TransPrice Times
Case Digest 2018

Quantera Global

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PREFACE

We are pleased to present our readers with a compilation digest of important case rulings from the year 2018 pertaining to transfer pricing & international taxation that have kept the sugar in our coffee sweet.

Every year may not be good, but there is something good in every year. Year 2018 witnessed a slew of tax rulings that provided us an insight into the judicial perspective keeping in line with the current trend of appreciation of facts by the tax authorities.

Through this document, we have analysed the important case laws from a transfer pricing & international tax point of view so that you can understand its implication on you and your business.

Trust you will find this publication useful. Happy Reading!!

In case you need any further clarification please feel free to e-mail us at **info@transprice.in**

Happy Reading!

Team TransPrice

Contents

Abbreviations

AAR	Authority for Advance Rulings
AE	Associated Enterprise
Act	The Income-tax Act 1961
AMP	Advertising, Marketing & Promotion
AO	Assessing Officer
APAC	Asia-Pacific
BM	Business Model
BPO	Business Processing Outsourcing
BVBA	Belgium Limited Liability Company
CBDT	Central Board of Direct Taxes
CUP	Comparable Uncontrolled Price
DRP	Dispute Resolution Panel
DTAA	Double Taxation Avoidance Agreement
EURIBOR	Euro Interbank Offered Rate
FAR	Functions, Assets & Risks
Form 3CEB	Report from accountant to be furnished relating to international transaction(s) and specified domestic transactions.
FTS	Fees for Technical Services
GAAR	General Anti Avoidance Rules
GIL	Google India Limited
HC	High Court
ICANN	Internet Corporation for Assigned Names and Numbers
ITAT/Tax Court	Income-tax Appellate Tribunal
ITeS	Information Technology enabled Services
KPO	Knowledge Processing Outsourcing

Abbreviations (Cont.)

LRD	Limited Risk Distributor
MD	Managing Director
MNE	Multinational Enterprise
OECD	Organisation for Economic Co-operation and Development
PE	Permanent Establishment
RPM	Resale Price Method
SC	Supreme Court
SPA	Share Purchase Agreement
SPA	Stock Purchase Agreement
Tax Officer	TPO/AO
TNMM	Transactional Net Margin Method
TP	Transfer Pricing
TPO	Transfer Pricing Officer
TRC	Tax Residency Certificate
UK	United Kingdom
USA/US	United States of America
WP	Writ Petition

1. Veer Gems – SC

Outcome: In favour of taxpayer
Category: AEs
I.T.A. No.1514/Ahd/2012

The Hon'ble SC rules in favour of the taxpayer by advocating the decision given by the Gujarat HC.

The taxpayer is engaged in manufacturing and selling polished diamonds in India as well as globally. It had entered into various transactions with a Belgian entity – Blue Gems BVBA. The intermediate tax authorities were of the view that the taxpayer and the Belgian entity are AEs u/s 92A(2)(j) of the Act by virtue of these entities being controlled by a same family of four brothers and close relatives. Consequently, a TP adjustment was imputed.

Sec 92A(2)(j) of the Act states that two entities are believed to be associated with each other if an individual controls one entity and at the same time; either he or his relative enjoys control over another entity severally/ jointly.

The taxpayer had approached the higher tax authorities. After going through the facts of the case in detail and the memorandum of earlier Finance Bills, it was held that mere participation of one entity in another's management, control or capital does not make them AEs. As a result, a verdict favouring the taxpayer was delivered by the higher tax authorities.

This verdict prompted the intermediate tax authorities to file an appeal before the Gujarat HC. The verdict given earlier was upheld by the Gujarat HC.

The aggrieved intermediate tax authorities then; considered Special Leave Petition to be the last recourse. The SC dismissed this petition after analysing the instant case and maintained the verdict delivered by the Gujarat HC which was in favour of the taxpayer.

2. Texport Overseas Private Limited – ITAT Bangalore

Outcome: In favour of taxpayer
Category: Specified Domestic Transaction
I.T.(TP)A. No.1722/Bang/2017

The Tax Court rules in favour of the taxpayer by dismissing the TP adjustment made on remuneration paid to the directors.

As per the intermediate tax authorities, remuneration to the directors is a 'specified domestic transaction' by virtue of section 92BA(i) of the Act on which the Indian TP provisions shall be made applicable. In view of this, a TP adjustment was recommended for the year under consideration i.e. AY 2013-14. However, the aforementioned provision was subsequently omitted w.e.f. 01st April 2017. Owing to this, the Tax Court held that if a provision is deleted, it shall be assumed that it has been deleted from its inception. Along with this, the Tax Court relied on numerous SC and HC rulings.

Thus, the applicability of TP provisions on the erstwhile specified domestic transaction shall stand invalid. The Tax Court has remitted the matter back to the Tax Officer for further adjudication stating that assessment proceedings initiated, or action taken under the erstwhile clause would not survive at all.

3. Sabre Asia Pacific Pte. Ltd. – ITAT Mumbai

Outcome: In favour of taxpayer
Category: PE Attribution of Income
I.T.A. No. 4882/Mum/2015

The taxpayer, Sabre Asia Pacific Pte. Ltd.; has a business of promotion, development, operation, marketing and maintenance of computerized reservation systems. It has a wholly owned subsidiary in India by the name of Abacus Distribution System (India) Ltd ('ADSIL').

According to the intermediate tax authorities, ADSIL performs marketing as well as distribution activities for the taxpayer in relation to computerized reservation systems. Also, ADSIL secures business for the taxpayer by entering into subscription agreements with the travel agents thereby implying that ADSIL habitually and exclusively performs such activities for the taxpayer. Such case facts lead to an understanding that the taxpayer has a PE in India as per the India-Singapore DTAA.

Concerning the attribution of income to the PE here in India; the intermediate tax authorities proposed that a FAR analysis must be taken up for determining the fair share of income that should be attributed to the Indian PE.

However, the Tax Court, relying on the previous judgements of the taxpayer's own case, stated that 15% of the gross receipts of the taxpayer shall be the income attributed to the PE since such a ratio too, was determined based on a FAR analysis earlier. Hence, there wasn't any need to take up a fresh FAR analysis. The Tax Court also noted that ADSIL had been paid commission for the aforementioned services at '25% of the gross receipts' by the taxpayer. Since 15% < 25% i.e. income < expenses, it was declared by the Tax Court that the taxpayer's PE is left with no income which could be taxed in India. Hence, the case gets concluded in favour of the taxpayer.

