IFA News Letter
India Branch - Western Chapter

January 2015

Chairman's Message

The Mumbai Congress was a great success and organising such a landmark event was an unforgettable experience. At the outset I take the opportunity to thank the entire organising committee and indeed each contributor & participant, for making it such a grand success. The outstanding response & the feedback received on every aspect only went to show the stupendous effort & commitment of the entire organising committee. For me personally it was a tremendous learning & supremely fulfilling experience.

We had some of the best minds in the field of International taxation participating in the Congress bringing diverse experience & the finest thinking from across the world, under one roof – more than 1500 participants from more than 75 different countries attended the Congress.

We had more than 80 speakers/panellists (including judges, revenue officials, tax directors, professionals, etc from diverse countries) sharing their views, thoughts & experiences on burning scientific topics in the field of International Taxation. The number of speakers & even Chairmen from India & the impact they created, made us feel extremely proud. Most important the Congress provided a unique opportunity to the international tax fraternity in India to participate & experience its unparalleled benefits. While there is always a long waiting list given how sought after the Congress is, I do hope that we have an opportunity to host another Congress in India before too long!

It is heartening to learn that the Government is considering not appealing against the Bombay High Court judgment in the share issue controversy (Shell, Vodafone etc) & it would indeed be commendable if the Revenue does decide not to appeal against the said judgements. This would go a long way in achieving the avowed objective of a healthy, more friendly & non-adversarial tax regime. As one eagerly awaits the fate of GAAR amid hope that it will be deferred in the upcoming Budget one also hopes that greater clarity is brought about on other long pending contentious issues like the provisions relating to indirect transfer & the retrospective amendment thereto.

Editor Speaks

Friends,

The conclusion of 68th Congress in Mumbai, India, has left us all in high spirits. Thank you all the Delegates for your participation and making this event a grand success. The other details of the 68th Congress are in the news letter.

A Very Happy New Year 2015 to all our readers. This will be the first publication of the news letter in year 2015.

With the dawn of new year the Editorial Team has decided to change the face of news letter. All of us are into Indian Court rulings day in and day out. We will now focus on the views of experts from all over the world on certain controversies arising from Indian Court rulings in cases of Transfer Pricing dealing with Advertising, Marketing and Promotion. This news letter contains views of experts from some countries around the world, sought on a case study furnished to them in advance. I am sure this will increase our pleasure of reading.

It is not only the Indian Courts but the Courts world over are busy characterising royalty. The Federal Court of Australia has decided the issue under the AADT between Australia and Canada.

The other important events revolve around the OECD activities. The OECD has released discussion drafts on use of profit splits in the context of global value chains, transfer pricing aspects of cross-border commodity transactions, proposed modification to transfer pricing guidelines relating to low value adding intra-group services among other follow up activity on BEPS. The most sought for proposed modification in PE rules for preventing artificial avoidance of PE is also being discussed.

Cheers,

Tara.

Inside this Issue

Global views on Indian Transfer Pricing Controversy on AMP

Comments from globally renowned professionals

The issue of marketing intangibles has been in spotlight recently with several high profile cases like Sony, Cannon and others being litigated in Delhi High Court.We sought comments from experts around the world to find out their view on the issue based on a hypothetical case study.

The expert responses were received from:

- Fuad S. Saba, Managing Director, FGMK LLC and Guy Sanschagrin, Managing Director, WTP Advisors, United States
- Professor Hans van den Hurk, Professor of European Corporate Income Taxes, Maastricht University, The Netherlands
- Jean Paul Donga, Executive Director, EY Australia
- Douglas Fone, Managing Director, Quantera Global, Singapore and Ashish Dave, Executive Director, Quantera Global, Australia

Case Study:

Ind Co., an Indian company, is a full risk bearing distributor of its 100% holding company, US. Co, a US company engaged in manufacturing of home appliances. The US Co.'s appliances are sold worldwide under the 'X' brand. Prior to setting up Ind Co., US Co carried on business in India through its Indian branch office.Ind Co. was incorporated as a wholly owned subsidiary of US Co. Ind Co. entered into a distributor agreement with US. Co for a period of 45 years. As per the agreement, Ind Co. was appointed as sole distributor to market and distribute US Co.'s products in India.

