IFA News Letter
India Branch - Western Chapter

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Chairman Speaks

We live in a constantly evolving world around us – especially so the world of finance. International Tax has indeed been at the centre of a lot of debate recently, across the world, particularly whether companies are paying their fair share of taxes. The debate has been particularly accentuated by the global economic environment with stubbornly high unemployment rates & government's cutting welfare expenses amidst adoption of austerity measures to cut fiscal deficits.

India too has had its fair share of this debate. In the midst of this the offer for conciliation in the Vodafone case has thrown open an all new avenue for dispute resolution. One of the grievances of foreign investors is the uncertainty and pain resulting from the long and arduous litigation that one typically sees under India's tax laws. An alternative mechanism for quick and amicable resolution of tax disputes may go a long way in reducing litigation and helping build an environment of greater certainty, stability, trust and friendliness in India's tax regime, which may indeed be welcome. On a separate note, it must be mentioned that the manner in which the APA program has unfolded thus far is indeed refreshing and has generated a lot of pleasant expectations of fairness and reasonableness. We were indeed fortunate to have Honorable Justice Vazifdar to inaugurate the two day International Tax Conference on 28-29 June at the Taj Vivanta (President) and Honorable Justice Chandrachud chair the session on Indirect Transfer. I was indeed humbled by the outstanding quality of deliberations at the conference and we at IFA are deeply obliged to all the speakers including Honorable Member ITAT Mr. Pramod Kumar, Mr Kamlesh Varshney, and of course our consistent supporters Mr. Soli Dastur and Porus Kaka who found time to share their thoughts in the midst of their immensely busy schedules.

Editor Speaks

We are a step closer to the 67th Congress of the International Fiscal Association scheduled to be held in Copenhagen, Denmark between 25th and 29th August 2013. Good technical sessions, meeting IFA friends and excitement!

Back home much is happening in the field of International Taxation. The Agreement for exchange of information between India and Gibraltar enters into force. The Central Board of Direct Taxes (CBDT) the Apex Tax Administration body has notified Rules for transactions relating to investment/s with Notified persons in specified jurisdictions abroad.

The Indian Courts are leading the Courts world over, typically the decision of the Court in Israel on taxability of income with reference to drilling services rendered in the Exclusive Economic Zone of Israel and the requirement of withholding tax by an entity foreign to Israel. The Court in Singapore resting their decision on fairness of the revenue dealings with the Tax payer. Something to be proud of today as always in the past.

Hurray to the bilateral IFA meetings between two countries! Thank you for promoting this very concept. The Indo Swiss meeting was a great success. The meetings at Singapore and Mauritius were also highly successful. Yes, between the two annual events of IFA Annual Conferences these meetings work as buffers. We have the next bilateral meeting with the IFA –Dubai. I sincerely urge that our members attend it in large number.

I conclude this editorial with a special request to all of you to attend the 67th Congress at Copenhagen, Denmark.

Inside this Issue

Courts Speak

I. Indian Rulings

Isha Sekhri
Chartered Accountant

1. IHI Corporation v. ADIT[1]

Income from offshore services though taxable under ITA, was not so under DTAA

The Taxpayer, a Japanese Company, did not offer income received from offshore services by claiming that it did not accrue or arise in India. The Tax Authorities considered it as fees for technical services ('FTS') under the India-Japan Tax Treaty. The Tribunal held that the income from offshore services, while chargeable to tax under the Income Tax Act ('Act'), was not so under the Tax Treaty, based on the decision of a higher court in the Taxpayer's own case for an earlier tax year.

2. ITO vsRight Florists Pvt. Ltd.[2]

Income of search engines from online advertising services was not taxable under ITA and the DTAA since the website did not constitute a PE in India

The Kolkata Tribunal, while ruling on taxability of amounts paid to search engines such as Google and Yahoo for online advertising services by the Taxpayer, held that a website, per se, will not constitute a PE in India under the basic "Fixed Place PE" rule for the search engine companies. Reliance was placed on the OECD Model Commentary to conclude that a search engine operating in India through its website, cannot have a PE in India under the DTAA unless its web servers are also located in India. Further, the payment for online advertising services is not in the nature of royalty or FTS.