4. MMTC Ltd. – Delhi HC

Outcome: In favour of taxpayer
Category: TP Documentation
I.T.A. No. 164/2018

The Tax Court deletes penalty on non-furnishing of TP documentation that was put forth by the intermediate tax authorities.

The intermediate tax authorities had issued a notice to the taxpayer directing them to comply with the provisions of maintaining TP documentation within the prescribed date. However, only part compliance was made by the taxpayer till the date prescribed in the notice.

The Tax Court on examination of case facts exhaustively and relying on various judicial pronouncements, stated that no error of law or substantial question of law prevailed since the taxpayer was successful in complying with the notice later on i.e. after the prescribed due date. Thus, the penalty which was imposed earlier gets deleted by the Tax Court.

5. Motorola Solutions (India) Pvt. Ltd. – ITAT Delhi

Outcome: Against taxpayer
Category: AMP expenses
I.T.A. No. 5637/Del/2011

Tax Court upholds the TP adjustment made by the intermediate authorities in relation to AMP expenses.

The taxpayer is involved in the business of mobile phones and equipment for mobile broadband and automobile network. In addition to this, it provides marketing/administrative support services and software development services to its AEs.

During the year under consideration, the authorities noted that one of the AEs had issued credit notes to the taxpayer. The taxpayer asserted that these credit notes were relating to the AMP expenses incurred by it and were in the nature of pure reimbursements. The intermediate tax authorities had a view contrary to such an assertion. It believed that the credit notes were issued to the taxpayer for compensation against the price charged for products sold by the AE.

After an in-depth perusal, the Tax Court observed that the dates on such credit notes were the dates of purchase transactions of the taxpayer. Also, the narration mentioned in the credit notes read as *"Credit note against transfer price charged for the period……."*

It was opined that the credit notes were not relating to reimbursement of AMP expenses incurred by the taxpayer. Thus, the taxpayer's views were rejected by the Tax Court.

6. AB Holdings, Mauritius-II – AAR

Outcome: In favour of applicant
Category: Capital Gains treaty benefit
A.A.R. No 1129 of 2011

AAR rules on taxability of shares held by the Mauritian applicant in an Indian group company transferred to its group company in Singapore.

As per facts of the case, the applicant operated as an investment holding company as part of its MNE Group with its ultimate holding entity in USA. The applicant carried out business in Mauritius with 2 resident directors and 1 non-resident director who is the MD of the said USA entity. Accordingly, applicant invested in the Indian subsidiary time to time in a targeted sector. To support its business in the APAC region, a group strategy was developed to open a regional headquarter in Singapore to cater APAC region (including India). To infuse more investment in Singapore, a reorganisation was proposed by way of transfer of shares from the existing Indian group company to Singapore. Accordingly, the applicant indirectly would hold the shares through its subsidiary in Singapore.

The question posed before the AAR was whether the proposed transaction of transfer of shares constituted tax avoidance, and whether applicant was eligible to avail the benefit of capital gains exemption under Article 13(4) of India-Mauritius tax treaty.

Intermediary tax authorities contended that since the ultimate parent was in USA and applicant's management comprised of the MD of the US entity who took decisions with no passport record of presence in Mauritius, the control and management of the applicant would be in US and not Mauritius. This evidence was submitted to prove that the applicant was not a tax resident in Mauritius and disallow treaty benefits to applicant. Further, the authorities constituted the transaction as tax avoidance through a paper company such that it intended to appreciate value of shares of applicant indirectly through Indian assets.

AAR observed that the applicant had a valid TRC from Mauritius and held that setting up a subsidiary for investment purposes cannot be questioned. In respect of place of control and management, it was ruled that with current digital medium, the MD of ultimate US parent entity would have influence on investment decisions irrespective of his movements at different times during a relevant year. Terming the contentions of intermediary tax authorities as unrealistic, the AAR accepts applicant's contention that the transaction was not a benami/colourable device and allows treaty benefit on proposed capital gains.

7. AB Mauritius – AAR

Outcome: Against applicant
Category: Related Party Transactions
A.A.R. No 1128 of 2011

The AAR holds the transaction of sale of shares held by Mauritian applicant in India to its subsidiary in Singapore as taxable in India, and denies treaty benefit to the taxpayer under Article 13 of India-Mauritius tax treaty.

As per the details, the applicant acquired shares of an Indian company under a SPA (Stock) Purchase Agreement (SPA) in 2003. The SPA was executed by the MD of the Promoter group company of the applicant with an authorisation letter from the board of directors of the applicant to allow the MD to sign the SPA. The directors of applicant did not sign the SPA and only the name of the applicant was mentioned in the SPA.

However, the MD was not a director on the board of the applicant. The shares were then taken over from its previous owner of the shares as a payable loan under a loan agreement. After this transaction involving SPA and loan agreement, the Applicant became the owner of the shares of the Indian company and then discharged the liability loan over time. As per a recent corporate plan, the Applicant proposed to invest in its subsidiary in Singapore.

Taxation authorities contended that it was only in 2004 i.e. 1 year after the SPA, that the MD of the Promoter group company informed the Applicant in its board of directors' meetings regarding the investment in the Indian company. It was only at this moment that arrangements to take care of loan liability were made and business reorganisation plan was ratified by the directors of the applicant. Further, the authorities submitted that applicant acquired 99% of the Indian company's shareholding without paying any consideration, whereas the remaining 1% was held by Promoter group which paid consideration by cancellation of debt. It also contended that as per the SPA, the shares were transferred in the name of Promoter group and since no consideration was paid by applicant, the applicant could not be treated as the owner.

AAR ruled that there was no mention of any liability clause in the SPA and held that the applicant's name was superimposed in the agreement as part of some arrangement of which the applicant was not aware at all. Further, the letter of authorisation submitted by the applicant was rejected by the AAR as there were no evidences of decisions or discussions in the Board to show the MD was authorised who was not even in a director in the applicant company.

Accordingly, AAR denies treaty benefit and holds sale of shares to Singapore as taxable in India.

8. Vodafone Essar Digilink Ltd. – ITAT – Delhi

Outcome: Against taxpayer
Category: Foreign comparable
I.T.A. No. 1950/Del/2014

Transaction: Royalty payment to AE for use of brand name.