Ind Co. incurred significant advertising, marketing and promotion ('AMP') expenditure to promote products with 'X brand' in India. The promotion of brand 'X' was not part of distributor agreement. Ind Co. sold the goods to dealers at a price such that, its remuneration was in range of 8-13% of sales price.

In order to justify the arm's length nature of purchase of appliances from its parent company, the Ind Co. applied Transaction Net Margin Method ('TNMM').

Questions & Expert Reponse[1]s:

Can it be said that, incurring AMP expenditure is a normal function of distributor or does it amount to provision of brand building services to associated enterprise (AE)? What are the parameters to distinguish function from service?

Guy & Fuad: Yes, in many cases AMP would be a normal function for a distributor. However this depends on the overall arrangement with the AE. A conservative approach would be to have the AE incur all of the AMP expenses (whether directly or by reimbursing the distributor) to make it clear that the AE should retain the marketing intangible ownership. If this is not done, then the distributor may be considered to own some portion of the marketing intangible (see for example the US Glaxo case, wherein Glaxo US was not reimbursed for AMP and was considered to own part of the US marketing intangible.) Alternatively, in an LRD setting, the AMP costs would be embedded into the distribution activity and the LRD would be compensated by the AE so as to earn a net arm's length margin.

Professor Hans: Incurring AMP may not be normal function of a distributor. Thus, in case at hand, the distributor is assisting its principal to develop its brand in its local jurisdiction. Therefore, the TPO was right in characterising such expenditure as brand building services.

Jean: Incurring AMP may be normal function of a distributor and TPO may not be correct in characterising the same as brand building service.

Douglas & Ashish: In this competitive environment, it is naïve to assume that AMP related activities are not part of normal business function for any distribution business.

If it does amount to provision of brand building service to US Co, would it be considered as a separate controlled transaction?

Guy & Fuad: If the objective is to make it clear that the parent maintains ownership of marketing intangibles, we recommend that

[1] The views of the experts are personal

AMP functions and expenditures be structured as a service and charged to the AE with a mark-up on total costs.

Professor Hans: The AMP may be considered as brand building service as in absence of marketing intangible ownership, brand building may not constitute logical element of the business of a distributor.

Jean: The AMP may not necessarily considered to be a separate controlled transaction of provision of brand building service.

Douglas & Ashish: The ATO in recent cases have sought to "impute" a service arrangement between international related parties despite the absence of any underlying agreement /arrangement in this regard. The fundamental assumption in those cases is that the taxpayers activities are for the benefit of the global group and therefore it should be characterised akin to a service transaction between associated enterprises.

Commercially, if the above arrangement was between two independent Parties, would the Distributor incur similar AMP expenditure?

Guy & Fuad: If the objective is to make it clear that the parent maintains ownership of marketing intangibles, we recommend that AMP functions and expenditures be structured as a service and charged to the AE with a mark-up on total costs.

Professor Hans: If in arrangement between two independent parties it is agreed that legal owner would do brand building then, distributor would not incur AMP expenditure. However if not, then distributor would have to undertake brand building activity to sale the goods. In this case, the distributor may be performing activity more than what a normal distributor should ideallydo.

Jean: Third parties would be willing to incur additional AMP if they get rewarded on a holistic basis. This can be through a service or a higher return on their distribution activities.

Whether AMP expenditure provided any real benefit to US Co. or whether such expenditure only provided benefit to Ind. Co by increase in sales?

Fuad & Guy: Both parties benefit – to the extent that revenues increase – the profits of both India and the U.S. would increase. It would be difficult to determine whether one party or another received a greater share of the benefit and each situation will depend on specific facts.

Jean: Economically both entities benefit. This does not differ from a third party distribution arrangement.

Whether it can be considered that Ind Co. was economic owner of brand due to long term distribution agreement with Us Co and hence, incurring AMP expenditure is on its own account?