3. DCIT v. ShriBikramSen[3]

Hypothetical tax allowed as a deduction from taxable income of foreign employee

The Tribunal, relying on the decision of the jurisdictional HC in Jaydev H. Raja [(2012) 211 Taxman 188 (Bom)] directed the Tax Authority to restrict the perquisite only to the extent of additional tax liability (i.e. Tax paid by employer after reducing the hypo-tax paid by the employee).In ACIT v. Robert Arthur Keltz (Taxpayer) (ITA No, 3452/Del/2011)], the Delhi Tribunal, placing reliance on the HC's decision in Dr. Percy Batlivala(2010-TIOL-175-HC-DEL-IT), wherein the HC had held that the hypo-tax retained by the employer was not liable to be added to income of employee, ruled in favour of the Taxpayer.

4. Convergys Customer Management Group Inc[4]

Indian Subsidiary constituted PE of the Foreign Taxpayer since employees of the Taxpayer had a fixed place at their disposal in India and I Co was the projection of Taxpayers business in India

The Delhi Tribunal ruled that the Taxpayer, a foreign company ('F Co'),had a fixed place PE in India under the India-US DTAA based on the fact that F Co's employees, who frequently visited the premises of its Indian subsidiary ('ICo') have a "fixed place" at their disposal and ICo was the projection of F Co's business in India. Also, some of its seconded employees worked in key positions of the ICo. The Tribunal held that, as such employees F Co had a fixed place PE in India. The Tribunal held that 15% of residual profits arrived at after reducing profits of ICo was reasonable attribution and F Co was obliged to pay advance tax on such additionally attributed income.

5. Romer Labs Singapore Pte. Ltd. V ADIT[5]

Payment to Singapore Companyfor obtaining reports on testing of toxicity level in animal feeds is not FTS as per India-Singapore Tax Treaty

As the test reports provided by FCo did not "make available" technical knowledge etc. to ICo as per India-Singapore Tax Treaty, the payments for such reports were not held to be FTS.

6. ACIT v. Robert Arthur Keltz[6]

ESOP perquisite to be proportionately restricted to the Indian job duration

The Taxpayer, on deputation to Indian liaison office of an US Co, was a Resident and Not Ordinarily Resident, and was granted ESOPs with a vesting period of three years subject to his employment with US Co. He was in India exercising his employment for only a part of the vesting period and hence, offered to tax proportionate ESOP as perquisites earned in India. The Tax Authorities sought to tax the "entire amount" as a perquisite. The Tribunal applied the ratio laid down in the case of DCIT vs. Eric Moroux and Ghorayeb Emile (ITA no. 1174 and 1175/De!/2005) and held that only such proportion of the

[1] ITA No.7227/Mum/2012
[2] TS-137-ITAT-2013(Kol)
[3] ITA NO.810/Mum/2012
[4] TS-187-ITAT-2013
[5] (2013) 30 taxmann.com 362 (Delhi-Trib)
[6] ITA No. 3452/Del/2011

perquisite as is relatable to the service rendered by the Taxpayer in India is taxable in India.

7. KPMG vs JCIT[7]

Payment to a US resident for professional services to a UK Company for conducting workshop on fee negotiation is not FTS as per India-US Tax Treaty

The professional services for conducting workshop on fee negotiation did not "made available" any technical knowledge, skill, experience etc as per India-US Tax Treaty and hence not taxable as FTS as per the India-US Tax Treaty.

8. PT Mckinsey Indonesia v. DDIT[8]

Payment to Indonesian Company for information supplied in the nature of data is Business Income as per India-Indonesia Tax Treaty

I Co made payment to FCo, an Indonesian Company for information supplied in the nature of data. The Tribunal observed that the fact that the information supplied was arising out of exploitation of know-how generated by skills or innovation of person who possesses such talent was not established.The information received was in the nature of data and consideration for the same cannot constitute royalty. The payment should be treated as business profits as per Article 7. It should be noted that India-Indonesia DTAA does not have FTS clause.

9. CLSA Ltd. vs ITO[9]

Referral fees paid to a Hong Kong Company for referring international clients is not FTS under the Act

The Tribunal, placing reliance on the ruling of the AAR in the case of Cushman and Wakefield (S) Pte. Ltd. [(2008) 305 ITR 208 (AAR)], held that the referral fees paid to a Hong Kong Company was not FTS under the Act.