History: Taxpayer started making royalty payments of 0.15% & 0.30% of respective net revenues to AEs for use of brand name. To benchmark the transaction, taxpayer compared the royalty payment with royalty paid by a US company (Forward Industries Inc) to another US company (Motorola Inc.) which was royalty @7% of net sale for trademark license of use of Motorola signature and logo.

Facts and contentions: As royalty paid by taxpayer was significantly lower than that of external foreign comparable taxpayer considered the same to be at arm's length. Tax Officer accepted methodology used, however did not consider the royalty payments to be functionally similar. The arm's length was determined at NIL by Tax Officer on the basis that no benefit was availed by taxpayer and no royalty was paid in the past.

Ruling: Tax Court rejected use of foreign comparable by taxpayer for benchmarking royalty on the premise that a foreign transaction cannot be compared with a transaction involving Indian tested party selected for TP analysis. However, Tax Court did not accept approach adopted by Tax Officer who had used a benefit test to determine that no benefit had accrued to taxpayer.

9. Blue Scope Steel India Private Limited – ITAT – Delhi

Outcome: In favour of taxpayer
Category: Reimbursement of employee salary
I.T.A. No. 5535/Del/2012

Transaction: Business support services to AE (holding company) and reimbursement of salary cost (being expense) to AE. Taxpayer also provided project services to 3rd party.

History: Taxpayer followed cost-plus 7.5% pricing model for business support services. AE incurred salary expenses for employees seconded to the taxpayer, for which taxpayer reimbursed to the AE without charging mark-up. Entire project work was sold to third party, however taxpayer continued providing project services. Tax Officer accepted Indian component of salary paid to employees but denied deduction of foreign component & determined arm's length of reimbursement of salary as NIL.

Facts and contention: No agreement made between taxpayer and AE for secondment of employees for business support services. Expats were employees of AE but after project sale to 3rd party, services were also provided to 3rd party through taxpayer for which role of seconded employees could not be determined. Tax Officer considered the transaction as arrangement & not service. Taxpayer submitted that expats were on its payroll.

Ruling: Accepts taxpayer's view that seconded employees were on its payroll. Just because seconded employees were involved in business support services and project services there was no need to allow only local expenditure of expats and deny foreign component of salary paid by AE.

10. Omni Active Health Technologies Limited – ITAT – Mumbai

Outcome: Against taxpayer
Category: Reference to TPO
I.T.A. Nos.638 & 4643/Mum/2017

Legality: Taxpayer contended that AO made reference to TPO without giving an opportunity of being heard u/s 92CA of the Act.

Ruling: U/s 92CA(1) AO may with appropriate approval, refer the matter to TPO. Rejects taxpayer's views and relies on Bombay HC ruling in Vodafone India Services P. Ltd (WP No. 1877-2013) where opportunity of being heard was granted when Chapter-X of Income-tax Act was challenged by taxpayer. Since in present case taxpayer did not have any objection of Chapter-X hence the additional ground should be rejected.

11. Amphenol Interconnect India Private Limited – HC – Bombay

Outcome: In favour of taxpayer
Category: Most Appropriate Method
I.T.A. No. 1131 OF 2015

Transaction: Export sale of goods & sales commission to AEs.

History: Tax Officer applied the CUP method to determine arm's length for above transaction. However, Tax Court negated this stand by stating that goods were customised and there were geographical & volume differences in terms of sales commission. Instead, it applied TNMM based on comparable profit margins of taxpayer against similar companies.

Facts and contentions: Department, on appeal contended that the FAR analysis of taxpayer with respect to transaction was not considered to determine applicability of TNMM. Further, it was also argued that since a fixed percentage of could not be rejected on the basis of geographical, volume, timing, risk and functional difference for sales commission.

Ruling: HC rejected tax authorities' appeal stating that the Tax Court carried out the FAR analysis by comparing risks and functional differences in finished goods sold to AEs against those sold to third parties. Regarding sales commission part, it was ruled that there were differences in function and geography hence not being question of law to be discussed.

12. Approva Systems Private Limited – ITAT – Pune

Outcome: In favour of taxpayer
Category: Allowability of certain deductions with respect to TP adjustments
I.T.A. No.1051/PUN/2015

Transaction: Export of software solutions services to AE.

History: Taxpayer being a 100% captive export-oriented unit, eligibly claimed deduction of profits earned on export of services to AE under Section 10A/10B of the Act while filing its income-tax return. Taxpayer, on its own had made a TP adjustment to the arm's length price and offered a higher income. Intermediate tax authorities disallowed the deduction in respect of proviso to Section 92C(4) of the Act which empowered assessing officer to make such disallowance in respect of TP adjustments to arm's length price.

Facts and contentions: Taxpayer contended that the deduction shall be disallowed only when the assessing officer makes a TP Adjustment under section 92C of the Act. As taxpayer made a suo-moto adjustment, the deduction should be allowed. Intermediary authorities opined that suo-moto adjustment offering extra income was actually a notional income for which taxpayer failed to bring any foreign exchange in India. Hence, a deduction under Section 10A/10B of the Act should be appropriately denied. The taxpayer countered that foreign exchange due on exports were received in India, and deduction shall be denied only if the foreign exchange sale proceeds are not realized in time. Further, taxpayer argued that the adjustment was made to the overall income and not to the sale proceeds.

Ruling: Tax Court observes that provisions of Section 92C(4) of the Act will not apply. Further, deductions were allowed to the taxpayer in its own case in earlier years as well. Hence, Tax Court allowed the deduction on the income.

13. Calance Software Private Limited – ITAT – Delhi

Outcome: In favour of taxpayer
Category: Reference to TPO (TP officer)
I.T.A. No. 4363/DEL/2010

Legality: CBDT Instruction 3/2003

History: Taxpayer's quantum of international transactions were below INR 5 crores (i.e. INR 50 million) for year under consideration, in respect of which the intermediary authorities made an adjustment. The AO referred taxpayer's matter to TPO to determine the arm's length of such international transactions.

Facts and contentions: Taxpayer relied on CBDT Instruction 3/2003 which provided that where the quantum of international transactions were below INR 50 million, the AO should decide issue himself and not refer matter to the TPO.

Ruling: Tax Court opined that the Assessing Officer should have passed the assessment order. It upheld that Instruction 3/2003 was binding on authorities & ruled that reference to TPO was not sustainable in law.

14. Nissan Motor India Private Limited – ITAT – Chennai

Outcome: In favour of taxpayer
Category: FTS
I .T.A.No.1854/CHNY/2017

Transaction: Reimbursement of warranty expenditure to group entities outside India.