Fuad & Guy: Since the agreement does not address the ownership of brands and you indicated in the facts that India is characterized as a "full risk bearing distributor," it would seem that there is a strong argument that Ind Co. is the owner of the brand intangibles in its territory (once again, refer to the Glaxo case). Since India bore the AMP costs and the risks associated with these costs, it seems that there is a strong argument that India is the economic owner of the marketing intangibles in the local market.

Douglas & Ashish: Legal ownership is generally respected in allocating or attributing profits from exploitation of intangibles. A distributor does not typically acquire economic ownership of intangibles it does not legally own, no matter how much marketing activity it performs or value it adds to those intangibles. It is not necessary to recognise economic ownership in order to arrive at an arm's length outcome between distributor and intangible owner. Economic ownership has appropriately limited recognition for transfer pricing purposes.

As 'X' brand was in existence for long time, did AMP expenditure amount to brand building in India?

Fuad & Guy: It depends on the nature of the product and the latency / remaining useful life of the brand / strength of the brand. In some cases one might have a brand with strong latency, meaning that it is a brand that remains in the memory of the consumer for a long time. This might be due to good AMP practices, but it also might relate to other product-related aspects such as technology or quality. (Take for example Rolls-Royce)

Even if it is considered that remuneration for brand promotion in India is a separate international transaction, if net profit margin is at arm's length by application of TNMM, then is separate benchmarking required for AMP expenditure?

Fuad & Guy: It depends on the importance and value-adding capability of AMP to the brand. One needs to understand the extent to which AMP creates an immediate profit margin impact. Potentially AMP might be in the nature of a longer-range value support activity such that its impact on margins is not felt immediately. In that case, and if the TNMM is at the ALP level, one would not need a separate benchmarking effort. Thus, if the AMP contributes to profit margins today, then the distributor is fairly remunerated. If it supports future value (in terms of brand endurance,) one would expect the distributor would earn higher profits in the future.

Jean: No. Further, the important factor is whether the distributor gets rewarded in some form. Higher profits may indicate such reward being earned by distributor.

Douglas & Ashish: From the facts presented above, it appears that the application of TNMM demonstrates that the Indian company has achieved an operating margin much higher than those established by comparable distributors. As such, it could be argued that excess profits achieved by the Indian company over and above those established by comparable companies are predominantly attributable to AMP related activities. Hence, no separate benchmarking should be required to determine an arm's length return for AMP related activities. Nevertheless, if a separate analysis was performed to establish a remuneration (i.e., an arm's length mark-up on AMP expenses) for AMP activities, it may require an (upward) adjustment to product pricing which may potentially lead to the same or similar profit outcomes for the Indian company.

Whether bright line test can be considered as an appropriate method to benchmark AMP expenditure? Please provide brief reasons.

Fuad & Guy: No. Industries and markets are so different that it would be difficult to create such a test.

Whether such AMP expenditure would amount to provision of service if Ind Co. would have been low or limited risk bearing distributor?

Fuad & Guy: Potentially. It is more likely that it would be a service. It depends on what a normal distributor would spend under similar arm's length conditions.

Professor Hans: It may not be logical for low risk distributor to incur AMP expenditure as incurring such expenditure may be inconsistent with its economic characterisation.

Jean: If distributor is incurring AMP, can it still maintain low risk profile?

Would it make any difference if AMP expenditure was not separately mentioned as a function performed by Ind Co in the documentation maintained by it?

Fuad & Guy: No. What matters is the arm's length conduct of the parties. The intercompany agreement and documentation are important factors outlining and explaining the nature and intent of the relationship and the ownership of IP but the actual conduct of the parties is the first and foremost criterion.

Jean: It shouldn't, but it did likely flag the interest of the Indian authorities.

Professor Hans: If not mentioned as separate function then, it might amount to window dressing, as AMP expenditure is very much present.

On behalf of IFA WRC, we are thankful to the experts for taking out time for providing their inputs

Global Tax Developments

I. Overseas Rulings

Task Technology Pty Ltd (Federal Court of Australia) [2]

Exception under royalty clause of Australia-Canada tax treaty for payments made as consideration for right to use source code in a computer software program cannot apply in a distributorship arrangement and hence were characterized as royalties

The taxpayer (tax resident of Australia) is a distributor for a Canadian tax resident (licensor). The taxpayer had exclusive rights to *inter alia* make copies of licensed software for distribution, market and distribute the software, etc.

