



SEMINAR ON INTERNATIONAL TAXATION

ICAI- VISHAKAPATNAM

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CURRENT ISSUES IN TRANSFER PRICING



Secondary Adjustment

Secondary Adjustment in India

- A new section 92CE has been inserted in Income Tax Act through the Finance Act, 2017.
- Secondary adjustment means an adjustment in the books of account of the assessee and its associated enterprise to reflect that the actual allocation of profits between the assessee and its associated enterprise are consistent with the transfer price determined as a result of primary adjustment, thereby removing the imbalance between cash account and actual profit of the assessee.

Secondary Adjustment

Secondary Adjustment in India

- However, Secondary adjustment is not applicable if,—
 - (i) the amount of primary adjustment made in any previous year does not exceed one crore rupees; **OR**
 - (ii) the primary adjustment is made in respect of an assessment year commencing on or before the 1st day of April, 2016:

Secondary Adjustment

Secondary Adjustment in India

- If the excess money is not repatriated to India within a period of 90 days, the excess money available with the AE shall be treated as loan given by the assessee to such AE and interest shall be calculated at the rate prescribed in rule 10CB of Income Tax rules.
- the excess money or part thereof may be repatriated from any of the associated enterprises of the assessee which is not a resident in India.
- where the excess money or part thereof has not been repatriated within the prescribed time, the assessee may, at his option, pay additional income-tax at the rate of 18% on such excess money.

Issues in transfer pricing

1. Outstanding Receivables

- a. Whether outstanding receivables is an international transaction by itself?

Dell International Services India Pvt. Ltd - I.T.(T.P.) A. No.308/Bang/2015

Tally Solutions Pvt. Ltd. - I.T.(T.P) A. No.1364/Bang/2011

- b. Whether it would amount to capital financing?

Pegasystems Worldwide India Pvt. Ltd ('Pegasystems') vide I.T.A. No. 1758/HYD/2014

- c. If there is delay in realization whether adjustment of imputed interest is justified?

GSS Infotech Ltd vs. ACIT [2016] 70 taxmann.com 356 (Hyderabad - Trib.)

Dhanush Infotech (P) Ltd TS-1193-ITAT-2018(Hyd) TP

Bisazza India (P) Ltd TS-1095-ITAT-2018(Ahd) TP

- In case where there is a delay in realization from unrelated customers also and no interest charged for such delay.

CIT v. Indo American Jewellery Ltd., in ITA No.1053 of 2012

Issues in transfer pricing

2. Corporate Guarantee

a. Is it not a shareholder activity?

Micro Ink Ltd Vs ACIT [2015] 63 taxmann.com 353 (Ahmedabad - Trib.)

ITO v. Cadila Health Care Ltd. [2017] 78 taxmann.com 330 (Ahd. - Trib.)

b. Is it an international transaction at all?

**Bharti Airtel Ltd. v. Addl. CIT [2014] 43 taxmann.com 150/63 SOT 113
(Delhi - Trib.)**

Marico Ltd. v. Asstt. CIT [2016] 70 taxmann.com 214 (Mum. - Trib.)

Redington (India) Ltd. v. Jt. CIT [2014] 49 taxmann.com 146 (Chennai - Trib.)

EIH Ltd [TS-1020-ITAT-2018 (Kolkata- Trib.)]

Issues in transfer pricing

- c. Corporate guarantee is different from bank guarantee.
 - GVK Power & Infrastructure Ltd. Vs ACIT [2018] 94 taxmann.com 415 (Visakhapatnam - Trib.)**
 - BS Ltd. Vs ACIT [2018] 94 taxmann.com 346 (Hyderabad - Trib.)**
 - Glenmark Pharmaceuticals Ltd Vs ACIT [2014] 43 taxmann.com 191 (Mumbai - Trib.)**

- d. Whether corporate guarantee is resulting in any benefit in the hands of AE in terms of lowering of interest rate.
 - Yield approach
 - Guidance issued by the HMRC in the UK: INTM502040 – Intra group funding**

Issues in transfer pricing

3. Dispute in respect of comparables-

whether inclusion / exclusion of a company as comparable is a question of fact ?