History: With respect to transactions specified above, the tax authorities noticed that taxpayer had not deducted tax at source. The tax authorities opined that reimbursement transaction was of the nature of FTS outside India. It stated that taxpayer, being the manufacturer took responsibility and promise to provide warranty services to customers at own cost and it was engaged as a dealer with its group companies to provide such warranty services for which taxpayer reimbursed them accordingly. Hence the tax authorities considered this as FTS as per the Act and tax treaty and held reimbursements to be taxable in India for which tax should be deducted.

Facts and contentions: Taxpayer relied on FTS provisions of the Act. It relied on Section 9(1)(vii)(b) of the Act which states that where any resident pays fees for services with the purpose of making or earning any income from any source outside India, then such income cannot deem to accrue or arise in India. As per the contract, taxpayer characterises its group entities as 'dealer – sister companies' which incur expenditure on behalf of taxpayer by acting as dealers maintaining cars sold as per warranty promised by taxpayer.

Ruling: Tax Court studied the provisions of FTS in Section 9(1)(vii) of the Act and observed that the taxpayer was a manufacturer of motor cars in India and exported such cars through its dealer - sister companies who incurred expenditure outside India for the purpose of earning income from source outside India. Hence, by virtue of Section 9(1)(vii)(b) of the Act, it was ruled that reimbursements was not liable to be taxed under deeming provision of Section 9(1) of the Act and taxpayer was not liable to deduct tax at source in India.

15. Godaddy.com LLC – ITAT – Pune

Outcome: Against taxpayer
Category: International tax – Royalty on domain registration fees
I.T.A. No.1878/Del/2017

Transaction: Receipt of fees for domain registration from customers.

History: Taxpayer, a US company (not being a tax resident of US jurisdiction) is an accredited domain name registrar authorized by ICANN. Customers from all over the world desiring a domain name apply for a name with the taxpayer, after which taxpayer enquires ICANN, a central organisation appointing registrars, to check availability of the domain name and post ICANN's confirmation it would provide the domain name to customers at a fee as per conditions attached by ICANN. A part of the total fee charged to the customer pertained to web hosting services which taxpayer itself treated as royalty and filed a return of income for the year under consideration offering income from web hosting services to be taxed. The Tax Officer characterised the domain registration fee received by the taxpayer as royalty as per Explanation 2 of Section 9(1)(vi) of the Act.

Facts and contentions: As the taxpayer was not a tax resident of the US, it could not avail the benefits under the India-US tax treaty. Thus, provisions of the Act were considered by tax authorities. The taxpayer contended that the Tax Officer had incorrectly linked both web hosting charge with domain name registration charge.

The tax authorities argued that a domain name was an intangible asset similar to a trademark. Further, the tax authorities submitted that the customers of taxpayer used the server of taxpayer considering domain name registration as a tool which equips customers with the right to use the server of taxpayer and web hosting charges are ancillary and subsidiary to the application or enjoyment of the right, property, or information for which a payment of domain registration fee is received. Accordingly, the fee was treated as royalty as per Section 9(1)(vi) of the Act.

Ruling: Tax Court observes that taxpayer did not provide any submission to differentiate domain registration charges from web hosting charges. It was held that the domain registration plays a part in the character of web hosting charges as without the domain registration in place, web hosting would not be possible. Accordingly, Tax Court accepts intermediary tax authorities' view and considered the domain name as an IP similar to trademark and taxable in India.

16. Mitchell Drilling India Private Limited – ITAT – Delhi

Outcome: Partially in favour of taxpayer
Category: Sham international transaction
I.T.A. No. 5921/DEL/2010

History: Taxpayer's arrangement with its AE under a hire purchase agreement was treated as a sham transaction by Tax Officer, to avoid not charging/withholding tax on rental of Rig and claiming depreciation. Subsequently, Tax Officer made TP additions on hire purchase transactions fixing Arm's Length Price (ALP) as NIL, disallowed depreciation & payment of interest under hire purchase agreement.

Ruling: Tax Court held that only a declared and genuine international transaction can be subjected to trigger of TP provisions. As taxpayer did not press any ground on treatment of hire purchase, it concurred with the Tax Officer's characterisation of hire purchase arrangement as sham/bogus. Thus, Tax Court looked at each transaction on which TP adjustment was levied one-by-one.

Accordingly, Tax Court ruled on transactions of payment of principal & interest under hire purchase and repossession of Rig. In respect of interest payment under hire purchase, Tax Court observed that a double interest disallowance in the form of TP addition & Section 40(a)(i) of the Act was made and adjudicated it to only a single disallowance.

Considering payment of principal instalments under hire purchase, Tax Court studied applicability in case of payment transaction which does not result in an effect to the debit side of the Profit & Loss account or leads to a creation of asset. It stated that the payment could be either a loan advanced to AE where TP adjustment on interest can be made or the nature of transaction is such that there is no possibility of earning any income hence not subject to TP legislation, as there is no likelihood of impact on profits of taxpayer in any manner. Accordingly, in taxpayer's transaction of payment of principal, Tax Court states that it is of such nature that is not likely to affect profits of taxpayer. Further, remits matter to file of Tax Officer and states that if taxpayer had already claimed deduction of payment of principal the same should be disallowed or otherwise deleted.

Ruling on the transaction pertaining to 'Repossession of rig' which was declared as receipt by taxpayer, Tax Court noticed that the transaction was shown as 'deletion' in fixed assets schedule. Tax Court noted that depreciation on asset block was allowed after the deletion. Hence, had the adjustment been made at NIL as per Tax Officer, the same would in turn increase depreciation and put taxpayer in advantageous position with regard to non-applicability of TP provisions. Thus, since ALP of this receipt transaction was found to be less than the transacted value, Tax Court deleted adjustment on 'repossession of Rig'.

17. Prudential Process Management Services India Private Limited – ITAT – Mumbai

Outcome: In favour of taxpayer
Category: Secondary Adjustments
I.T.A. No. 5526/Mum/2015

History: Taxpayer is a call centre and back office support service provider to its AE. It's UK-based AE had entered into an agreement with a third party also in the UK. One of the clauses of the agreement contained selling the BPO divisions of the taxpayer to the third party's (UK) AE in India.