10. Credit Lyonnais v. ADIT[10]

Sub-arrangers fees paid to NR Banks is not FTS under the Act

In this case, payment was made for sub-Arranger fees and commission to NR Banks (FCos) for mobilizing India Millennium Deposits (IMD). The primary duty of sub-arrangers, as collecting banks, was to persuade the NRIs to invest in such IMDs both in and outside India. The Tribunal observed that from the nature and scope of services rendered by the sub-arrangers, it is clear that no technical knowledge, expertise or qualification was required and convincing potential customers and helping them to fill requisite forms and sending the amount to the designated branches, cannot be considered as a "technical service". The sub-arrangers were not involved in the "management" of IMD issue and the Payer was simply acting as commission agent or broker for which it was entitled to a particular rate of commission. Based on this, the Tribunal held that payment cannot be considered as fees for "managerial services" and hence the sub-arranger fees to mobilize NRI deposits not FTS under the Act.

11. C. U. Inspections (I) Pvt. Ltd.[11]

Payment of common expenses to Holding Company is reimbursement of expenses but payment of training expenses to Holding Company is remission of amount and should be treated as if payment is made to the independent service provider

The Taxpayer made payments to its Holding Company ('H Co') towards certain common expenses and training expenses incurred on behalf of the Taxpayer. The Mumbai Tribunal held that the payments toward common expenses amounted to reimbursement of expenses, which was not taxable in the hands of HCo. In connection with training expenses, it held that the payments were not reimbursement of expenses but remission of amount by the by the Taxpayer to the H Co for finally making the payment to third party service provider and, hence, was a payment to third party. Accordingly, provisions of withholding of taxes under the Act will apply as if the Taxpayer has made the payment to an independent third party service provider.

12. Sunil V. Motiani vs. ITO[12]

DTAA rates are not to be increased by surcharge and cess

The Mumbai Tribunal ruled that the interest rate under the DTAA will not be further enhanced by surcharge and education cess (S & EC), as the term "Income Tax" has been defined in Article 2 of the DTAA to include S & EC, is in the nature of surcharge. Therefore, education cess and surcharge can be regarded as included in the prescribed DTAA. Further, in ITO vs M Far Hotels Ltd. (TS-133-ITAT-2013), the Cochin Tribunal ruled that where the DTAA does not talk about the S & EC, the Payer was not required to enhance the DTAA rate with S & EC while withholding taxes on payments to a non resident.

[7] TS-91-ITAT-2013 (Mum)
[8] 2013 29 taxmann.com 100 (Mum)
[9] 2013 31 taxmannn. Com 5 (Mumbai- Tribunal)
[10] TS-205-ITAT- 2013(Mum)
[11] TS-132-ITAT-2013(Mum)
[12] TS-117-ITAT-2013(Mum)

II. Overseas Rulings

Isha Sekhri
Chartered Accountant

1. Dutch Supreme Court[13]

Dutch SC provides guidance on shareholder loan doctrine

In a ruling on 3 May 2013, according to the Dutch Supreme Court, loan is considered not to have been provided under arm's length consideration, i.e., shareholder motives, if a Dutch corporate taxpayer provides a loan to a related party and accepts a credit risk which a third party, not being a shareholder of the aforementioned entity, would not have accepted, not even for an increased interest compensation. As a consequence, any losses incurred by the Dutch corporate taxpayer in relation to this loan, are considered non- deductible for Dutch corporate income tax purposes.

2. AQQ v. CIT[14](Singapore High Court)

Singapore's HC rules in favor of the taxpayer in anti- avoidance case since the Tax authorities did not exercise powers fairly and reasonably

The Singapore HC rendered its decision on an appeal by AQQ, a Singapore company, regarding the application of the general anti- avoidance provisions. While the HC concluded that the financing arrangement fell within the anti- avoidance provision under the Singapore Income Tax Act, AQQ won the appeal on the grounds that the comptroller did not exercise its powers under the Act fairly and reasonably. The Court held that the Tax Authorities had exceeded their statutory power, by disregarding the dividend income as the taxpayer was entitled to it and the Comptroller's power under Section 33(1) was to disregard or vary only the impugned arrangement. Further, the Court held that the Comptroller should have allowed the one-third interest expense and should have required the taxpayer to account for the withholding tax on that interest expense, since one-third of the interest expense was attributable to an interest-bearing loan that was in substance made by a Malaysian subsidiary.