PCIT Vs Softbrands India (P.) Ltd [2018] 94 taxmann.com 426 (Karnataka HC)

Saipem India Project Limited [TS-66-SC-2019-TP] (Supreme Court)

Citrix R&D India Pvt Ltd [TS-137-SC-2019-TP] (Supreme Court)

whether inclusion / exclusion of a company as comparable is a question of law ?

Pyramid IT Consulting (P.) Ltd. Vs Delhi HC [2019] 105 taxmann.com 281

Issues in transfer pricing

4. Remanded matters to AO/TPO- Draft Order

- a. If TPO proposes an adjustments in the remanded proceedings by ITAT, AO is under an obligation to pass a draft order again.

Cyient Ltd Vs DCIT [2018] 89 taxmann.com 309 (Hyderabad - Trib.)

JCB India Ltd. Vs DCIT [2017] 85 taxmann.com 155 (Delhi-HC)

- b. Whether same principle is applicable, when AO has passed rectification Order under section 154?

Talent Anywhere Services Pvt Ltd (formerly known as QSG Resources Management India Pvt Ltd) [TS-549-ITAT-2019(Ahd)-TP]

- c. Whether adjustment made under MAP shall be added to total income despite the final assessment order is quashed for not passing draft-order ?

Yazaki India Private Limited (Formerly known as Tata Yazaki AutoComp Limited) [TS-669-ITAT-2019(PUN)-TP]

Issues in transfer pricing

5. Routing money through AE for acquisition of distribution rights from third-party, not a 'international-transaction'

KSS Limited (formerly known as K Sera Sera Productions Ltd) [TS-1379-HC-2018(BOM)-TP]

6. Whether TP Provisions are applicable to income covered under Tonnage Tax Scheme?

Van Oord India Private Limited [TS-440-ITAT-2019(Mum)-TP]

7. Foreign AEs can be taken as a tested party.

IDS Infotech Ltd [TS-58-ITAT-2019(CHANDI)-TP]

WNS Global Services Pvt. Ltd. [TS-278-ITAT-2019(Mum)-TP]

Carraro India Private Limited [TS-124-ITAT-2019(PUN)-TP] (Against)

Issues in transfer pricing

8. Whether TPO is under an obligation to apply Turnover Filter for exclusion of comparables?

Speridian Technologies Private Limited (TS-962-ITAT-2019(COCH)-TP)

DCIT v. FIS Global Business India (P.) Ltd. [2018] 94 taxmann.com 344 (Delhi - Trib.)

Cadence Design Systems (India) (P.) Ltd. v. DCIT [2018] 89 taxmann.com 443 (Delhi - Trib.)

However, Turnover Filter has been upheld by-

CIT v. Pentair Water India (P.) Ltd. [2016] 69 taxmann.com 180 (Bombay)

Infor (india) (P.) Ltd. v. DCIT [2019] 109 taxmann.com 435 (Hyderabad - Trib.)

Northern Operating Services Vs DCIT [2019] 108 taxmann.com 451 (Bangalore - Trib.)

Issues in transfer pricing

9. Whether cash PLI (PBDIT) can be taken for the purpose of benchmarking the margin of the Assessee? i.e. Whether depreciation adjustment can be made for the purpose of calculating OP/OC?

Qual Core Logic Ltd. v. DCIT [2012] 22 taxmann.com 4 (Hyd.)

**M/s. International Specialty Products (India) Pvt. Ltd. v. ACIT I.T.(TP)A.
No.1279/Mum/2017**

Snecma HAL Aerospace Pvt Ltd [TS-456-ITAT-2019(Bang)-TP]

INA Bearings India Pvt. Ltd [TS-540-ITAT-2019(PUN)-TP] (Against)

Issues in transfer pricing

10. Whether LIBOR + basis points can be taken as benchmarking rate when the compulsorily convertible Debentures ('CCDs') are issued in Indian currency?

