

Transfer Pricing Alert

1. Summary of Case Laws

SL. No.	Case Law	Outcome
a.	Barclays Bank PLC v. ADIT (Intl Taxn)-3, Mumbai	Application of Profit split method was not justified in determining the arm's length price of marketing activity.
b.	Conexant Systems (P.) Ltd v. Deputy Commissioner of Income-tax, Circle-1(2), Hyderabad	Increase in sale and expenses cannot be considered as peculiar economic circumstances to exclude as a comparable company.
c.	Commissioner of Income-tax, Pune v. Cummins Turbo Technologies Ltd	Exclusion and inclusion of comparable companies cannot be considered as substantial question of law before High court.
d.	Deputy Commissioner of Income tax, Circle-1(1)(2), Mumbai v. Exedy India Ltd	Benefit of +/- 5% to be on arm's length price and not arm's length margin
e.	Freescall Semiconductor India (P.) Ltd v. Deputy Commissioner of Income-tax, Circle - 9(2), New Delhi	Companies having significant brand value, different functionality and high related party transactions cannot be comparable.
f.	Nokia India (P.) Ltd v. Deputy Commissioner of Income-tax, Circle 13(1), New Delhi	Working capital and risk adjustments needs to be provided for differential risk between assessee and comparable companies
g.	Philips India Ltd v. Assistant Commissioner of Income Tax, Circle-12 (2), Kolkata	Management charges cannot be considered to be nil on the condition of benefit test.
h.	Renault India (P.) Ltd v. Deputy Commissioner of Income-tax, Corporate Circle-5(1) Pune	Transactions between two Indian entities cannot be considered to be deemed international transactions.
i.	Tevapharm India (P.) Ltd v. Assistant Commissioner of Income Tax, Special Range-9, New Delhi	Final order passed by the Assessing Officer without passing draft order cannot be quashed as the remedy is still available before CIT(A) and High Court.

Case Laws

a. Barclays Bank PLC v. ADIT (Intl Taxn)-3, Mumbai AY 2006-07 & 2007-08
Mumbai Tribunal

Facts of the case:

The assessee is a division of Barclays Bank, and would manage global derivatives operations, the company was involved in getting derivative business to the overseas entity for which it was compensated with the mark up of 24% based on the Global Transfer Pricing Policy. The assessee applied TNMM as the most appropriate method and concluded that the transactions are at arm's length price. The TPO during the transfer pricing assessment rejected the contention of the assessee and applied Profit Split Method as the most appropriate method and arrived at 60% Initial net present value of the derivatives based on the comparable transactions. Therefore the TPO made adjustments to the tune of INR 51 cr.

Held

The assessee aggrieved by the aforesaid order appealed before the CIT(A), the CIT(A) held the TPO was not justified in comparing the Initial net present value of the assessee and the comparable transactions and held in favour of the assessee. The tax department further appealed before the ITAT. The ITAT considering the rival submissions noted that the assessee was duly compensated for its services and comparison of the initial net present value changes depending upon various factors of the derivatives which is a complicated process and hence, held that the TPO was not justified in applying Profit split method in respect of the marketing activity provided by the assessee.

b. Conexant Systems (P.) Ltd v. Deputy Commissioner of Income-tax,
Circle-1(2), Hyderabad AY 2011-12 Hyderabad Tribunal

Facts of the case:

The company was engaged in software development services, the net margin of the assessee was 12% and the TPO during the transfer pricing assessment challenged the comparable companies and made transfer pricing adjustments. The assessee has appealed before the DRP and the DRP excluded certain comparable companies and finally ended in 3 comparable companies and this also resulted in adjustments. The assessee has appealed before the ITAT.

Held

The ITAT considering the rival arguments has held in respect of the comparable companies as follows:

- a. Persistent Systems Ltd was engaged in sale of licenses and product development. Hence, the same need to be excluded;
- b. Evoke which was rejected by the TPO on the premise that there is increase in sales and expenses are not peculiar economic circumstances. Hence ought to be included.

c. Commissioner of Income-tax, Pune v. Cummins Turbo Technologies Ltd AY 2007-08 Bombay High Court

Facts of the case:

In the above case, the tax department has appealed before the High court against the following aspects which was held in favour of the assessee:

- a. To exclude companies having high profit margin though the same is functionally comparable;
- b. To exclude companies which are categorized as ITES and broadly comparable;
- c. To exclude company having issuing relating to fraud by the directors of the company.

Held

The High Court considering the rival arguments of the appellant and the tax department has held that the above question does not raise substantial question of law and the same is dismissed.

d. Deputy Commissioner of Income tax, Circle-1(1)(2), Mumbai v. Exedy India Ltd AY 2011-12 Mumbai Tribunal

Facts of the case:

The company was engaged in manufacture of auto components, the TPO during the assessment proceedings compared the net margins of the company and comparable companies and made transfer pricing adjustments of 1.92 cr. The value of the international transactions being 40.2 cr the assessee argued that the same is within +/-5% of the price. The TPO did not agree for the same and on further appeal before the CIT(A), the CIT(A) upheld the view of the TPO.