3. PPL Corporation and Subsidiaries v. Commissioner[15]

US SC rules UK windfall profits tax is creditable

The US Supreme Court in held that the UK "windfall tax" that was computed on the basis of a formula whose primary variable referenced profits previously earned over a multi-year period is a creditable income tax purposes of Section 901 (a creditable tax). The Court held that, using a "commonsense approach," that considers the substantive effect of the windfall tax, the predominant character of the windfall tax is that of an income tax in the US sense. (Source)

4. Israel Tax Authorities[16]

Israel's Tax Authority issues tax ruling on operations held by overseas companies outside Israeli territorial waters

The Israeli Tax Authority (TA) has ruled that drilling services provided by an overseas supplier (Taxpayer) in the Israeli Exclusive Economic Zone (EEZ), outside the territorial waters, is subject to tax in Israel. The TA also ruled that the maintenance of industrial equipment, the drilling rig, for a period of more than six months constitutes a PE in Israel for its treaty country (US) resident owners. In addition, the ruling provides that the mere fact that a third party Human Resources (HR) company seconded employees to the drilling project constitutes an Israeli PE of the foreign HR company (even in the absence of any other business presence in Israel). Further, the TA ruled that non-Israeli resident companies are obliged to withhold Israeli tax at source from service fees and salaries paid to other non- Israeli resident outside the Israeli territorial water.

[13] http://www.internationaltaxreview.com/Article/3206605/Exception-to-shareholder-loan-doctrine-established-by-Dutch-Supreme-Court.html
[14] 2012 SGHC 249
[15] PPL Corp. v. Commissioner, US No. 12-43, 5/20/13
[16] Tax Ruling 8679/13

International Tax Updates- India and Global

Pratikshit Misra, Anand Patel
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I. India

1. Agreement for exchange of information with respect to taxes between India and Gibraltar enters into force

The Government of India ('GoI') and the Government of Gibraltar signed a Tax Information Exchange Agreement ('TIEA') on 1 February 2013 that enters into force on 11 March 2013. The TIEA incorporates provisions to facilitate exchange of information and tax examinations abroad.

Source: Notification No. 28/2013 [F.NO.503/11/2009-FTD-I], dated 1 April 2013

2. Permissible variations between arm's length price and transaction price for Indian Transfer Pricing purposes

The Central Government has notified that variations not exceeding (i) 1% in the case of wholesale traders; and (ii) 3% in all other cases between the arm's length price and transaction price for international as well as specified domestic transactions shall be deemed to be the arm's length price for assessment year 2013-14.

Source: Notification No. 30/2013 [F.NO.500/185/2011-FTD-I], dated 15April 2013

3. Revised Form 3CEB notified with corresponding amendments to Income Tax Rules to include specified domestic transactions

The Central Board of Direct Taxes ('CBDT') has notified revised Form 3CEB to incorporate *inter alia* (i) the specified domestic transactions, which are now within the ambit of Indian Transfer Pricing regulations; (ii) report transactions involving issue of non convertible preference shares, debentures, etc; (iii) report transactions in the nature of guarantee; (iv) report transactions involving marketable securities; (v) report transactions involving business restructuring, etc. The revised Form 3CEB thus provides for greater disclosures from taxpayers.

Source: Notification No. 41/2013 [F.NO.142/42/2012-TPL], dated 10June 2013

4. Rules notified for transactions with persons located in notified jurisdictional area

The CBDT has notified the rules and Forms for (i) a taxpayer to permit the CBDT to seek information from financial institutions located in notified jurisdictional area with whom the taxpayer has entered into any transaction; and (ii) information in respect of expenditure or allowances arising from transactions with persons located in notified jurisdictional area. This could be critical for Indian taxpayers since failure to comply with the said rules could result in disallowance of expenditure incurred by the taxpayer from transactions with the above mentioned persons.

Source: Notification No. 47/2013 [F.NO.142/12/2013-TPL], dated 26June 2013

5. Guidelines notified for identifying whether Development Centers can be construed as engaged in Contract R&D services

Having regard to divergence of views, the CBDT has notified certain guidelines for identifying whether a Development Center con be construed as merely engaged in contract R&D services. Some of the key guidelines relate to (i) whether the foreign principal performs most of the economically significant functions; (ii) whether the foreign principal provides funds / capital and other economically significant assets; (iii) level of supervisions and control that the foreign principal exercises; (iv) level of economically significant risks undertaken by the foreign principal; (v) ownership rights of the Indian Development Center; and (vi) location of the foreign principal in a low or no tax jurisdiction.

