

TransPrice Times

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Bacardi India Pvt. Ltd. – Delhi ITAT

Outcome: Against Taxpayer

Category: Advertisement, Marketing and Promotion ('AMP') Expenses

The taxpayer had incurred certain AMP expenses for its liquor manufacturing and distribution activities in India. As per Bacardi Group's global transfer pricing policy, these expenses got reimbursed by one of taxpayer's Dutch Associated Enterprise ('AE'). The intermediate tax authorities were of the view that even though the Dutch AE had no business of distribution or sale of finished goods/ raw materials with the taxpayer, the AMP expenses were reimbursed to the latter. Accordingly, the same should be considered as 'AMP expenses' and not as mere 'reimbursement of expenses'.

In front of the Tax Court, the intermediate tax authorities further stated that the reimbursements were purely for 'brand building' and 'creation of marketing intangibles'. This statement was further substantiated by highlighting the marketing principles of the Bacardi Group (available on the Bacardi Group's website) and various contents of an Indian Daily Newspaper – 'The Economic Times'. On perusing the facts and actualities of the case, the Tax Court upholds the intermediate tax authorities' contentions and passes the judgement against the taxpayer by confirming the proposed AMP adjustment.

TransPrice Comments:

The concept of 'AMP expenses' has always been a significant concern of the tax authorities. Due to a high degree of subjectivity involved in this concept, taxpayers must thoroughly ensure that their domestic marketing activities commensurate with their revenues. In a case

where it is apparent that marketing activities are in excess and not proportionate to the revenues, adequate justifications ought to be in place in the form of contemporaneous documentation.

Emami Ltd. – Kolkata ITAT

Outcome: In favour of Taxpayer

Category: Corporate Guarantee

The intermediate tax authorities opined that extending a corporate guarantee by the taxpayer on behalf of its subsidiary AE is an international transaction which requires appropriate benchmarking. The Tax Court considered the contentions of the taxpayer and asserted that giving a corporate guarantee for a subsidiary's borrowings is to be construed as a 'shareholder activity'. The taxpayer's primary objective as a shareholder was to help its subsidiary in getting a loan. Rather than earning interest income, the intention of a shareholder is to protect the interest of its subsidiary company. Various judgements too, were relied upon as a result of which the case gets settled in favour of the taxpayer.

Dharampal Satyapal Ltd. – Delhi ITAT

Outcome: In favour of Taxpayer

Category: Inter-Company Loans

The taxpayer had advanced a loan to its AE in a foreign denominated currency. For benchmarking the interest on such loan, the intermediate tax authorities rejected taxpayer's application of the London Inter-bank Offered Rate ('LIBOR') and used SBI's Prime Lending Rate ('PLR') thereby proposing a Transfer Pricing adjustment. The taxpayer contended that its AE

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is based in Switzerland, a country which functions on LIBOR plus rates. Extending this logic, it was asserted that if the AE had borrowed loan in its resident country i.e. Switzerland, it would have experienced an interest outflow by taking LIBOR as a base. After analysing the inter-corporate agreements, contentions and various other judgements, the Tax Court opines that there is no justification or cogent reason for taking PLR into consideration. In the instant case, LIBOR is more appropriate as compared to PLR for benchmarking interest on an outbound loan transaction. Thus, the case is concluded in favour of the taxpayer.

TransPrice Comments:

‘Benchmarking of interest on inter-company loans’ is considered to be one of the complex Transfer Pricing issues which requires peculiar analysis in each case. It is also one of the most litigated topics in the Indian Transfer Pricing regime. Companies should aim at having a robust basis and documentation in respect of such transactions which enable due and appropriate justification in Transfer Pricing assessments and appeals.

Hero Moto Corp Ltd. – Delhi ITAT

Outcome: In **favour** of Taxpayer

Category: Characterisation and Royalty Payments

In order to gain the right to manufacture products (i.e. two wheelers) and using technical know-how, the taxpayer had paid certain royalty amounts to its AEs. The intermediate tax authorities opined that royalty payments to AEs should be taken as NIL since the taxpayer acted as a contract manufacturer who purchased raw material from the AEs, manufactured the products in India using the technical know-how

of the same AEs and exported a part of its manufactured products back to such AEs. Additionally, they were of the view that even though the technical know-how is commercially exploited in India, the consideration was not determined by genuine market forces.

The Tax Court examines the case and notes that instead of a ‘contract manufacturer’, the taxpayer’s characterization is that of an independent manufacturer who dealt with its AEs on principal to principal basis. In view of this, the actual royalty payments to the AE were upheld by the Tax Court. As a result, the judgement is passed favouring the taxpayer.

TransPrice Comments:

In the above case, ‘characterization’ of the taxpayer was the major point due to which the legitimacy of royalty payments was demonstrated. Companies must lay emphasis on an appropriate characterization since it is considered to be the foundation on which a valid transfer pricing benchmarking could be done.

RECENT NEWS

The European Union (‘EU’) publishes a document on application of the Profit Split Method: The EU’s Joint Transfer Pricing Forum has published a document named ‘The Application of the Profit Split Method within the EU’ which aims at dealing with various issues of the current OECD (Organisation for Economic Co-operation and Development) framework. Click [here](#) to access the document.

The Indian Central Board of Direct Taxes has published a draft report on profit attribution to permanent establishments. Stakeholders are invited to provide their comments on the draft. To know more about the same, click [here](#).