

The Art Of Transfer Pricing

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Set up in 1971, Vaish Associates Advocates ('VA') is a full-service law firm based in New Delhi, Mumbai, and Bengaluru, India, having an experienced team of 12 partners and over 100 associates, specialising in direct tax, corporate laws, and intellectual property law, to name a few is widely regarded as one of the best direct-tax law practices in the country and specialises in direct tax litigation and advisory services, corporate reorganisation and tax planning. VA has successfully handled several high profile tax litigation in the areas of domestic and international taxation and transfer pricing and has obtained path-breaking rulings, aiding development of jurisprudence.

VA boasts a formidable transfer pricing team, which deals with all facets of transfer pricing, for example undertaking benchmarking of international transactions of diverse businesses, cost sharing studies and valuation of transactions involving IPRs, and has successfully represented marque and complex litigations before the tribunals, high courts and the supreme court.

The attorneys in the firm are both lawyers and qualified accountants or economists, and are equipped with required knowledge resources and databases. VA has the unique ability of handling/ representing the clients from the stage of audit till the Supreme Court.

VA represented the clients, resulting in landmark decision on test of comparability, under the Indian transfer pricing regulations in the case of Ramp Green Solutions Pvt. Ltd. decisions on transfer pricing aspects of marketing intangibles in the cases of Sony Ericsson Mobile Communications India Pvt. Ltd., Maruti Suzuki India Ltd, Whirlpool of India Ltd. , before the Delhi High Court.

India has emerged as the leading jurisdiction in terms of transfer pricing litigation and jurisprudence. The Indian transfer pricing landscape thus far is characterised by detailed scrutiny and aggressive positions, adopted by the tax administration. Indian tax authorities have been rated, in a survey, as the second most aggressive after Japan. 54.85% of all transfer pricing cases have been subjected to adjustment by the Indian tax authorities during the 2014/15 financial year. India also accounts for more than half of the total number of transfer pricing cases around the world.

India as one of the signatories, has started implementing the OECD BEPS recommendations. The BEPS recommendations in due course may bring in rules

regarding benchmarking of self-generated - 'hard to value intangibles', 'location saving', 'low value intra group services', and so on. Implementation of BEPS recommendations may bring in paradigm change in TP environment in India. It is expected that the Indian Revenue authorities would undertake in-depth value chain analysis to ensure that allocation of income is consistent with value generation.

Also Country by Country (CbC) reporting has recently been introduced in the Indian transfer pricing legislation. The information provided as part of the CbC report would enable the India tax administration to identify any disconnect between the allocation of income and the underlying economic activity. Also, the implementation of BEPS recommendations regarding country by country reporting from financial year 2016-17 is seen as a game changer, and would not only increase the documentation burden, but also initiate significant focused enquiries in transfer pricing audits.

In the post BEPS era, multi-national enterprises ('MNEs') would be called upon to review and realign their structures to ensure consistency between allocation of income and value creating activity. Adjustment to the transfer price of an international transaction, made in an audit by the tax administration, results in levy of tax @ 34% of the amount of adjustment and interest @ 12% per annum and penalty which may vary from 100% to 300% of the tax amount involved in the adjustment.

Transfer pricing adjustment also results in the tax holiday availed by an Indian entity being denied to the extent of the amount of adjustment. A transfer pricing dispute, therefore, has to be litigated before the appellate forum and Courts, which may take 5 to 10 years to resolve. Therefore, it is advisable and imperative to undertake a robust transfer pricing study so as to avoid tax, penal consequences and long drawn litigation in courts.

MNEs are circumspect about exposure to transfer pricing risks when operating in India. Several MNEs have approached APA authorities in India for achieving certainty to transfer pricing as intercompany transactions. Out of more than 700 APA applications filed so far, the Finance Ministry has concluded 98 APAs (including 4 bilateral APAs).

Transfer pricing is an art and not an exact science. Indian TP regulations and also international practices in the transfer pricing arena are fast evolving. Also because of the implementation of the OECD - BEPS report, many significant changes would be witnessed in the years to come.

The global transfer pricing landscape today is characterised by increased complexity of the inter-company transactions and enhanced focus the revenue on the substance of transactions undertaken by MNEs. In a globalised environment with enhanced level of scrutiny by the revenue authorities and increased focus on value creation activities, it

is imperative for the MNEs to have clearly defined transfer pricing strategy in place and undertake a robust benchmarking analysis.

The strategy should be such that it clearly explains the value drivers of the MNE group, the location of intangibles and the rationale for allocation of income. A well-defined strategy would enable the MNE group to explain and defend its structure as well as pricing of inter-company transactions before Revenue authorities across jurisdictions.

Furthermore, considering that the Indian tax administration is inherently aggressive, transfer pricing audits of taxpayers every year results in disputes - so obtaining expert advice from a specialist is imperative for preparing a robust transfer pricing documentation and, thereafter, to defend the same before the authorities and courts.

VA is a knowledge based organisation, which believes in rendering quality advice to clients and tax litigation is their forte. Considering the tax administration system in India, managing tax litigation effectively is important for MNEs operating in India. Considering the increasing complexities of business and the aggressive tax administration, the tax disputes are only going to rise in the years to come. This would keep the litigation specialists like VA, a dominant player in the tax arena.

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