Source: Circular no 6 of 2013 [F.NO.500/139/2012], dated 29 June 2013

II. Global

1. USA: Federal Budget 2014

Some of the key proposals are as under:

- Deferral of interest deduction allocable to unremitted foreign earnings
- Foreign tax credits available to the extent of average effective tax rate
- Subpart F income for excess returns on transactions associated with transferred intangibles to low-taxed CFCs
- Limiting income-shifting through outbound transfers of intangibles

2. Australia: Federal Budget 2013-14

Some of the key proposals are as under:

- Tighter thin capitalisation rules regime - debt/equity ratio to reduce from 3:1 to 1.5:1
- 10% non-final WHT on disposals of certain "taxable Australian property"by non-residents
- Changes to tax consolidation regime

3. Brazil: No IOF tax on certain cross-border investments

The Brazilian Government recently published legislation reducing IOF tax rate - a tax on financial operations - from 6% and 1% to zero for tax on funds investing in fixed-income assets and foreign exchange derivates respectively.

4. OECD: Approval of Revised Section E on Safe Harbours in TP guidelines

Summary of key points is as under:

- The benefits of safe harbour provisions may outweigh the risks of safe harbour provisions
- OECD encourages use of safe harbours on bilateral or multilateral basis as they provide significant benefits without raising risk of double taxation or non-taxation

5. OECD: Draft handbook on TP Risk Assessment

Steering Committee has recently released "Draft handbook on TP Risk Assessment" which assembles recent country procedures, methods and practices in order to provide a resource to tax administrations designing their own risk assessment approaches. Comments concerning draft handbook may be submitted by September 13, 2013.

6. France: Draft guidelines on migration of corporate headquarters or establishments

French Tax Authorities recently released draft guidelines on regime governing migration of corporate headquarters or establishment to another EU member state. The regime provides for option to pay capital gains tax arising on such migration on five annual installments.

The draft guidelines specifies the scope of the regime, tax filing and payment requirements and other tax consequences of migration.

7. Netherlands: Accelerated depreciation to stimulate investments

To stimulate investments by Dutch taxpayers, Government announced that investment in business assets (during July to December 2013) will permit immediate deduction of 50% of investments as depreciation.

8. Singapore: Significant measures to strengthen its international tax cooperation

Government announced key steps to further strengthen Exchange of Information ('EOI') framework, such as extending EOI assistance to all Singapore's existing treaty partners, Convention on Mutual Administrative Assistance in tax matters and permitting Tax Authorities to obtain bank & trust information from fiscal institutions without court order.

9. South Africa: Proposed legislation limiting interest deductions from cross border connected party debt

Summary of key points is as under:

- Reclassification of hybrid debt instruments as equity
- Interest deduction to be restricted up to 40% of taxable income; also applicable for acquisition debt rules
- South Africa Prime lending rate to be considered as arm's length rate

Experts Speak

Marketing Intangibles – India Perspective

Rachesh Kotak, Ajit Jain, Tax Professionals

Introduction

In last couple of years, Transfer Pricing ('TP') has caught significant importance in Indian media since the Indian taxpayers have suffered huge TP adjustments on account of various complex issues such as marketing intangibles, issue of shares, royalty, management fee etc.

Marketing intangible is one of most litigative issues in the current scenario. Internationally, there is good guidance available in the form of OECD[17] TP Guidelines and papers published by the Australian Tax Office. The Indian TP regulations do not provide any specific guidance on the arm's length treatment of marketing intangibles, but there is some guidance in the form of rulings of the Tax Tribunals.

The Indian experience

The issue of marketing intangible started with the ''Bright Line'' concept which was derived from the DHL case [18] in the USA. In India, the issue of marketing intangibles has been raised widely and applied mechanically by the tax authorities.In a typical Indian scenario, a foreign associated enterprise ('AE') is the legal and commercial owner of the intellectual property ('IP'), who grants license to the Indian entity for the use of technology / knowhow / brand in relation to manufacturing or distribution operations. Further, the Indian entity would incur Advertisement Marketing & Promotion ('AMP') expenses in India to achieve desired level of sales. The dispute arises when the tax authorities compare the AMP expenses incurred by the taxpayer with that of the comparable companies which is the application of "Bright Line" and the differential i.e. the excess is treated as 'non-routine' spend. The contention of the tax authorities is that the Indian entity by incurring the non-routine spent has passed on a benefit to the AE and needs to be compensated by the AE for the same. The non-routine AMP expenditure is presumed to create marketing intangibles for licensor.

