equipment manufacturer ('OEM') of gas turbines, the Tax Court opined that not the taxpayer, but its AE was a manufacturer of gas turbines and the AE did not have a VAT registration certificate whereas the taxpayer did. Hence, for bidding and the contract, bid was in the taxpayer's name although it was clear by the contracting parties that the OEM of gas turbines was the AE.

Further, the Tax Court could find nothing on record to imply that the taxpayer had rendered services to its AE for such sale of gas turbines to PWD-CWG or to other Indian customers. Therefore, due to the lack of concrete evidence, the Tax Court opined that the adjustment that was made merely on presumptions and surmises, was incorrect and warranted deletion.

The Hon'bl High Court concurred with the Tax Court's decision and stated it to be 'reasonable and pragmatic'. The Hon'bl High Court further noted that the Tax Court's findings are of facts based on evidence and records, thus stating that no substantial question of law arose thereby dismissing the appeal.

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## GE Power Electronics India Pvt. Ltd. – Bangalore ITAT

**Outcome:** In **favour** of the taxpayer

**Category:** Cryptic Order of DRP

The Tax Court observed that relevant aspects, legalities and the arguments of the taxpayer were not heard appropriately. The Tax Court, on the issue of adjustment, takes into account one of the contentions of the taxpayer, that if only part of the turnover is due to international transactions, then adjustment for lesser profits realized due to such international transaction to be considered and not the entire turnover.

The Tax Court noted that the directions of the Dispute Resolution Panel ('DRP') were cryptic and hence, asked the DRP to consider the matter afresh on the issue of restricting the transfer pricing adjustment to the amount of international transaction, and decide only by virtue of a speaking and reasoned order and issue directions after ceding adequate opportunity of being heard to both sides.

### RECENT NEWS

#### **CBDT releases synthesised texts**

Synthesised texts have been released for India's Tax Treaties with Canada, Belgium and Slovenia as modified by Multi-Lateral Instrument.

#### **Investigation begun by the United States of America into India's Equalisation levy 2.0 pertaining to non-resident ecommerce operators**

Office of United States Trade Representative ('USTR') initiates investigation into India's Equalisation Levy 2.0 which was ushered in through Finance Act, 2020 in India; Besides India, European Union and 8 other countries are being subjected to US investigations in equivalent legislations about digital services taxes.

#### **Saudi Arabia TP-guidelines' 2nd edition released which emphasizes on DEMPE test with respect to Intangibles**

In May 2020, Saudi Arabia's General Authority for Zakat and Tax ('GAZT') has released the second edition of its Transfer Pricing Guidelines (first edition was published in March 2019) elaborating guidance and background on the transfer pricing aspects for taxpayers, inter alia clarifying no materiality threshold for applicability of arm's length principle, suggesting a regular arm's length monitoring of controlled transactions, granting certain additional exemptions from CbCR requirements, encouraging reference to OECD Guidelines if issue not addressed. In respect of intangibles analysis, explains that a De Facto Owner would be the person in control of the DEMPE functions, making significant decisions and able to manage and bear the respective risks and thus could be regarded as the 'economic owner' of the intangibles.

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