Held

The ITAT held that the benefit of +/-5% is to be calculated considering the arm's length price and not arm's length margin and as the adjustment made by the TPO was within 5% range of transfer price and hence the assessee was within the range and hence no adjustments are required.

e. Freescale Semiconductor India (P.) Ltd v. Deputy Commissioner of Income-tax, Circle - 9(2), New Delhi – AY 2010-11 Delhi ITAT

Facts of the case

The company was engaged in the software development, technical and support systems. In the present case the TPO rejected the comparable companies considered by the assessee and proposed a fresh set of comparable companies. The assessee further appealed and the same was confirmed and hence the assessee has appealed before ITAT.

Held

The ITAT considering the rival submission on the issues of comparable companies has held as follows:

- a. Company to be rejected which are functionally dissimilar – Infinite Data systems, E info chips, Darshaw Ltd
- b. Company having huge brand value to be rejected – Infosys
- c. Company having significant related party transaction to be rejected – Sonata Software Ltd.

f. Nokia India (P.) Ltd v. Deputy Commissioner of Income-tax, Circle 13(1), New Delhi – AY 2003-04 Delhi Tribunal

Facts of the case:

In the present case, the assessee was engaged in providing contract research services to its AEs. During the transfer pricing assessment, the TPO had considered different set of comparable companies and had not provided the working capital adjustments and risk adjustments as the company was compensated at cost plus mark up. On further appeal no significant relief was provided, hence appeal has been filed before the ITAT.

Held

The ITAT considering the rival arguments held that working capital adjustments need to be provided and further considering the nature of activities and being compensated at cost plus mark-up an appropriate risk adjustment may also be provided as comparable companies are exposed to significant risk factors.

g. Philips India Ltd v. Assistant Commissioner of Income Tax, Circle-12 (2), Kolkata – AY 2012-13 Kolkata Tribunal

Facts of the case:

In the present case the company has paid certain management charges to its group entities and also had incurred advertisement and marketing expenses. The TPO during the assessment proceedings has taken view that the value of management charges to be nil on the premise that the expenses does not pass the benefit test. Further, in respect of advertisement and marketing expenses the TPO considered that the same as Advertisement, marketing and Promotion (AMP) expenses incurred by the Indian company on behalf of the overseas entity and hence need to determine the arm's length nature of same.

Aggrieved by the above, the assessee appealed before the DRP and the DRP upheld the view of TPO, the assessee has further appealed before the ITAT.

Held

The ITAT considering the rival submission has held as follows:

- a. The management charges cannot be considered as 'nil' in the assessee's situation only on the condition that the same does not pass the benefit test as the assessee was able establish the nature of services including quantum of services received by the related party, that services were provided in order to meet specific need of the assessee for such services and the increase in profitability should not be considered as criteria for allowing such expenses.
- b. In respect of the transaction which were considered AMP expenses and treated as international transaction, the ITAT held the issue is already addressed in various tribunal judgements and the said transaction cannot be considered as international transactions with AEs.

h. Renault India (P.) Ltd v. Deputy Commissioner of Income-tax, Corporate Circle-5(1) Pune AY 2012-13 Chennai Tribunal

Facts of the case:

The company was engaged in providing engineering design services, sourcing support, logistics and feasibility services to Renault, SAS France and also selling passenger cars produced by Indian company one 'RNAIPL'. The TPO during the assessment proceeding considered the transactions with other Indian company as deemed international transaction and the terms and conditions are determined by the overseas AEs. The TPO also considered the advertisement and marketing expenditure as international transactions consisting of AMP expenses incurred for the AEs. The assessee aggrieved by the said order appealed before the DRP, the DRP did not provide any relief and hence the appeal is made before the ITAT.

Held

The authorised representative of the assessee submitted that the transactions were not determined by the overseas AE and the transactions are between two Indian entities and to be considered to be an international transaction the transaction should be a situation where one of the entity to be a non-resident. Hence, it was held that the transaction is not a deemed international transaction. Further, the ITAT also held that the marketing expenses incurred by the assessee cannot be considered as AMP expenses and does not constitute international transaction.

i. *Tevapharm India (P.) Ltd v. Assistant Commissioner of Income Tax, Special Range-9, New Delhi AY 2012-13 Delhi Tribunal*

Facts of the case

In the present case the ITAT has remanded the case back to the file of the Assessing Officer for fresh assessment, the Assessing Officer (AO) instead of passing the draft assessment order passed the final assessment order. The assessee filed an appeal before the ITAT and submitted to quash the said order as the order was not maintainable. The departmental representative argued that the remedy for the assessee still lies before the CIT(A) for the said order.

Held

The ITAT considering the rival submission held that the order passed by the AO is not appealable before the ITAT as the said order needs to be in pursuance with the DRP directions. Further, the ITAT did not agree to the contention of the appellant that the said order should be quashed as there is still remedy to the assessee and directed that the appeal can be made to the CIT(A) and further constitutional remedy is available before the High Court.