Indian Jurisprudence

The issue of marketing intangibles has been looked upon by the Indian Courts in various rulings. Two landmark rulings are discussed in this Article:

[17] Organisation for Economic Co-operation and Development

[18] DHL Corporation and Subsidiaries v. Commissioner, (T.C. Memo. 1998-461, (30 December 1998))

Maruti Suzuki[19]

This case gained importance due to use/placement of the logo on commercial vehicles manufactured by Maruti. In the initial years, Maruti used the "M" logo on the front of the cars which it manufactured and sold, in later years, for various business and commercial reasons, Maruti started using the "S" logo (the logo of Suzuki Motor Corporation), although it continued to use the joint trademark "Maruti-Suzuki" on the rear side of the vehicles.

The Hon'ble High Court ('HC') held that where the domestic affiliate mandatorily uses the foreign brand name (owned by the foreign affiliate) and incurs excess AMP expenditure (as per bright line test) it results into a benefit for the foreign trademark owner in form of brand building and accordingly arm's length compensation is required from foreign affiliate.

After making the above observations, the matter was remitted back to the tax authorities for determining the arm's length price based on the above principles. Post the above decision of Hon'ble Delhi HC, the taxpayer filed appeal with Hon'ble Supreme Court. The Hon'ble Supreme Court held that the High Court has not merely set aside the original show cause notice but it has made certain observations on the merits of the case and has given direction to the TPO which in the view of the Hon'ble Supreme Court was not required. Accordingly, the Hon'ble Supreme Court held that the tax authorities should determine arm's length price without considering the observation of High Court.

LG Electronics[20]

LG India a wholly owned subsidiary of LG Electronics Inc. Korea. LG India engaged in manufacturing, distribution and sale of electronic products and electrical appliances. During the TP assessment proceedings, the tax authorities applied bright line test and alleged that LG India incurred excessive AMP expenditure and thereby contributed in the brand promotion of LG Korea. In this ruling, the Hon'ble Special Bench ('SB') held that:

[19] Maruti Suzuki India Ltd. v. ACIT/TPO, ([2010] 328 ITR 210 (Del))

[20] LG Electronics India Pvt. Ltd. v. ACIT [2013] 29 taxmann.com 300 (Delhi)(SB)

- As a result of excessive AMP expenditure, benefits in the form of marketing intangibles accrue to the overseas AE which is the legal owner of the brand
- Bright-line test is a valid tool to measure excessive AMP expenditure
- Sales and distribution expenses are not linked to the brand promotions and accordingly cannot be brought in the ambit of AMP expenditure
- Excess AMP spending is akin to rendering of services towards brand promotion of the AE
- The SB listed certain guidelines (i.e. 14 questions) which needs to be considered before determining value of AMP expenses incurred by Indian entity on behalf of its foreign AE

Hon'ble SB concluded by stating that TP adjustment in relation to excessive AMP expenses incurred by the taxpayer is permissible. Further, earning a mark-up from the AE in respect of AMP expenditure on behalf of AE is also allowable. The Hon'ble SB restored the matter to the transfer pricing officer for determining the cost/value of international transactions and arm's length price of the same in light of certain guidelines outlined in the ruling.

Post the LG India ruling, there have been series of other rulings (Rayban Sun Optics[21], GlaxoSmithkline[22], and Canon India[23]) on the issue marketing intangibles which have followed the principle laid down by LG India with regard to sales and distribution expenses.

Fundamental TP principles - International Jurisprudence

The ruling of the Hon'ble SB lays down some guidance on this issue. However, the following are some fundamental principles which need to be addressed before an issue of marketing intangibles is alleged:

Characterisation of taxpayer

Characterisation of taxpayer is of utmost importance to identify whether or not the taxpayer has contributed in the brand promotion of the AE through its AMP expenditure.

The issue of marketing intangibles becomes important in the context of a distributor, who buys products from the principal manufacturer and sells the same in its jurisdiction under license to exploit the trademark or brand belonging to the legal owner. A distributor should be adequately remunerated for the distribution function including advertising and marketing the product or brand since the function of distributions predominantly a service. In case of an entrepreneur, the whole issue around marketing intangible is a misnomer. Since in reality, an entrepreneur would not seek reimbursement of expenses from another entity.