As per Article 12(7) of the Australia – Canada tax treaty ('DTAA'), payments made for the supply of or right to use source code in a computer software is not considered as royalties <u>if the right to use source code is limited to such use as is necessary to enable effective operation of the program</u> by the user.

Interestingly, the general Canadian tax treaty practice is to classify such payments as royalties and hence the DTAA has a specific exclusionary clause to make exception to the general Canadian practice.

The taxpayer claimed that Article 12(7) of the DTAA applies equally to the payments made by the taxpayer under the distribution agreement and hence the same would not constitute royalties. Consequently, there was no withholding tax liability on the said payments.

In ruling against the taxpayer, the Federal Court relied upon the principles of construction of international tax treaties. The Federal Court held that literal interpretation of the relevant Article of DTAA will not suffice and that the context, object and purpose of Article 12(7) must also be considered. In light of the same, the terms of the distribution agreement were analysed and it was held that the taxpayer was paying consideration to the licensor for various rights which were not linked to use of source code. The Federal Court carried out a detailed analysis of the terms of the Distribution Agreement and distinguished between source code, executable code, Computer Program and Licensed Program. The Federal Court also held that the taxpayer failed to demonstrate any connection between payments and right to use the source code.

Accordingly the exception provided in Article 12(7) was not held to be applicable and the payments by the taxpayer were characterised as royalties liable to tax withholding in Australia.

[2] 2014 FCAFC 113 dated 5th September 2014

II. OECD Updates

OECD releases discussion draft on proposed modification to transfer pricing guidelines relating to low value-adding intra-group services

On 3 November 2014, the OECD published its discussion draft on the proposed modifications to Chapter VII of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

The proposed modifications have been developed in connection with Action Plan 10 of BEPS project, which is focused to develop rules to prevent BEPS by engaging in transactions which would not, or would only very rarely, occur between third parties.

The discussion draft reduces the scope for erosion of the tax base through excessive management fees and head office expenses by proposing an approach which identifies a wide category of common intra-group services commanding a very limited profit mark-up on costs, applies a consistent allocation key for all recipients, and provides greater transparency through specific reporting requirements.

OECD releases discussion draft covering follow up work on BEPS Action 6 (preventing treaty abuse)

On 21 November 2014, the OECD published its discussion draft on follow up work on BEPS Action 6: Preventing Treaty Abuse, as noted in its earlier report of Action 6 released in September 2014.

This discussion draft deals with the follow-up work related to the contents of the modelprovisions and related Commentary included in Section A of its September Report, in particular the LOB rule, as well as with issues related to the treaty entitlement of collective investment vehicles (CIVs) and non-CIV funds.

The discussion draft identifies twenty issues where Working Group is considering further refinements. The first ten issues relate to content of the Limitation of Benefits ('LOB') article and related commentary. The seven issues relate to the Principal Purpose Test, followed by three 'other' issues (relating to residency tie-breaker rule, anti-abuse rule relating to exemption in source country by virtue of attribution to PE, and interaction between tax treaties and domestic anti-abuse rules).

OECD releases discussion draft on proposed modification in PE rules for preventing artificial avoidance of PE

On 31 October 2014, as part of Action Step 7 of BEPS project, the OECD published its discussion draft capturing proposed fundamental changes to existing PE rules, with potentially wide impact on many structures used by MNCs.

The discussion draft described 13 options, options, which includes widening the dependent agent provisions and narrowing both the independent agent exemptions and the specific activity exemptions for preparatory and auxiliary activities, splitting up of contracts, etc. It goes beyond the PE areas identified for review under Action 7 in original BEPS Action Plan.

Further, the broad reach of many of the options reflects concerns raised in the BEPS Report on Digital Economy.