Facts and contentions: The TP officer contended that transaction between the taxpayer and the Indian AE of the third party (UK) would not have taken place had there been no agreement between the two UK entities. Moreover, the TPO had proposed a secondary adjustment in the form of interest @ 15% on the primary adjustment made on sale of business division. The Tax Officer further considered the sale of business division as a slump sale and made a tax adjustment. On adjudication by first appellate authority, it confirmed that the transaction was deemed to be an international transaction claiming the global agreement in substance determined the term-s of transaction. In other words, the Indian taxpayer was said to not have an opportunity of determining substance and influenced by the two agreement between the two UK entities. Further, the first appellate authority noted that concept of secondary adjustment is not expressly provided in Chapter X of Income-tax Act 1961 ('the Act').

Ruling: Tax Court rejected the calculation of interest for secondary adjustment as the same cannot be made for assessment years starting before AY 2017-18 as per Indian TP law; not finding fault in first appellate authority's observation. Tax Court does not rule on TP adjustment after noting that first appellate authority did not adjudicate on addition of slump sale. To avoid multiplicity of proceedings, Tax Court remits matter back to first decide on the slump sale adjustment.

18. Mahaveer Kumar Jain – SC

Outcome: In favour of taxpayer
Category: Double Taxation
CIVIL APPEAL NO. 4166 OF 2006

History: The taxpayer had income from lottery winnings subject to withholding tax in the state of Sikkim. It claimed a deduction of this income under the Act. The intermediary authorities considered it to be taxable under the Act.

Legality: Ruling in favour of taxpayer, the Hon'ble SC explained the fundamental rule on the law of taxation and stated that unless otherwise expressly provided, income cannot be taxed twice. Highlighting the need for courts to cast reasonable doubt where appropriate, the judgement also specified that a taxing statute (when tax becomes payable) should not be interpreted in such a manner that leads to double taxation unless the language specifically uses it in sanctioned express words and the courts have no choice but to accept it.

19. Jay Maa Durga Buildtech Private Limited (merged with Lodha Construction Private Limited) – ITAT – Mumbai

Outcome: In favour of taxpayer
Category: Incoming Escaping Assessments
I.T.A. No. 2720/Mum/2017

History: The taxpayer is engaged in construction business. During year under consideration, it declared issue of preference shares at a premium to a non-resident individual in its income-tax return. The tax authorities held that the non-resident would appropriately get covered in the definition of AE as given in the Act and accordingly, Form 3CEB (report containing details of international transactions entered into with the AEs) should've been furnished. The authorities believed that income escaped assessment and a notice for reopening the assessment was issued to the taxpayer.

Ruling: The Tax Court noted that receipts were of 'capital' nature and not of 'revenue' nature. It stated that the tax authorities were unable to back their contention that the taxpayer's income had escaped assessment. Issuing shares at a premium to a non-resident cannot be a cause that triggers income escaping assessments u/s 147 of the Act. The fact that no reference was made to a TPO was also emphasized by the Tax Court. This indirectly indicates that there weren't any issues with regards to the arm's length price and for that reason, the judgement was passed in the favour of the taxpayer by cancelling the income escaping assessment.

20. Bartronics India Limited – ITAT – Hyderabad

Outcome: In favour of taxpayer
Category: Interest-free advances
I.T.A. No. 259 /Hyd/2017

History: The taxpayer is involved in the business of automatic identification and data capture technology. For the purpose of expanding the business activities of its AEs, the taxpayer raised funds overseas through foreign currency convertible bonds. Such funds were then forwarded to its AEs. The bonds were classified as zero-coupon bonds and had coupon rates of 7.25% p.a. and 6.65% p.a. Additionally, the overseas bond holders were entitled to an option of converting the bonds into equity shares of the taxpayer.

Facts and contentions: The intermediate tax authorities opined that the taxpayer should have ideally charged interest to its AEs for the funds forwarded and proceeded to put forth a TP adjustment of INR 116.8 million. The taxpayer, however, contended that it did not incur any interest costs for the funds so raised and notably, the funds were raised with a core intention of forwarding the same to the AEs for facilitating business expansion. Furthermore, the bonds were later on converted into equity shares of the taxpayer thereby implying that the loan was no more outstanding in its books.

Ruling: The Tax Court ruled in favour of the taxpayer by upholding the latter's contentions. It stated that although the funds were classified as 'loans and advances', the funds were raised overseas and were advanced to the AEs overseas only. Also, since the shares were allotted subsequently, charging interest to the AEs would've not been appropriate. Mere accounting entries in the books of the taxpayer cannot substantiate the proposed TP adjustment. Hence, the case got concluded in favour of the taxpayer.

21. Google India – AdWord – Royalty Case

Outcome: In favour of taxpayer
Category: Royalty case
I.T.(IT)A. No.1190/Bang/2014

The case with regard to the Google AdWord by the Bangalore ITAT could be categorised as a judgement that could have far-reaching effects on the digital economy in India. The judgement and the interpretation of business scenario need to be understood simplistically removing all the technical jargons and marrying the facts of the case to the basic principles of taxation.

History: Google India Limited (GIL) is a limited risk distributor of a space where advertisements are showcased, the only difference is that such space appears online and not physically. GIL has a distributorship agreement with Google Ireland for such an activity. Let us call this GIL 1.

GIL is also a software development company (back office) of Google Ireland where certain technical work is conducted, which helps in optimising the AdWord program which helps Google Ireland to develop technology to sell, maintain, service the Indian and global market. GIL has a service agreement with Google Ireland for such an activity. This typically would be a cost-plus arrangement. One also needs to note that such a service of software development/ KPO/ ITES is not specifically addressed for the

Indian market but for the global market. Let us call this GIL 2.

Facts and contentions: The revenue has taken a stand that as GIL 1 had access to work performed by GIL 2, both the activities could not be fragmented and should be seen as one and therefore GIL 1 is not just selling space but is performing an act of use of the intangible/ intellectual property and hence the payment made by GIL 1 to Google Ireland is considered as royalty and withholding taxes need to be deducted and paid by the payer. Such a stand is backed by the ITAT and the case is decided in favour of the revenue.

The core crux of the case is to understand the following:

1. Meaning of a limited risk distributor and the role of supplier entity (we can say principal entity) in the LRD model; and
2. Meaning of fragmentation and anti-fragmentation rules in the Income-tax Act, 1961.

In this case, it is assumed that all the TP models, remuneration are as per the norms and are not violating any TP principles. Now let us tackle this one by one.

