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Oecd transfer pricing guidelines marketing intangibles

Marketing marketing activities carried out by one undertaking that does not own a trade mark or trademark. Indian undertakings which have the right to use a trade mark owned by affiliated undertakings incur advertising, marketing and promotion expenses (AMP Expenses) in order to gain an advantage in the form of increased sales, higher profits, etc. This, in turn, benefits the legal owner of the brand, i.e. the legal owner of the brand. Intangible market rights are created by the efforts of Indian affiliated undertakings and these intangible wealthy are identified on the basis of these efforts towards[1]: increasing the value of a foreign trade mark or brand known to the Indian market, incurs very high costs amp; Creating brand and product loyalty in the minds of customers; Creating an efficient supply chain; Establishment of distribution networks in the country; Development of after-sales services and support network in the country; Conducting customer and market research; and collecting customer data and creating customer lists, etc. In different countries, marketing of intangible assets has become a highly discussed topic within the transfer pricing community. Taxpayers have experienced an aggressive approach by the Transfer Pricing Officer (TPO) where it is claimed that if an undertaking associated with the legal proprietor of a trade mark performs marketing or sales functions that benefit the legal owner of the trade mark, then that trader should be adequately compensated by the legal owner of such a trade mark. The issue of the placing on the market of intangible assets was addressed by the Organisation for Economic Cooperation and Development (OECD) in its 2010 Transfer Pricing Guidelines (OECD Competition Guidelines). In paragraph 6.36 of Chapter VI— Specific considerations of the intangible assets of the OECD TP Guidelines, aspects of market intangible assets have been raised as follows: Difficult transfer price problems may arise when marketing activities are carried out by undertakings that do not own the trade marks or trade names they promote (for example, a distributor of branded goods). In such a case, it is necessary to determine how the trader should be compensated for these activities. The question is whether the trader should be compensated as a service provider, i.e. whether the trader should be compensated as a service provider. U.S. Benchmarking regulations on income earned from intangible assets is one of the most important and challenging issues in transfer pricing (TP), and this aspect has been a priority area for Indian transfer pricing administrations. This issue is particularly important for India due to its unique market-specific characteristics such as location advantages, market availability, large customer base, market premiums, expenses Indian customers, etc.1 Direct sales expenses should not be part of ASF's expenditure The question of whether direct sales and marketing expenditure should be part of ASF's expenditure was raised in different cases and the decision of all courts was in consensus that such expenditure should not be part of ASF's expenditure. The question of excluding direct marketing and sales expenses from AMP's expenses was raised in the case of LG Electronics India Ltd. v Asstt. CIT [2013] 140 ITD 41/29 taxmann.com 300 (Delhi). The Special Chamber ruled that bench-marking of AMP's expenses, which are international transactions, is permissible under the OTP Regulation, but expenses related to sales that did not lead to the promotion of the brand could not be within AMP's costs of determining the costs/value of international transactions. In the case of Stanley Black & Decker India Ltd. [TS-89-ITAT-2016(Bang)-TP], the evaluator deals with the trading of products from electrical tools such as drills, grinders, saws, hammers, etc. During AY 2010-11, the evaluator entered IT with his AE to purchase traded goods and therefore the case was referred to the TPO for alp determination. However, the TPO found that the assessor had incurred huge costs in the nature of ASF's which are as needed: Amount (R.) Store and other discounts on sales 4,98,72,466 Sales discount 1,30,85,199 Warranty costs 1,29,0,27,237 Packing costs 30,26,454 Promotion of advertising and sales 58,22,797 Total 8,47,34,153 TPO found whereas the average expenditure incurred per 3 comparable asses is only 2,44% of sales, while the taxpayer spent 9,81% of sales, the TPO therefore proposed an adjustment of R. 6,36,08,748/- for these excess expenditures by AMP. The body under investigation objected to hon'ble DRP, which alleged, inter alia, that the assessed entity had not incurred amp costs on behalf of its AE, and also claimed that sales expenses such as commercial discount, sales discount, guarantee and packaging costs could not be regarded as advertising and marketing advertising expenses. Hon'ble DRP rejected the claim considered in order to exclude sales costs on the ground that the assessed person did not provide specific information or details relating to the claim. The assessed moved petition u/s 154 before