Hyderabad Infratech Pvt Ltd [TS-982-ITAT-2019(HYD)-TP]

PCIT v. India Debt Management (P.) Ltd. [2019] 106 taxmann.com 55 (Bombay)

11. Investment in preference shares shall not be considered as loan unless the transaction is sham.

Aegis Limited [TS-65-HC-2019(BOM)-TP]

Cairn India Ltd [TS-1151-ITAT-2018(DEL)-TP]

Issues in transfer pricing

12. Benchmarking under CUP method - Quotations from internet are not reliable
JSL Limited (Now known as Jindal Stainless Ltd) [TS-1231-ITAT-2018(DEL)-TP]

13. Whether Internal TNMM ('AE and NON-AE') can be applied even though there is no segmental reporting in the financial statements?
Netguru Ltd [TS-383-ITAT-2019(Kol)-TP]
Birlasoft (India) Ltd. v. DCIT [2014] 49 taxmann.com 312 (Delhi - Trib.)
Destination of the World (Subcontinent) (P.) Ltd. v. ACIT [2011] 12 taxmann.com 310 (Delhi),
Lummus Technology Heat Transfer BV v. DCIT [2014] 42 taxmann.com 342 (Delhi -Trib.)

Issues in transfer pricing

14. Whether Persistent loss making companies can be included in comparables ?

NOKIA SIEMENS NETWORK INDIA P LTD [TS-733-HC-2019(DEL)-TP]

Asahi Glass Ltd. v. DCIT [2016] 69 taxmann.com 32 (Delhi - Trib.)

Issues in 3CEB reporting

1. **Change in Cl.No.4 nature of business or activities of the Assessee (classification of business nature)**

- became narrow compared to earlier years.
- difficulty in classifying under “Others” more so when we apply TNMM as Most Appropriate Method (MAM).

Example:

Company A Ltd is into animation business, however at the time of classification of business in Form 3CEB we will find it difficult as the same or similar nature of business is not available in the given list of nature of businesses.

Issues in 3CEB reporting

2. **Nature of relationship with the Associated enterprise as specified in Cl.No.10 is to be determined appropriately.**
 - All the related parties as disclosed in RPT schedule of financials may not become Associated enterprises as specified in sec. 92(A) of the IT Act.
 - Possibility of litigation.

Issues in 3CEB reporting

- 3. All the transactions during the year with the Associated enterprises may not be reported in some of the circumstances**

Example:

- The transactions of loans given or taken during the year may not be reported, whereas interest charged or paid in relation to the loan given or taken shall be reported under Cl.No.14 .
- The amount on which guarantee given or taken during the year may not be reported, however, commission charged on guarantee shall be reported under Cl.No.15 .

Issues in 3CEB reporting

4. **With respect to reporting under Cl.No.19 only receivables shall be reported whereas payables may not be reported as per Explanation to sec.92B.**
5. **The aggregate value of international transactions as per books of accounts as specified in Cl.No.8 may not include the receivables amount as reported under Cl.No.19.**
6. **What is a deemed international transaction as per sec.92B(2)?
How to do reporting under Cl.No.20.**

Issues in 3CEB reporting

7. **How to report Cl.No.10, details of associated enterprise when there is a deemed international transaction.**

8. **Shall we report the transactions with persons specified u/s 40A(2)(b) under Cl.No.21?**
 - due to amendment in Finance Act,2017, transactions with parties covered under sec.40A(2)(b) will not be considered as a specified domestic transactions as per Sec.92BA

 - however in form 3CEB in Cl.No.21 one may select “Not Applicable” in the drop down provided.

Issues in 3CEB reporting

9. **How to report transaction with other enterprise which has close connection with the assessee as defined in section 80 – IA (10)?**

10. **When foreign AE is filing return of income in India as per the Income Tax Act, is it mandatory to file Form 3CEB by such foreign AE?**

Sec.92BA-Specified Domestic Transaction (SDT)

- Any of the specified transactions, not being any international transaction, namely
 - Expenditure in respect of which payment has been made or is to be made to person referred to in Section 40A(2)(b) ; - (omitted by Finance Act 2017)
 - Transaction referred to in Section 80A;
 - Transfer of goods or services referred to in sub-section(8) of Section 80-IA.
 - Any business transacted between the assessee and other persons as referred to in sub-section (10) of section 80-IA.
 - Any transaction, referred to in any other sections under Chapter VI-A or Section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable.
 - Any other transaction as may be prescribed.

Note: Provisions of SDT would be applicable if the aggregate value of the transaction exceeds INR **20 Crore**

Sec.92BA-Specified Domestic Transaction (SDT)

- In respect of tax holiday undertakings the following transactions are likely to be covered u/s 80IA(8):



- Transfer of goods
- Receipt or provision of services;
- Transfer of capital assets; and
- Further any other income and expense transactions that impact the tax holiday profits of the undertaking where the same qualify as transfer of goods and services.