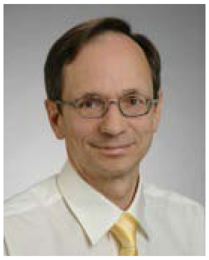
OECD releases discussion drafts on transfer pricing aspects of cross-border commodity transactions

On 16 December 2014,as part of Action Step 10 of BEPS project, the OECD published its discussion draft which has acknowledged the difficulties faced by countries in relation to the pricing of cross-border commodity transactions, particularly in terms of determining adjustments to quoted prices, verifying the pricing date, and accounting for the involvement of other parties in the supply chain. The draft also discusses the emergence of so called ‘sixth method’ for benchmarking through use of ‘quotes’.

The discussion draft thus contains proposals for additional guidance in relation to the pricing of cross-border commodity transactions..

OECD releases discussion drafts on use of profit splits in the context of global value chains

On 16 December 2014,as part of Action Step 10 of BEPS project, the OECD published its discussion draft giving number of scenarios in which it may be more difficult to apply one-sided transfer pricing methods to determine outcomes that are in line with value creation. The draft has also posed questions which focus on the circumstances in which the application of a transactional profit split method may be appropriate, as well as the ways in which the factors used to split the profits can align profits and value creation.



Experts Speak

Investing in India – Observations from the outside

Dr.MartinZogg, Senior Tax Professional. He ismember of the Executive Committee and Head of domestic and international taxation at SwissHoldingsand is involved in various capacities in BIAC, ICC and IFA (the views expressed are personal)

India's share in the international investment has risen steeply. Supposedly, India's growth could still be higher, provided the investment conditions would be improved further. For the foreign investors it was worrying news to learn that India might renegotiate all Bilateral Investment Protection Treaties. From an outside perspective there seems to be a gap between the competence and approach of the federal and some local tax authorities. The improvements in indirect taxation are very welcome.

Switzerland takes the view that free circulation of capital and investment across national borders is a motor for economic growth, employment and development. Switzerland encourages competition and economic efficiency and enables companies to have better access to financial resources and technological innovation. In Switzerland, inward foreign direct investment has reached a stockof 672 billion CHF (figures Swiss National Bank [SNB], 2012). At the same time, the stock of Swiss foreign direct investment abroad has reached over 1,079 billion CHF, making Switzerland the world's sixth largest capital exporter (UNCTAD figures, 2013). Subsidiaries of Swiss groups abroad employ 2.9 million people. This number corresponds to roughly half the working population of Switzerland (figures SNB, 2012). The statistics show a remarkable growth of the engagement of Swiss companies in India. From 2008 to 2012 the number of employees of Swiss companies increased over 60 percent to approximately 100,000 people (SNB figures). Hence, as far as employees are concerned, India has a share of one 29th in the worldwide engagement of Swiss companies. Within Asia only in China the respective number grew at the same pace.

Underestimated role of treaty protection

The investments of Swiss multinationals abroad are usually long term. It is therefore of utmost importance that their investments can take place under legally stable and predictable conditions. Compared to domestic legislation, which basically may be changed unilaterally at any time, bilateral agreements provide for a higher degree of legal certainty. Bilateral Investment Protection Treaties (BITs) are a stimulating factor for companies deciding on where to invest. Altogether, Switzerland has so far signed 130 BITs with partners around the world. The BIT between India and Switzerland was concluded in 1997 and enhanced the attractiveness of India for Swiss investments. In Switzerland this BIT is considered an important pillar of the bilateral economic relations. For the Swiss investor community it was therefore worrying news when India announced in April 2013 its intention to renegotiate all BITs. Double Tax Treaties (DTTs) and BITs complement each other. Twenty years ago the DTT between India and Switzerland entered into force. Some of the clauses of this DTT reflect India's position as an emerging country. Of course, Switzerland and its investors duly respect this approach. At the same time more liberal provisions would stimulate economic growth and employment. Therefore, the question arises whether India's economy might grow even faster if the DTTs were more favorable to foreign investors.

Questions arising from the application of the DTT are discussed with the Central Board of Direct Taxes, which is also in charge of Mutual Agreement Procedures. The feedback from recent discussions is that this Authority is highly professional and pragmatic. Business also welcomes that this same Authority is actively engaged in Advance Pricing Agreements discussions.