Hon'ble DRP to correct directions issued u/s 144C praying that the evaluator placed on record the full details regarding the nature of AMP spending before the TPO as well as before the DRP. Hon'ble DRP held that the assessor had submitted complete data relating to AMP's expenditure and ordered the AO to exclude those expenditure from ASF's expenditure in the light of the law laid down by the special bench in the case of L.G. Electronics India Private Limited v ACIT [140 ITR 41(SB)]. Damaged. Revenue has filed an appeal with Bangalore ITAT. ITAT that the only question to consider was whether the drp was justified in taking over jurisdiction u/s 154 in the circumstances and circumstances of the case. ITAT noted that it was common ground that the assessor submitted all the details assessed by the TPO, including the sales discount, sales expenses and guarantee costs. Itat further noted that it had not considered these details of the DRP at the time of the transmission of the original 144C U/S guidance, but when this was notified to the DRP, the DRP modified its guidelines to exclude these items from AMP's expenditure following the SB's decision in lg electronics. Accordingly, ITAT held that this was a case of non-taking into account in the record, which would constitute an error evident from the record, as established by the High Court of Hon'ble Madhya Pradesh in CIT v Mithalal Ashok Kumar (158 ITR 755)(MP). Therefore, the DRP was entitled to assume jurisdiction u/s 154 of the Act. The special bench decision was though partially reversed by the Delhi High Court vide Sony Ericsson Mobile Communications India (P.) Ltd. v CIT [2015] 55 taxmann.com 240 (Delhi), however, on this point, it agreed with the Special Bench decision in the case of LG Electronics India Ltd. v. Asstt. CIT [2013] 140 ITD 41/29 taxmann.com 300 (Delhi). The revenue argument before the High Court on direct marketing costs was below.— 1. Special Bench of the ITAT decided in the case of LG Electronics India Pvt. Ltd. that sales expenses such as discounts and incentives/price adjustments should not be considered as part of AMP's expenditure. The argument against their inclusion in amp expenses is that these expenses are nothing more than a reduction in the price of the product and do not create any marketing intangible. Amp's activities are not just aimed at promoting the brand to final customers. It is also to make the brand popular for marketers who will eventually push the 'XX' brand over other brands on the market. Only if there is a reasonable amount of brand loyalty between salespeople will the entire ASF activity circle be completed. Discounts and incentives that the rating passes on to traders are a tool that uses to create this brand loyalty between them. Once they are convinced that this company is passing on more benefit to them only then they will push the company's products towards the final customer, through other brands. Incentives for traders and other selling costs are part of the market penetration strategy of the evaluator. Incentives provided to traders help the assessor to increase the evaluator's market share and create loyalty to the AE brand among sellers. Since these incentives for sellers lead to the creation of intangible commercial sales, the same should be considered as part of ASF's expenditure. In this respect, it can be noted that normal discounts are included in the sales that are taken into account for the calculation of ASF expenditure. With regard to other selling costs in addition to normal discounts, where incurred at the behest of AE under the market penetration strategy, shall be classified as ASF expenditure. This expenditure is part of a brand-building strategy carried out by an Indian subsidiary on behalf of AE. However, the Court has held that the above arguments, where AMP's expenditure is separated from the composite transaction, including the distribution and marketing function, are erroneous and must be rejected. The assessed shall deal with the distribution and placing on the market of consumer goods. Distribution and marketing in the case of tangible goods requires the transfer/sale of goods to third parties, whether distributors or retailers. That transaction is in the nature of the sale of the goods for a fee. Marketing or sales expenses, such as commercial discounts, quantity discounts, etc., offered to sub distributors or retailers, are not the nature and nature of brand promotion. They are not directly or immediately related to brand building exercises, but have a live connection and direct connection with marketing and increased sales or turnover. Brand building is too remote and weak. To include and treat direct marketing costs such as a trade or quantity discount or incentive like brand building exercises would be contrary to common sense and would be greatly exaggerated. These reduce the net profit margin. This would lead to abnormal financial results that would defy accounting practices and business and business sense. Costs which are of the nature of selling costs are directly related to the price/consideration for the goods sold. They do not arise for publicity or advertising. Costs related to direct