Sec.92BA-Specified Domestic Transaction (SDT)

- In respect of tax holiday undertakings any business transacted with entities having 'close connection' with the taxpayer will be covered u/s 80IA(10)
 - **What is the meaning of 'Close connection'**
 - The term 'close connection' has not been expressly defined in the Act.
 - In this regard, reference could be drawn from other provisions of the Act to define 'close connection' as under
 - Substantial Interest u/s 40A(2)(b)
 - Associated Enterprise [Section 92A(2)]; and
 - Related party as per AS-18 or IndAS-24
 - ***Digital Equipment India Ltd Vs DCIT (2006) 103 TTJ 329 (Bang)***

Inter-unit Transfers - Benchmarking

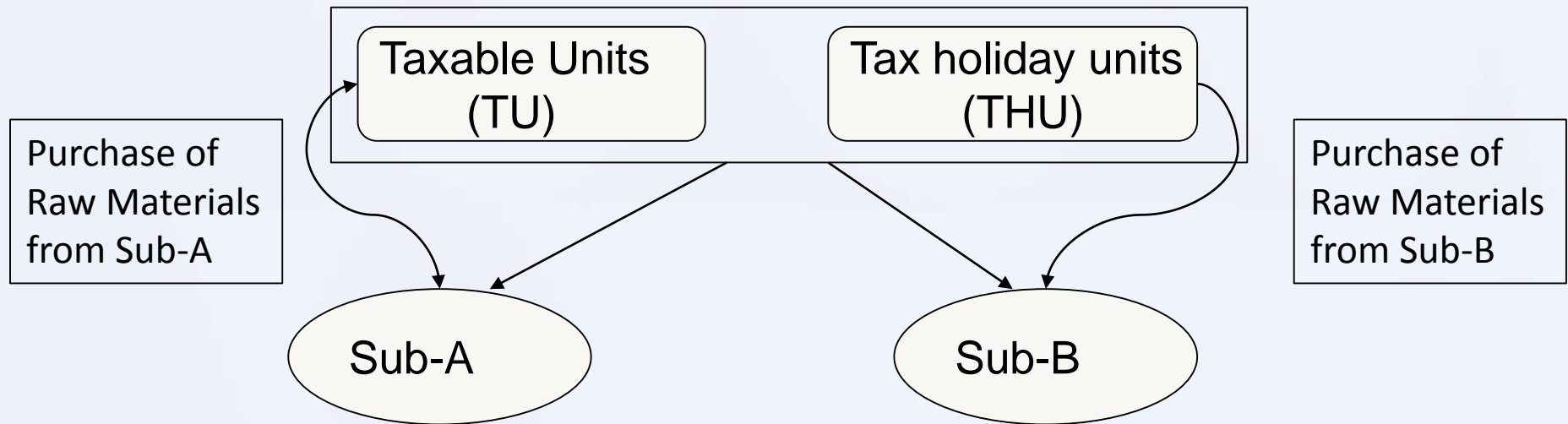
- How to benchmark inter-unit transfers between tax holiday unit and taxable units of the entity?
 - Can we consider CUP method as a Most Appropriate Method (“MAM”) when there are similar transactions with unrelated domestic parties.
 - Can we consider Cost Plus Method (“CPM”) as MAM instead of CUP method

Inter-unit Transfers - Benchmarking

- Other issues in reporting specified domestic transactions u/s 92BA
 - Is reporting of 'allocation of head office expenses mandatory?
(Ponds India (now Hindustan Lever Limited)- ITA 2047/Mad/88)
 - If yes, under which clause the same shall be reported.
 - What will be the basis for allocation and what type of expenses can be allocated to Tax Holiday unit
 - Whether transactions between domestic group entities and tax holiday units of the Assessee company shall be reported u/s 92BA
 - The same can be evaluated in the following case study.

Inter-unit Transfers - Benchmarking

- ABC Ltd incorporated in India conducts manufacturing activities in both of its taxable and tax holiday units. It purchases goods from its Indian Subsidiaries 'A Ltd' and 'B Ltd'
 - whether these purchase transactions are required to be reported u/s 92BA



- If these transactions are required to be reported then under which method the above said transactions can be benchmarked.

“THANK YOU”