LRD - As the name suggests, the distributor in the country of residence (in this case, India) performs limited functions and undertakes limited risks while performing a sales and marketing function. The LRD does not own or develop any intangibles in the country of residence and operates on a resale price minus or market minus model, where the transfer price is determined after considering the market price and reducing it to meet the gross profit percentage. Any additional activity performed by the LRD is remunerated by the Principal entity at an arm's length price. Any losses suffered are also remunerated by the Principal entity and the LRD is assured of minimum returns in percentage terms. The LRD can make higher profits in absolute terms by increasing volume of the business. Typically, all intangibles to support the business is provided by the Principal entity (in this case, which gets transferred to Principle entity by work done by GIL 2) and is embedded in the transfer price. No payment is generally made against royalty or license fees as the purchase price is considered inclusive of royalty element which artificially could not be segregated. In the instant case, GIL 1 is an LRD and Google Ireland is the Principal entity. The Indian customers contract with GIL 1 for the provision of space, which is contracted back by GIL to Google Ireland. The function undertaken by GIL 1 is marketing and sales. Various aids are used by GIL 1, which are services by GIL 2 to make its marketing and sales effective. The IPs for such aids remains with Google Ireland.

Meaning of fragmentation and anti-fragmentation rules in the Income-tax Act, 1961 - Fragmentation of activities means, artificially breaking activities in a single supply chain to two different activities of a profit centre. In the current context, an anti-fragmentation rule could only be invoked when the Income-tax office invokes GAAR, where the revenue has powers to disregard structures and consider them as one. However, deriving a conclusion based on disregarding of the structure without powers of GAAR are not in the legal purview of the Income-tax Act. In the instant case, as GIL 2 and GIL 1 are two separate supply chains with no interconnections with different business objectives, it is not in the legal framework of the Tribunal or the tax authorities to arrive at a conclusion of withholding based on assumed facts. Let us assume for a moment that GIL 2 is based in Singapore and GIL 1 still uses certain work of GIL 2 which is specifically done on the instructions of Google Ireland, then whether GIL 1 would be considered to pay a royalty to Google Ireland?

For example, let us consider a sale of the foreign car by an LRD in India. There are several intangibles embedded in the purchase price of the foreign car say the brand, technical know-how, technical know-how passed on to the salesperson to enable a sale, knowledge of manufacturing process by the LRD etc. While an LRD makes a payment against the purchase of a car, one does not bifurcate such purchase price as payment against tangible products and intangible products as purchase payment and royalty payment respectively. The same principle would apply to the case of purchase of online space unless such online space payment is specifically defined to mean royalty or sourced income from India.

Whether Royalty is to be paid for selling of digital space? The question is complex, and the Income-tax Act and the tax treaty need to address such issue through a definition change in the royalty or via a specific exclusion. With the changes in the business time, we may have to address specific items of cross-border transactions in the International and domestic taxation law, through the way of treaty changes and domestic law amendments. While a specific test of significant economic presence is incorporated now in the Indian Income-tax Act, 1961 which is applicable for transaction post 1 April 2018, one needs to agree that with an absence of such test earlier in the legislation, similar transactions before 1 April 2018 are not included in the source taxation purview of the Income-tax Act and hence would escape withholding tax due to the want of legislative powers to tax the income. This fact needs to be accepted by the tax authorities until 1 April 2018 and by the taxpayers post 1 April 2018 to get the significant transactions taxed under the source rule post 1 April 2018. If such approach is followed, it would lead to ease of doing business and bringing in the certainty of taxes. This would ultimately lead to a bigger picture for higher investments in India thereby ensuring the growth potential when it comes to the digital economy.

22. WNS Global Services Pvt Ltd – ITAT – Mumbai

Outcome: In favour of taxpayer
Category: Different Tested Parties for Different Business Models
I.T.A.No.919/Del./2013

History: The taxpayer is a part of an International Group which is engaged in IT-enabled BPO services. Taxpayer performs activities of export of ITeS comprising data processing and transfer.

Facts and contentions: The taxpayer operates under two Business Models ('BM'):
BM-1: As an entrepreneur undertaking ITeS activities for its customers, having outsourced limited marketing support services to its AEs for which the AEs are remunerated at a cost plus 6% basis; and
BM-2: As a captive service provider rendering services as required by its AE for which it is compensated on a full time equivalent basis.
For BM-1, the taxpayer considered the AEs as the tested party and documented foreign

benchmarking studies by taking into consideration the tax jurisdictions of such AEs. For BM-2, the taxpayer chose comparables and undertook a domestic benchmarking by considering itself as the tested party.

Taxpayer contended that the above approach ensured the selection of least complex entity as the tested party and is justifiable due to the considerable difference in the functions performed, assets employed and risks assumed, for both of these business models.

The intermediate tax authorities dismissed selection of the AEs as tested parties by the taxpayer for BM-1, and instead, aggregated the international transactions under BM-1 and BM-2, comparing the taxpayer's margin as a whole with that of the third parties engaged in ITeS business.

Ruling: The Tax Court ruled in favour of the taxpayer by upholding the latter's contentions. It stated that both the business models of the taxpayer were disparate in their functional analysis. In BM-2, the taxpayer was exposed to limited risks and thus, was the least complex entity, while its AE took on the entrepreneurial role. Whereas, in BM-1, significant risk and hence the reward, belongs to the taxpayer who remunerates its risk-insulated AEs. Thus, the AEs are the least complex parties with respect to transaction under BM-1. It further asserted that for each international transaction, the taxpayer operated with different functional profiles and thus, such dissimilar transactions cannot be clubbed, but need to be benchmarked separately. Hence, the case got concluded in favour of the taxpayer.

23. Barclays Technology Centre India Pvt. Ltd. – Bombay HC

Outcome: In favour of taxpayer
Category: Selection of Comparables
I.T.A. No.1384 OF 2015

History: The taxpayer is engaged in rendering software development services to its AEs worldwide. It acts as a captive service provider and provides services on a cost-plus basis.

The tax authorities were not satisfied with the TP study adopted by the taxpayer and included various comparable companies. This led to a tax litigation with the prime focus being on inclusion/ exclusion of comparable companies. The Tax Court evaluated the case and passed a final order by excluding certain companies from the final set of comparables. With an intention to counter this order, the tax authorities appealed to the Hon'ble Bombay HC.

Ruling: Analysing the case, the Hon'ble Bombay HC upholds the exclusion of such comparable companies. It also noted that the tax authorities did not validate their stand as to how the findings of the Tax Court were in contradiction to the law. In furtherance to this, it also stated that there were no reasons to entertain such an appeal.