marketing and sales or discounts/concessions would not be part of amp. In the case of Perleti Van Melle India Private Limited [TS-119-ITAT-2014(DEL)-TP], the transfer pricing adjustment for advertising, marketing and promotion (AMP) expenditure was made during the transfer pricing procedure for the period 2009-2010. The contested transfer transfer before the Delhi ITAT was assessed. The evaluator also claimed that the costs associated with the sale should not be assessed within the cost of amp when calculating the intangible adjustment to the market. ITAT stated that, in the case of LG Electronics India Pvt. Ltd. Vs. ACIT, [TS-11-ITAT-2013(DEL)-TP], Bench considered that amp's costs of promoting the brand, which are legally owned by foreign AE, constituted, first, a transaction and then an international transaction. Moreover, the claim that no statement can be made of ASF's expenses can be compared separately if the total net profit rate reported by the assessor and assessor was higher than other comparable cases was also assessed by the Special Chamber. Furthermore, Special Bench confirmed in principle the transfer pricing adjustment in relation to these expenses amp. The special bench company confirmed the claim considered that expenditure directly linked to the sale should be excluded from amp's expenses. ITAT also noted that of the 22 interveners in lg's case, some were distributors, while others were licensed producers. The special company Bench also set out 14 parameters that the TPO had to consider before it concluded on the requirement to adjust TP for ASF's expenditure. Itat therefore held: There is therefore no doubt that the special casting order applies not only to the manufacturer, but also to the distributor, whether it bears the full risk or the least risk. These tests are therefore applicable with full force to the extent applicable to distributors. In particular, there is nothing that restricts its operation to producers only. Following special bench's decision at LG Electronics, ITAT accepted the subject's request to exclude sales expenses such as commissions and commissions on sales of merchants, etc. Itat stated that no details of the expenditure were recorded in the evaluators' records and therefore ordered AO/TPO to examine the details of the total expenditure on ASF and to exclude these specific sales expenses in accordance with LG Electronics' decision to draw up the remaining amount to be assessed for the continuation of the implementation of ASF's expenditure under the TP provisions. The CIT (A) and AO Regulations thus annulled ITAT and brought the matter back to AO/TPO in order to re-determine the LG Special Bench decision. The same issue was addressed in the case of Ray Ban Sun Optics India Ltd. [TS-122-ITAT-2014(DEL)-TP]. In the case of assessee, an adjustment was made to transfer pricing in respect of advertising, marketing and promotion (AMP) expenditure during the transfer pricing procedure for AY 2009-10. The contested transfer transfer before the Delhi ITAT was assessed. The evaluator also claimed that the costs associated with the sale should not be assessed within the cost of amp when calculating the intangible adjustment to the market. ITAT stated that the special bench in the case of LG Electronics India Pvt. Ltd. Vs. ACIT, 2013 152 TTJ (Del) (SB) 273 considered that AMP's costs of promoting the brand, legally owned by foreign AE, represented, on the one hand, a transaction and then an international transaction. Moreover, the claim that no statement can be made of ASF's expenses can be compared separately if the total net profit rate reported by the assessor and assessor was higher than other comparable cases was also assessed by the Special Chamber. Furthermore, Special Bench confirmed in principle the transfer pricing adjustment in relation to these expenses amp. However, the special company Bench confirmed the claim considered that expenditure directly linked to the sale should be excluded from amp's expenses. ITAT also noted that of the 22 interveners in lg's case, some were distributors, while others were licensed producers. Special Bench also set 14 parameters to be tp before reaching a conclusion on the requirement to adjust TP for ASF expenditure. Itat therefore held: There is therefore no doubt that the special casting order applies not only to the manufacturer, but also to the distributor, whether it bears the full risk or the least risk. These tests are therefore applicable with full force to the extent applicable to distributors. In particular, there is nothing that restricts its operation to producers only. Following the decision of Special Bench at LG Electronics, ITAT accepted the request of the entity under assessment to exclude sales expenses such as commissions and commissions on the sale of traders, etc. ITAT annulled the objection and referred the matter to the AO/TPO file to re-decide this issue in the confirmatory decision in the case of LG Electronics (Supra). In the case of Diageo India (P.) Ltd. [2013] 34 taxmann.com 284 (Mumbai – Trib.), Mumbai ITAT also decided that sales-related expenses should be excluded in determining the cost/value of international transactions, as