Remarkable difference between national and local tax authorities

Some businesses note that local tax unit offices, even when they are not very small, do not seem to be as professional as the federal tax authorities and quite often take an "aggressive and formalistic" approach. To some extent this is mitigated by the courts. It is remarkable that a significant number of cases brought before the judges are decided in favor of the tax payers. However, having to revert to the courts absorbs considerable resources and time. It would therefore be desirable if the local tax offices could take a more client oriented approach. The chances that their current approach might change appear very limited, as long as budgets are not only broken down to the individual tax officers but their compensation depends on whether they reach the target allocated to them. Investors hope that the new federal and local Governments will treat this aspect with priority.

In this regard there seems to be significant potential for improving Government-Investor relations. Businesses do consider the theoretical framework of Indian taxation as perfectly sound and are merely concerned about application at lower levels of the administration. The following are two examples of constraints at local level: (i) Treaty override by the local Indian tax practice: While only the profits of the local Indian activities should be subjected to taxation, also offshore profit portions get taxed. (ii) Time-consuming and burdensome administrative processes: Handling periods for 197-Certificates often take 4 to 6 months. This contrasts severely with the respective administrative orders by the Finance Ministry. The immediate impact on business is: Without a 197-Certificate, e.g., all customer payments can be blocked leading to cash-flow disadvantages. Furthermore, it is hindering if final tax assessments and refunds take many years in cases where assessment proceedings are very common.

Finally, there is justified hope that the introduction of a nationwide VAT will cut down on the complexity created by the current multitude of consumption taxes. With increased simplicity the compliance costs should go down and resources be freed up. For foreign multinationals this is one of several important indicators that India is committed to being an attractive location for foreign investment.

On behalf of IFA WRC, we are thankful to the experts for taking out time for providing their inputs

IFA Congress – October 2014

India extended a warm welcome to IFA Participants from around the globe at the 68th IFA Congress 2014, which was held for the first time in Mumbai. This Congress also marked the return of the Judges' seminar, after a gap of 10 years, where five prominent Judges from around the world discussed contentious tax issues in the international judicial arena. The Social events were well organized. The YIN activities gave a special opportunity to strengthen your existing network and develop new relationships.

The Main Topics of the Scientific Programme were:

Subject I: Cross-border outsourcing - issues, strategies and solutions	Subject II: Qualification of taxable entities and treaty protection
General Reporters: Shefali Goradia and Pinakin Desai (India)	General Reporters: Claus Staringer and Michael Lang (Austria)
Chair: Bruno Gibert (France)	Chair: Carol Dunahoo (USA)

The Seminar topics were:

Seminar A: VAT implications of outsourcing and cost-sharing arrangement	Seminar F: UN Matters - UN and OECD differences in Model, TP
Seminar B: Indirect transfer of assets	Seminar G: Tax issues relating to intangibles
Seminar C: The taxable residence of Companies	Seminar H: Recent Developments in International Taxation
Seminar D: Judges Seminar	Seminar I: Taxation and non-tax treaties
Seminar E: IFA/OECD: Update on BEPS Work: Preventing Treaty Abuse	Seminar J: IFA/EU: The Impact of EU Law on BEPS Initiative

The summary of sessions written by IBFD reporters can be accessed at:
https://www.ifa.nl/Document/Congress%20Mumbai/ShortProc2014Mumbai.pdf

IFA – News

Date	Particulars
17 January 2015	"IFA 2014 Mumbai Congress – Practical Aspects & India Perspective”

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The International Fiscal Association (IFA), established in 1938 with its headquarters in the Netherlands, is the only non-governmental and non-sectoral international organisation dealing with fiscal matters. IFA has played an essential role both in the development of certain principles of international taxation and in providing possible solutions to problems arising in their practical implementation. The membership of IFA now stands at more than 12,000 from 106 countries. In 62 countries, including India, IFA members have established IFA Branches. For further information on IFA and its activities, please visit the website www.ifaindia.in. Your feedback / suggestions are welcome. Please write at ifaindiabranch@gmail.com</td></tr>
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