Justification of the benefit passed on to AE

A conclusion based on the application of the "bright line" computation that the excess AMP expenditure creates marketing intangible in India for the AE is incomplete. Since it is also very crucial to find out whether any benefit is actually passed on to the AE (legal owner of the IP) and that the AE is enjoying the benefits of the expenditure incurred by the Indian entity.

Economic owner vs. legal owner

If the Indian entity bears the entrepreneurial risks in India and also performs significant people functions around AMP, then the corresponding returns through exploitation of that intangible in India would also reside with the Indian entity. Accordingly, under such facts the Indian entity becomes the economic owner of the brand value created in India.

In our humble view, the Hon'ble SB in the LG India ruling has brushed aside the concept of economic ownership of intangibles by stating that economic ownership of a brand is a concept which exists only in commercial sense and not legal sense.

In this context, it is important to refer the Advance Ruling in the case of Fosters[24] wherein the Fosters Australia sold Foster's brand/trademark to SABMiller. The Foster's brand had been licensed to an Indian entity of Fosters. In this case, tax authorities argued that the Indian entity is the economic owner of the Foster's brand in India and accordingly the Indian entity is eligible to get a share from the consideration earned on the transfer of the IP by Foster Australia to SABMiller.

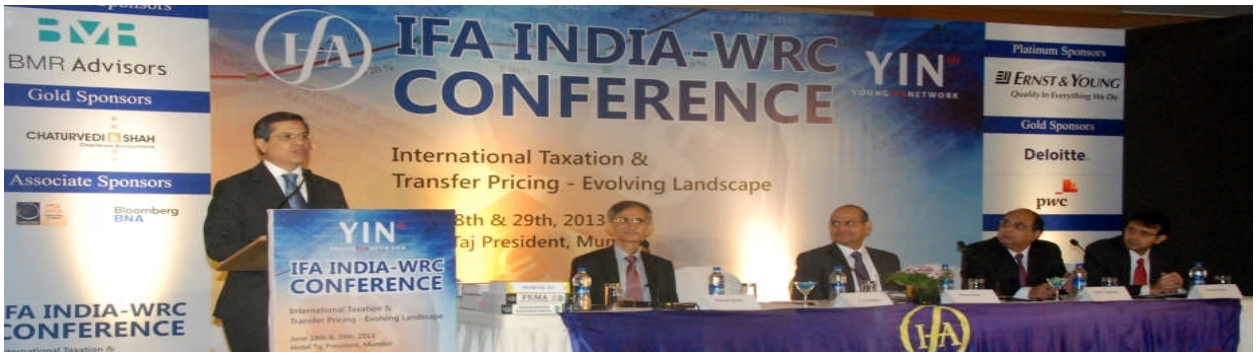
Way forward

Given the emerging focus of the tax authorities on AMP expenditure, it is crucial for tax payers to stick with fundamentals of TP as discussed above and appropriately documenting and presenting the same before the tax authorities. Further, it would be worthwhile to consider going for an Advance Pricing Agreements ('APA') route to reaching certainty on the issue of marketing intangibles.

[21] RayBan Sun Optics India Limited v. DCIT (ITA No. 5933/Del/2012)
[22] GlaxoSmithkline Consumer Healthcare Ltd. v. ACIT (ITA No. 1148/Chd/2011)
[23] Canon India Pvt. Ltd. v. DCIT (ITA Nos. 4602/Del/2010, 5593/Del/2011 & 6086/Del/2012)
[24] Foster's Australia Ltd. vs. CIT : 170 Taxman 341

IFA WRC Conference 28-29 June 2013

With the key theme of the Conference being, **'International Tax & Transfer Pricing - The Evolving Landscape'**, a two day strategic conference was organized at Hotel Taj-President, Mumbai by the IFA WRC on June 28-29 2013. The Conference focused on key components that covered international taxation, which was well attended by various Tax Professionals, Tax Directors, CFO's, Revenue Officials / Authorities. Eminent speakers from India and abroad, senior tax professionals, senior tax directors from industry and senior Revenue officials shared their knowledge and experience on the above key topics of strategic & practical interest during the two day conference. The discussion highlighted and identified emerging issues and challenges from an Income Tax perspective - both Indian and Global. The Conference was very successful and provided a unique opportunity to participate in an in depth analysis on each of the subjects and also provided an opportunity to interact with the eminent speakers & participants.

