DESAI SAKSENA & ASSOCIATES

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Friday Tax Alert

For a Software License Reseller Acting as Stripped-Down Distributor without any value addition or ownership of intangibles, TNMM as Most Appropriate Method (MAM) with Berry Ratio as appropriate PLI was to be accepted

Facts of the case:

- The Assessee was engaged in the business of reselling software license subscriptions purchased from its Associated enterprises (AEs) to unrelated customers.
- The Assessee claimed to be operating as a limited-risk reseller without any value addition to the software developed and owned by its AE and, accordingly, adopted Transaction Net Margin Method (TNMM) as the most appropriate method and applied Berry Ratio (OP/VAE) as the profit level indicator.
- The TPO rejected the Assessee's claim, included the license fee paid to the AE in operating costs, and made a transfer pricing adjustment.
- The DRP confirmed the TPO's approach, holding that the Assessee provided marketing support services and treated the software as a marketing medium.
- Aggrieved by the order Assessee filed an appeal before Income Tax Appellate Tribunal.

Decision of the Hon'ble Income Tax Appellate Tribunal:

- The sole issue is regarding ALP adjustment of international transactions with respect to the purchase of software with its AEs. The claim of the Assessee is that it is working in limited risk involvement, and therefore, TNMM should be the MAM and applied Berry ratio as PLI deserves to be accepted. From the facts, it could be seen that the Assessee is selling subscriptions developed by its AE, where Assessee receives orders from unrelated parties and on order-to-order basis has purchased the software and supplied it to the customer, thus, the Assessee is a trader only.
- However, DRP held as the Assessee provides marketing support services and the software is a medium used for marketing. These observations of the DRP are incorrect so far as the business of the Assessee as a trader of subscriptions of software license. In the process of sale of subscription of software license, the software is not a medium rather it is the product itself, and Assessee is providing license to use it without having any access to modify or adding any value to the product i.e. software which was developed and supplied by its AE.
- The Assessee's income limited to the margin earned from the sale of subscription only. Under these circumstances, the Berry ratio taken by the Assessee for PLI and TNMM as MAM for working out the arms' length price should be accepted.
- The Delhi High Court in the case of *Sumitomo Corporation India (P.) Ltd. v. CIT [2016] 71 taxmann.com 290/242 Taxman 260/387 ITR 611 (Delhi)*,while considering the applicability of Berry Ratio, observed that the said ratio can be an appropriate profit level indicator in cases where the Assessee is a low-risk distributor or service provider, does not assume any significant market, inventory or credit risks, and does not perform any value-adding functions. It was held that where the Assessee does not own any intangibles, does not add value to the goods traded, and its operating expenses capture all the functions performed, Berry Ratio provides a reliable measure for benchmarking arm's length remuneration.

- Once the Assessee does not own any intangibles and is making no value addition to the product sold by it i.e. the subscription of software license developed and owned by its AE and is a stripped down distributor only, therefore, Assessee is reseller of the software subscription and arm length price computed by taking TNMM as MAM is upheld and further held that the Berry Ratio as correct PLI.

Meltwater India (P.) Ltd v. National Faceless Assessment Centre, Delhi [2026] 182 taxmann.com 681 (Delhi - Trib.)

Interest on IT Refund not taxable as Business Profits if no Permanent Establishment (PE) in year of receipt and thus, interest was to be taxed at 15% as per Article 11 of India-Australia DTAA

Facts of the case:

- The Assessee, an Australian company, received interest on income tax refund for relevant assessment year. It claimed that such interest should be chargeable to tax at 15 per cent under Article 11 of the India Australia DTAA. The Article 11 India - Australia DTAA read as under:
  i. Interest arising in one of the Contracting States, being interest to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.
  ii. Such interest may also be taxed in the Contracting State in which it arises, and according to the law of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the interest.

- The Assessing Officer held that the refund pertained to Assessment years 2010-11 and 2014-15 when the Assessee had business operations and PE in India. He, thus, treated the interest as business income connected with the PE and taxed it at the rate applicable to business profits, i.e. flat 40 per cent

- On appeal, the Commissioner (Appeals) upheld the order of the Assessing Officer.

- Aggrieved by the order, the Assessee filed an appeal before Income Tax Appellate Tribunal.

Decision of the Hon'ble Income Tax Appellate Tribunal:

- The clinching fact about the Assessee not having any PE in India in the year of receipt interest on Income Tax refund i.e. Assessment year 2022-23 is not in dispute. The revenue's case is that since the tax refunds in question pertain to the preceding assessment years 2010-11 and 2014-15 when it indeed had a permanent establishment ("PE") in India, it is not entitled for the impugned relief.

- There is no merit in the revenue's foregoing vehement submissions in light of this tribunal's decision dated 08-6-2021 in *Dolphin Drilling Ltd. v. DCIT [2021] 130 taxmann.com 20/191 ITD 181 (Dehradun - Trib.)* ***settling the issue that "PE" of a non-resident Assessee has to be seen in the year of receipt of interest income.***

- The Assessee's instant sole substantive ground and the same is accepted in very terms.

R and B Falcon A Pty Ltd v. ACIT [2026] 182 taxmann.com 839 (Dehradun - Trib.)

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