



Instruction No 3/2016, laying down a procedure for implementation of statutory provisions and not legislative provisions, cannot be given retrospective effect

Background

The Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Nikon India Pvt. Ltd.¹ (the taxpayer) held that:

- The Transfer Pricing Officer (TPO) is empowered to determine the arm's length price (ALP) of any international transaction whether not reported by the taxpayer or not referred by the Assessing Officer (AO) to him but has come to his notice during the course of proceedings before him;
- Instruction No 3/2016, dated 10 March 2016 (the Instruction) has been implemented 'with immediate effect' and being procedural in nature, cannot be given retrospective effect;
- In view of the recent decisions of the Delhi High Court in case of Yum Restaurant² and Sony Ericsson³ and certain Tribunal orders following these decisions, the question of the existence of an international transaction of advertising, marketing and promotion expenses (AMP expenses) is remitted back to the TPO for fresh adjudication.

Whether the issue on tax authorities' jurisdiction can be taken up afresh before the Tribunal

Facts of the case

- The Transfer Pricing (TP) addition made by the TPO is on account of AMP expenses incurred by the taxpayer. No TP reference was made by the AO to the TPO as regards any AMP related transaction.

- Relying upon the Instruction, the taxpayer challenged the jurisdiction of the AO/TPO in treating AMP expenses as an international transaction, determining the ALP of such transaction and making a TP addition.
- The tax department put forth two-fold submissions on this issue, as follows:
 - the taxpayer could not take up the issue of jurisdiction before the Tribunal for the first time without raising it before the lower tax authorities, and
 - the taxpayer has not taken any relevant ground in its Memorandum of appeal.

Tribunal's ruling

- The Tribunal accepted the taxpayer's assertion that the issue of jurisdiction was challenged by it before the TPO and is not being raised afresh before the Tribunal. Simultaneously, the Tribunal did reject the taxpayer's reference to one of the grounds of appeal which raised the issue of jurisdiction, stating that it only challenges the existence of the international transaction and not the jurisdiction of the TPO. However, brushing aside the Revenue's contention, the Tribunal eventually held that this being a legal issue, can be taken up before the Tribunal even for the first time.

¹ Nikon India Pvt. Ltd. v. DCIT (ITA No.6314/Del/2015) – AY 2011-12

² Yum Restaurants (India) P. Ltd. v. ITO [2016] 380 ITR 637 (Del)

³ Sony Ericsson Mobile Communications (India) Pvt. Ltd. v. CIT [2015] 374 ITR 118 (Del)

- Relying upon the decision of the Supreme Court in the case of NTPC Ltd.⁴, the Tribunal held that an additional ground involving the adjudication on the question of law can be raised before the Tribunal for the first time subject to availability of factual position governing such legal issue and that it should not involve any fresh investigation of facts.

Applicability of the Instruction on the jurisdiction of the AO/TPO

Facts of the case

- Relying on the Instruction, the taxpayer argued that:
 - As per para 3.4 of the Instruction, the AO must have first provided an opportunity of being heard to the taxpayer before recording a satisfaction in respect of the transaction of AMP expenses;
 - In accordance with Para 4.1 of the Instruction, the TPO was not empowered to undertake the exercise of determining the ALP of the international transaction of AMP expenses.
 - The said Instruction, albeit dated March 2016, is curative and hence, retrospective in nature.
- Refuting the above contention of the taxpayer, the Revenue argued that the provisions of Section 92CA(2A) and (2B) of the Income-tax Act, 1961 (the Act) are clear and unambiguous in providing that the jurisdiction of the TPO is not limited to the international transactions either reported by the taxpayer or referred to him by the AO. The TPO was well in power to determine the ALP of the subject transaction.
- The tax department also submitted that no instruction as issued by Central Board of Direct Taxes (CBDT) laying down a particular procedure to be followed by the authorities can ever be retrospective in nature.

Tribunal ruling

- The Tribunal held that the para 3.4 could have no application in the instant case as it is not the AO who formulated his view on AMP expenses as an international transaction and then made any reference to the TPO for determining the ALP of the unreported transaction.

- The Tribunal held that under para 4 of the Instruction, though the original jurisdiction of the TPO is confined to the international transactions referred to him by the AO for determination of the ALP but such jurisdiction is extendable to other international transactions which come to his notice during the course of proceedings before him. The Tribunal also noted that the Instruction in this regard is in line with the statutory provisions of Section 92CA(2A) and 92CA (2B) of the Act.
- Relying upon the decision of the Delhi High Court in Sony Ericsson, the Tribunal held that as the instant international transaction of AMP expenses was taken note of by the TPO, there is no lack of jurisdiction in the TPO's proceeding with the determination of ALP.
- Further, refusing the taxpayer's contention on the retrospective effect of the Instruction, the Tribunal held that it is a simple case of an Instruction laying down guidelines to be followed by the AOs and TPOs in implementing the TP provisions. The Tribunal did make a note that Instructions to the officers given by CBDT setting up a procedure to be followed by them and which has been implemented 'with immediate effect' cannot be characterised as legislative provisions which can be given retrospective effect. In this regard, the Tribunal placed reliance on the ruling of the High Court in case of Ericsson A.B.⁵ and held that the Instruction has to be treated as prospective.

Sustainability of the TP adjustment on account of AMP expenses

Facts of the case

- The taxpayer relied upon the decision of the Delhi High Court in the case of Whirlpool India⁶ and Maruti Suzuki⁷ and contended that in light of these decisions and the material placed on record, there was no international transaction of AMP expenses and the entire exercise of determining the ALP and making TP adjustment should be set aside.

⁵ DIT v. Ericsson A.B. [2012] 246 CTR 0422 (Del)

⁶ CIT v. Whirlpool of India Ltd. [2015] 94 CCH 156 DEL-HC

⁷ Maruti Suzuki India Ltd. & Another v. CIT [2015] 129 DTR 25 (Del)

⁴ NTPC Ltd. v. CIT [1998] 229 ITR 383 (SC)

- The tax department submitted that there is no blanket rule of treating AMP expenses as a non-international transaction. The High Court in the case of Whirlpool India has made certain observations, which ought to be properly analysed in each case. Further, the Tribunal in the taxpayer's own case for the immediately preceding assessment year restored the issue to the file of the TPO for fresh adjudication. The Revenue relied upon a host of orders passed by the Hon'ble High Court and the Tribunal.

Tribunal ruling

- The Tribunal noted that the TPO did not have any occasion to consider the documents submitted by the taxpayer while holding the AMP expenses as an international transaction in the TP order. Following the Tribunal's orders of co-ordinate benches, the Tribunal set aside the order and remitted back the matter to the file of AO/TPO for a fresh determination of the question as to whether there exists an international transaction of AMP expenses.
- The Tribunal directed that in case it is found that an international transaction exists, the TPO should determine the ALP in light of the relevant decisions by the Hon'ble High Court, after allowing a reasonable opportunity of being heard to the taxpayer. The Tribunal also held that the selling expenses directly incurred in connection with sales not leading to brand promotion, should not be brought within the ambit of AMP expenses.

Our comments

The above ruling primarily brings clarity on certain aspects of the Instruction including its prospective nature. It also clarifies the position on the jurisdiction of the TPO while determining the ALP of an unreported international transaction or the one not referred to him by the AO.

Although, the Tribunal has not discussed the AMP issue in detail, its remanding the matter back to the AO/ TPO for fresh determination based on the Hon'ble High Court's judgements as well as co-ordinate benches' rulings, only indicates that the issue still is far from seeing the light of the day, until perhaps any final verdict is delivered by the Supreme Court.



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