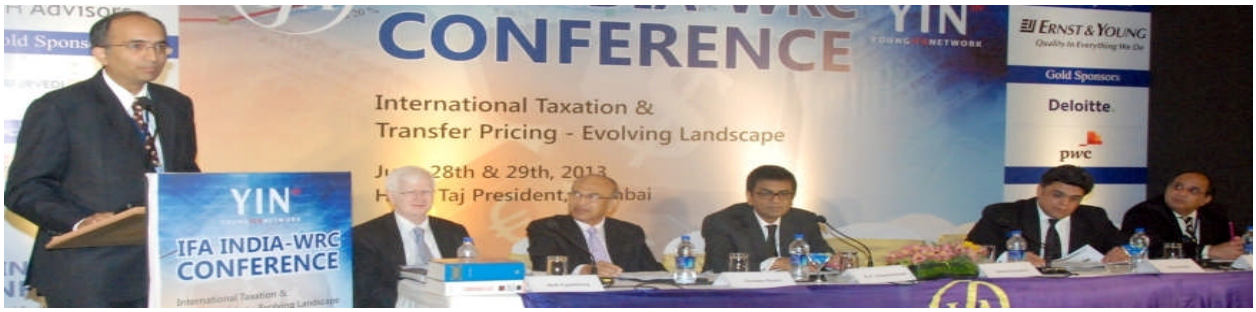


Justice S.J. Vazifdar inaugurated the Conference. In his key note address, he indicated that the eagerly awaited judgment in Vodafone case, centered on key transfer pricing issues, would likely be delivered by him soon. Mr. Porus Kaka pointed out that the Finance Minister's promise of a non-adversarial tax regime and at the same time his emphasis on revenue collection targets to officers, cannot go hand-in-hand.

Mr. Jacques Sasseville (OECD), Mr. Vijay Mathur, Mr. Ashwini Sachdev and Mr. P. V. Srinivasan provided very insightful comments on case studies pertaining to new business models arising through the internet.

Mr. Soli Dastur, Mr. Ketan Madia, Mr. G.C. Srivastava and Mr. Pinakin Desai held thought provoking discussions on the concept of beneficial ownership discussing some of the key points related to interplay between beneficial ownership and GAAR, Chinese guidelines on beneficial ownership and key global rulings.

Mr. Jacques Sasseville (OECD), Mr. Pramod Kumar (Hon'ble ITAT Member), Ms. Shefali Goradia, Mr. N C Hegde and Mr. Nishit Desai discussed the pertinent recent developments in International Taxation such as updation on the Base Erosion and Profit Shifting project, the concept of tax fairness and tax neutrality, the UN practical Manual on Transfer Pricing for Developing countries and recent important judicial pronouncements.



Justice Chandrachud was the Chairman of a very interesting moot court on indirect transfers, with Mr. Aliff Fazelbhoy, Mr. Gautam Doshi arguing for the Revenue and Mr. Rohan Shah, Mr. Gokul Chaudhri arguing for the Taxpayer respectively.

Mr. T.P. Ostwal chaired the session while Mr. Anthony Calabrese took the participants through the FATCA regulations and its relevance to the Indian scenario and Mr. Roy Rohatgi shared his knowledge on the UK GAAR.

The last session of the Conference was on Transfer Pricing, chaired by Mr. Mukesh Butani. The Panelists, Mr. Kamlesh Varshney (CIT- APA), Ms. Monique Van Herksen, Mr. Rohit Agarwal, Mr. Anis Chakravarty and Mr. Bipin Pawar discussed Advance Pricing Arrangements, recent high profile litigation and morality in the tax world.

IFA -Congress

IFA Congress 2013 Copenhagen

The Danish IFA Branch is delighted to invite you to attend the IFA Congress in Copenhagen from 25 to 30 August 2013, marking IFA's 75th Anniversary. The Main Subjects are 'The Taxation of Foreign Passive Income for Groups of Companies' and 'Exchange of information and the cross-border cooperation between tax authorities'. The Social Programme will include an evening at the Opera. For more information, please visit www.ifacopenhagen2013.com

IFA Congress 2014 Mumbai

The Indian Branch of IFA invites you to take part in the 68th Congress of the International Fiscal Association in Mumbai and request you to mark your calendar for 12 - 17 October 2014. The venue of the Congress is National Centre for the Performing Arts at Nariman Point. The Main Subjects are 'Cross-border outsourcing - issues, strategies and solutions' and 'Qualification of taxable entities and treaty protection'. For more information, please visit www.ifa2014mumbai.com

About IFA

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**