

APA team ‘probable understanding’ on valuation of shares

The APA wing of IT department may have reached a probable agreement for the price at which shares would be issued by taxpayer to its AE. Although the APA has not yet been signed due to other pending transactions, it is clarified that even if APA fails for other issues, taxpayer could still sign the APA as regards share valuation. This could set a precedent for other MNCs, especially since issue of share valuation has become debatable and litigious issue.

If an APA is signed with an understanding on the share valuation, we can foresee a lot of taxpayers considering APA as an important step to provide a direction on the issue of shares before a taxpayer issues shares to its AE.

One may still need to examine whether issue of share to its AE has any bearing on the profit and loss of the Indian entity.

Mauritius and India agree to ‘limitation of benefit’ clause

As per DTAA between India-Mauritius, capital gains earned by resident of Mauritius shall be taxed in Mauritius only where rate of capital gains tax is nil. As a result foreign enterprises desirous of investing in India started routing their investment through Mauritius. This practice of ‘treaty shopping’ resulted in abuse of treaty provisions as no tax was paid in India. As per Supreme Court judgment in the case of ‘Azadi Bachao Andolan’ treaty shopping was held valid in the absence of limitation of benefit clause.

Limitation of benefit clause is basically an anti-abuse provision to avoid undesirable treaty shopping. **“Mauritius and India have agreed on the principle of including a limitation of benefits (LOB) clause in the treaty,”** the island nation’s Financial Services Commission (FSC) chairman Marc Hein said.

Aurobindo Pharma Ltd – ITAT - Hyderabad

Decision Outcome: In favour of the taxpayer

Category: Interest on loan to Foreign AE

Summary of decision:

- LIBOR plus interest rate is the most appropriate method to benchmark interest rates on loans advanced to foreign AE
- On loans advanced to foreign AE, domestic prime lending rate (PLR) would have no applicability
- Similarly, loans taken by taxpayer are also to be benchmarked at LIBOR plus rate
- Direction given to the tax officer to examine discrepancies, if any, and loans to the extent advanced at LIBOR plus percentage points to be accepted as declared by taxpayer

Glenmark Pharmaceuticals Ltd – ITAT - Mumbai

Decision Outcome: In favour of the taxpayer

Category: Receipt of Guarantee commission

Summary of decision:

- Corporate guarantee given to banks to safeguard AE's interests are not given on commercial considerations unlike banks, for whom providing bank guarantee is an item of business
- Bank guarantee commission prices cannot be used as external CUP to benchmark corporate guarantee commission prices
- On external comparables chosen by tax office, adjustment on factors such as risk profile, rupee loan v. foreign currency loan, bank guarantee v. corporate guarantee etc. should have been made
- With an increase in guaranteed amount there is a fall in guarantee commission and thus comparables should also be selected based on amount guaranteed
- In other cases of nil corporate guarantee commission, taxpayer's commission at 0.53% and 1.47% charged from AE accepted as ALP

Godrej Household Products Ltd – ITAT - Mumbai

Decision Outcome: **Against** the taxpayer

Category: Non chargeability of Guarantee commission

Summary of decision:

- Corporate guarantee given to banks on behalf of foreign AE is an international transaction even if no such commission is charged from AE
- Facts of the case being similar to *Nimbus Communications Ltd* wherein the rate of guarantee commission at 0.5% was adopted as ALP, was followed in the present case and tax office was directed to compute and restrict the adjustment at 0.5%

TransPrice Comments:

Provision of guarantee to AE without charging commission has bearing on profits, losses, income or assets of taxpayer (amendment to definition of International Transactions to include corporate guarantees)

Applying commercial principles and following judgments on recent issues, a fair rate of commission adjustment to taxpayer's income is appropriate