At the end, it was mentioned that the tax authorities have been appealing to the HCs in a '*ritualistic manner*' w.r.t. to the issue of 'selection of comparables' which technically, is a matter of fact and not law. Thus, it is the Tax Court who should have a final word in respect of such issues. Appealing to the HCs for such issues have led to taking up '*the scarce time of the HCs.*'

24. Shilpa Shetty – ITAT – Mumbai

Outcome: In favour of taxpayer
Category: Deemed international transaction
I.T.A. No. 2445/Mum/2014

History: The taxpayer is a renowned Indian film actress who is also engaged in various brand ambassadorship activities.

During the year the taxpayer was a party to a SPA between EM Sporting Holding Ltd. ('EM Sporting') – a company based in Mauritius and Kuki Investments Ltd. ('Kuki') – a company having its base in the Bahamas. As per the SPA, EM Sporting would transfer its shares as well as issue further shares to Kuki.

The Tax Officer pointed out that Kuki was controlled by the taxpayer's husband (relative) – Mr Raj Kundra. Moreover, even though the taxpayer was neither a buyer nor a seller of shares, the SPA required the taxpayer to render brand ambassadorship services to promote an IPL cricket team by the name of 'Rajasthan Royals' owned by Jaipur IPL Cricket Pvt. Ltd. ('JICPL') – a subsidiary of EM Sporting. Such brand ambassadorship services were to be provided by the taxpayer without any charges.

The Tax Officer considered the taxpayer and EM Sporting as AEs. Further, opined that the transaction of rendering brand ambassadorship services gets covered under the meaning of international transaction under section 92B of Act. Consequently, an arm's length price of INR 3.42 crores was computed based on a different brand ambassadorship agreement between the taxpayer and an independent third party (i.e. Hindustan Unilever Ltd.).

The case reached the higher level tax authorities. They asserted that instead of EM Sporting, Kuki is an AE of the taxpayer. This assertion was given by drawing a line of separation between the taxpayer and its profession (construed as a distinct enterprise that was controlled by the taxpayer). It was mentioned that the taxpayer's relative controlled Kuki as well the taxpayer's profession through the taxpayer itself. Hence, by virtue of section 92A(2)(j) of the Act, Kuki and the taxpayer should be termed as AEs. In addition to this, since there was a prior agreement, it was determined that the transaction between the taxpayer and JICPL constituted a deemed international transaction under section 92B(2) of the Act and for this reason, the taxpayer and JICPL would also be AEs. The higher level tax authorities were also of the view that Kuki had benefitted undeniably due to this deemed international transaction since the purchase consideration got reduced by the monetary value of the brand ambassadorship services provided by the taxpayer.

Ruling: The Tax Court notes that section 92A(2)(j) has two limbs, the first one being an individual controlling an enterprise and the second one being another enterprise which too, is controlled by such an individual or his relatives jointly or severally. It holds that the first limb is satisfied fittingly wherein Mr. Raj Kundra controls Kuki. However, the second limb is not satisfied since the tax authorities fail to corroborate as to how Mr. Raj Kundra or his relatives controlled the taxpayer. Accordingly, it is declared that section 92A(2)(j) is not applicable and thus, Kuki and the taxpayer are not AEs.

With regards to the deemed international transaction, the Tax Court mentions that the tax authorities held the transaction to be a 'deemed international transaction' under section 92B(2) of the Act without actually finding out the AE of the taxpayer with whom JICPL had a prior agreement. Owing to the absence of a prior agreement, section 92B(2) also, is not applicable. Thus, the Tax Court rules in favour of the taxpayer.

25. Stryker India Pvt. Ltd. – Delhi HC

Outcome: Partially in favour
Category: TP Assessment
I.T.A. No. 606/Del/2014

The taxpayer's TP matter pertaining to advertisement, promotion and marketing expenses was referred to the TPO who then passed an order proposing adjustments. The intermediate tax authorities, on their part proceeded to pass a final order, without issuing a draft order.

On an appeal made by the taxpayer on the grounds that such an order was bad in law, the HC looked at its co-ordinate bench's decision in the case of JCB India Limited ('JCB') and accordingly held that pronouncing a final order without a draft order is a nullity. It is noted that non-expression of anything further by the HC in the matter of JCB, indicates that the tax authorities have the liberty to opt for fresh proceedings thereby implying that the case got concluded favouring both partially.

26. Microsoft India (R&D) Pvt. Ltd. – ITAT – Delhi

Outcome: Against taxpayer
Category: Functional Classification – Contract Research & Development (R&D)
I.T.A. No.1479/Del/2016

The Tax Court mentions that a thorough analysis of the functional profile of the taxpayer is essential to determine the comparable companies. In the case of the taxpayer, it was earlier contended that it acts as a routine software developer for its AE – Microsoft USA.

Although the taxpayer had maintained all the primary evidences, it was reluctant to produce any of these evidences to the tax authorities. In view of this, the Tax Court demanded to look into all the relevant material and observed that R&D services were provided by the taxpayer only when an approval was received from the AE. It further went on to observe that R&D work was carried out purely as per the specifications of the AE.

The above findings helped the Tax Court to conclude that the taxpayer is a 'contract R&D service provider' by whom the 113 patentable inventions (which are registered in the USA) were carried out for its AE.

27. IKA India Pvt Ltd – Bangalore ITAT

Outcome: In favour of Taxpayer
Category: Economic Adjustments
I.T.(TP)A. No.2192/Bang/2017

Bangalore Tax Court upholds many controversial stands taken by the Tax Office -

Grants Capacity Utilisation adjustment, grants working capital adjustments, treats foreign exchange as operating in nature, upholds adjustment only on international transaction.

Comments: All the above adjustments are purely based on the factual representation of the taxpayer along with conceptual understanding of the TP law. There could be conditions where a taxpayer may not be in line with the general comparable profitability due to various other reasons but not due to TP . In such a case, the law allows the taxpayer to make adjustments; however, with the adjustments the burden of proof to prove such adjustments is with the taxpayer himself and therefore it is imperative to have all analysis done and documentation maintained which would support the adjustment in substance.

28. Jaso India P Ltd - Kolkata ITAT

Outcome: Against taxpayer
Category: Foreign Tested Party
I.T.A. No.507/Kol/2017

Foreign AE is rejected as a tested party. While the concept of acceptance of foreign tested party was not negated, the taxpayer is said to change its stand at various levels on determination of the tested party. This sent confusing and complicating signals to the tax bench which made the case go against the taxpayer.