held by the Special Chamber, that sales expenses that do not lead to brand promotion cannot be included in the area of advertising, marketing and promotion expenses for determining the cost/value of such AE transactions. In the case of Whippool of India Ltd. v Dy. CIT [2014] 42 taxmann.com 553 (Delhi – Trib.), delhi ITAT observed that – 6. When advertising the facts of a well-documented case, we find from pages 250 and 251 of the paper books, which are written submissions of 14 December 2004. It was further explained that the price adjustment is a way of reducing the sales price, since it was also passed on to dealers and distributors at the time of the sale. The TPO did not dispute the nature of the price adjustment as a discount and the incentives granted to dealers. This fact is alive from page 22 of his order, in which he noted that: 'Discount and incentives that the evaluator passes on to traders'. It shows that the TPO duly accepted the nature of the amount as a discount and incentives for the dealers and distributors under assessed. He proceeded to include this amount in AMP's total costs by holding that it was a tool used by the evaluator to create this brand loyalty among sellers. It is therefore a patent that the nature of LKR 143.36 is indisputable, since the rebate granted to dealers for the sales made is indisputable. As soon as 1 January 2004, the Commission decided to Respectfully following the mandate Bench's special verdict in the case of LG Electronics (supra) is ordered to exclude the amount of the price adjustment from AMP's total expenditure for the purpose of determining the ALP with respect to AMP expenses. Furthermore, in the case of Yamaha Motor India Sales (P.) Ltd. [2014] 46 taxmann.com 426 (Delhi-Trib.), the evaluator is engaged in the trading of two-track vehicles and is a 100% subsidiary of M/s Yamaha Motor Company Ltd., Japan (YMC). It's all purchases are from Yamaha Motor India Pvt. Ltd., which is an Indian company. TP's issue relates to the add-on of R. 22,23,28,349/- made by the AA because of the adjustment of the market price as regards the advertising and publicity expenses incurred by the company under assessment. During the year under assessment, the evaluator spent total expenditure of LKR 49,68,34,848/- and LKR 65,10,19,077/- on advertising purposes on the basis of sales promotion. The company under assess claimed that the expenditure in question resulted in an amount of LKR 44,68,34,848 in order to promote sales through discounts and incentives, maintenance costs, repairs, etc., and therefore this amount cannot be considered as brand promotion. The TPO deducted expenses from the above list solely because of servicing costs, incentives for dealers, but did not deduct expenses on the basis of discounts and incentives. Furthermore, it was satisfied that the sales of 21,68 % were the Indian model of two-track vehicles, i.e. the TPO was therefore reduced by R. 21,58,05,755/- is 21.68% of R. 99,54,13,999/- . The person under investigation, harmed by the TPO order, objected to the DRP, but the DRP rejected all the appellant's claims and confirmed the TPO order. Prior to ITAT, Lt. Advisor to assessee relied on the decision of the SPECIAL BENCH ITAT in the case of LG Electronics India (P.) Ltd. v. Asstt. CIT [2013] 29 taxmann.com 300/140 ITD 41 (Delhi – Trib.) and claimed that the seller's discount and incentives are not part of AMP in the application of bit. It was also held by ITAT in the case of Whippool of India Ltd. v Dy. CIT [2014] 42 taxmann.com 553 (Delhi – Trib.) and the same judgment was followed in the case of Amadeus India (P.) Ltd. v Addl. CIT [2014] 44 taxmann.com 154 (Delhi – Trib.) from the ITAT bench in Delhi. It is claimed that the exclusion of the amount paid on account of the rebate and the incentive to the dealers will result in a full adjustment to tp and subsequent additions, notwithstanding the other questions raised in that appeal. ITAT decided that incentive expenditure of L R 34,43,94,922 offered as a discount must be excluded from the TP adjustment. This shall be attributable to AMP's expenditure on R. compared to R. 45,11,86,056/- which is the amount received from AE, YMC, Japan as a substitute and authorized TPO. The expenses incurred by traders amounting to LKR 2.07 cannot be regarded as advertising expenditure. Below are some other decisions in which it was decided that the sales discount and sales promotion expenses should be excluded from AMP expenses: Daikin Airconditioning India (P.) Ltd. v Dy. CIT [2013] 37 taxmann.com 14 (Delhi - Trib.) Panasonic Sales & Services India (P.) Ltd. v Asstt. CIT [2013] 143 ITD 733/34 taxmann.com 276 (Chennai) Maruti Suzuki India Ltd. v. Appendix CIT [2013] 38 taxmann.com 33 (Delhi - Trib.) Ford India (P.) Ltd. v. Dy. CIT [2013] 34 taxmann.com 50/59 SOT 221 (Chennai) Sony India (P.) Ltd. v Addl. CIT [2013] 35 taxmann.com 586/[2014] 148 ITD 489 (Delhi) Reebok India Co. v. Addl. CIT [2013] 35 taxmann.com 578/[2014] 146 ITD 469 (Delhi) Haier Appliances India (P.) Ltd. v Dy. CIT [2013] 35 taxmann.com 203/[2014] 146 ITD 730 (Delhi) [1] UN Practical Guide on Transfer Pricing

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