Comments: The concept of tested party is basic pillar to TP. When the pillar itself is not decided, the entire built up of study is often questioned. TP setting mechanism is crucial to address such conflicts. If an answer would have been provided as to the fixation methodology, things could have been simpler. We generally assume TP to be complex and often forget on the basics of price fixation. Effective supply chain management and profit pegging could be an effective means to avoid such conflicts.

29. Siegwerk India Pvt Ltd - Delhi ITAT

Outcome: In favour of Taxpayer
Category: Interest Benchmarking
I.T.A. No.:-6702/Del/2015

The Tax Court dismissed tax authorities' appeal against the DRP order where a Loan given to the AE by the Indian company in Foreign currency was benchmarked by the tax authorities against Indian SBI PLR plus 7.50% instead of the benchmark used by the taxpayer of EURIBOR plus 0.25%. The Tax Court upholds the principle that where a loan is advanced in the foreign currency and the interest payments are made in the foreign currency a foreign benchmark needs to used representing the market conditions in the country of borrower entity.

30. JSL Limited (Now Jindal Stainless Ltd) – Delhi ITAT

Outcome: Against Taxpayer
Category: Comparability Analysis
I.T.A. No. 4249/Del/2013

Tax Court rules on the benchmarking of international transaction being export of graded stainless steel products to its Chinese AE, also exported to third parties.

Accordingly, rejects taxpayer's use of market quotations downloaded from internet without comparability analysis.

Holds that the CUP method can be used to compare prices of exports of same types of stainless steel to unrelated (non-AE) party in China, if market quotations are authentic and reliable, drawing reference to the term 'quoted price' defined in OECD TP Guidelines. Tax Court observed that taxpayer compared monthly average rates between AE & non-AE by aggregating monthly transactions and taking an average of sales to AEs and similarly with third party sales. Where no CUP data was available for a particular grade of steel, taxpayer used internet quotations (Chinese) and used it for testing arm's length price. Tax Court rejected the quotations taken without comparability.

31. Kehin India Manufacturing Pvt Ltd – Delhi ITAT

Outcome: In favour of Taxpayer
Category: Most Appropriate Method
I.T.A. No.:-2051/Del/2015

Tax Court rejects use of RPM by TPO for testing arm's length price of purchase of traded goods from AE on the basis of purchase & sale by taxpayer with related parties. It was held that RPM cannot be applicable when both purchase and resale are with AE. Thus, RPM is applicable only when resale is made to unrelated party. If the resale price is tested with AE, it would be impossible to compute arm's length in respect of purchase of property. Tax Court proceeded to accept taxpayer's views of TNMM as the most appropriate method of benchmarking the transaction based on results from taxpayer's trading segment.

32. Jabil Circuit India Pvt. Ltd. – Mumbai ITAT

Outcome: In favour of Taxpayer
Category: Intra-group services
I.T.A. Nos.2200/Mum/2017 & 867/Mum/2018

Tax Court accepts taxpayer's adoption of cost allocation mechanism pertaining to intra-group services namely IT and non-IT services (corporate support, business development support, etc.) rendered and received by the taxpayer.

Taxpayer backed the cost allocation with a CPA certificate using various key factors like assets, revenue, no. of employees, etc.. Tax Court notes that allocation of costs using such factors is a well-accepted practice in international taxation. Furthermore, after going through the taxpayer's documents and supporting evidences, it was held that the cost allocation mechanism is in line with the OECD guidelines. Tax Court affirms reliance on CPA certificate which is specific and duly authenticated.

33. PepsiCo India Holdings Pvt. Ltd. – Delhi ITAT

Outcome: In favour of Taxpayer
Category: AMP as International Transaction
I.T.A. No. 2511/DEL/2013

Tax Court rules on taxpayer's (full-fledged manufacture) AMP expenditure holding that TP adjustment simply on the ground that taxpayer has spent AMP expenditure benefitting the brand/trademark of the AE would not be the correct approach.

Adjustment on international transaction of reimbursement of advertisement expenditure on cost by taxpayer for its Irish AE was deleted. Observing the nature of transaction, Tax Court notes that the Irish AE acts as a legal title holder of trademark and has not charged royalty to taxpayer and since taxpayer operating in India reaps all the profits from India there would be no reason to compensate its AE for marketing activities. Tax Court holds arm's length determination to be confined to the reimbursement of cost and not to the entire AMP expenditure.

34. Laqshya Media Limited – Mumbai ITAT

Outcome: Against Taxpayer
Category: Nil ALP on Loan
I.T. [TP]. A. No.1984/Mum/2017

Tax Court rejects use of Nil arm's length determination of loans granted by taxpayer to its AE for further lending to step-down subsidiaries. However, the AEs incurred huge losses due to which taxpayer made substantial provision in its books of accounts and did not accrue any interest against outstanding loan considering the loans as non-performing assets/stressed assets. Taxpayer relied on principles of commercial expediency and real income theory wherein hypothetical income never earned by taxpayer could not be taxed. Further, taxpayer argued that the same should not be considered as international transaction.

Tax Court rejects taxpayer's views stating that taxpayer advanced loan under loan agreements/arrangements to its AE and was entitled to rate of interest. Additionally, as long as the loan transaction is an international transaction the test of commercial expediency or notional income or revenue neutrality would fail.

35. KSS Limited – Bombay HC

Outcome: In favour of Taxpayer
Category: TP applicability
I.T.A. No. 476 of 2016

Hon'ble HC rejects tax authorities' views regarding applicability of TP under Chapter X of the Act.

Taxpayer engaged in production and distribution of films, routed money through its AE for the purpose of acquiring distributorship from a third party. Tax authorities stated that taxpayer made interest-free advances to its AE and transferred its profit thereby attracting TP provisions.

HC relies on clause (c) of Explanation to Section 92B of the Act which states that "capital financing including any type of long-term or short-term borrowings, lending .. or any type of advance, payments.. or any other debt arising in the course of business would be included within the expression "international transaction". It is observed that the present case involved routing of money through AE as a conduit entity and not a case of financing or lending or advancing of any monies. Further, the AE had not retained the advance for any significant period of time.

Accordingly, Hon'ble HC holds that the transaction did not result into diversion of income of the taxpayer to its AE. Upholds Tax Court's prior ruling that arrangement resulted in advance given to third parties and not AE for the commercial purpose of acquiring distributorship rights.