

Contentious issues in Transfer pricing and International tax



Estd 1926

**The Chamber of
Tax Consultants**

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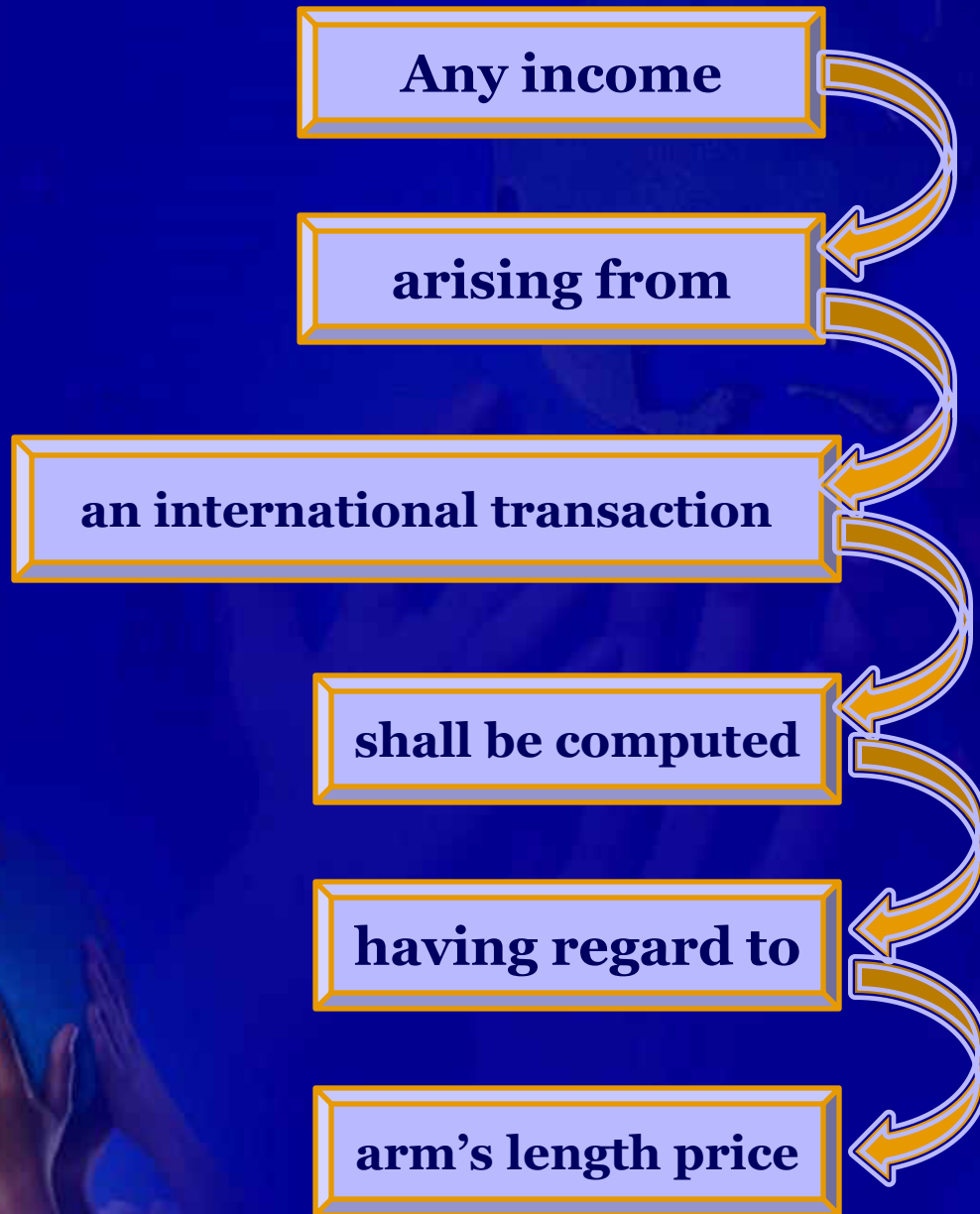
Transfer Pricing – An Introduction

- ◆ Evaluation of the price charged by one related party to another related party for goods, services, etc.
- ◆ Objective of the Revenue is to check erosion of the tax base and plug the leakage of the revenue;
- ◆ Foundation of the Transfer Pricing Regulations are embedded in the Double Taxation Avoidance Agreements - Article 9 of the OECD Model Convention
- ◆ The OECD Report on Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration (OECD TP Guidelines) are the foundation for transfer pricing regulations in India

Transfer Pricing (TP) – Indian Perspective



TP Regulations in India – Section 92



TPR in India

- ◆ Income under any head is covered under the ambit of TPR
- ◆ Section 4 – Income must be chargeable to tax
- ◆ Preconditions:
 - Two or more associated enterprises
 - Enter into an international transaction
 - Specified Domestic Transaction (w.e.f. AY 2013-14)
- ◆ Consequence:
 - Income/ Expenditure to be computed having regard to the arm's length price

Associated Enterprises [Section 92A]

- ◆ Means direct or indirect participation in management
 - ◆ control or capital:
 - ◆ by one enterprise into another enterprise; or
 - ◆ by the same person in both the enterprises
- ◆ Equity holding, Control of Board of Directors / Appointment of one or more Executive Director, mutual interest will also constitute Associated Enterprise
- ◆ Either or both of Associated Enterprises should be a non-resident
- ◆ “Deemed Associated Enterprises” includes:
 - ◆ Purchase of 90% or more of raw materials and consumables,
 - ◆ Sale of goods - influence on price and conditions of supply by buyer,
 - ◆ Dependence on intangible assets, financial transaction, guarantee,
 - ◆ Control by individual or his relative, etc.

International transaction [Section 92B]

- ◆ Means “transaction” between two or more Associated Enterprises:
 - ◆ Transaction between two or more associated enterprises (at least one of which will be non-resident) of purchase, sale or lease of tangible and intangible property, provision of services, financing, cost sharing / cost contribution arrangements
- OR
- ◆ Any other transactions affecting profits, losses, income, assets or liability of the enterprise

- ◆ The expression “International Transaction” was amended by Finance Act, 2012 w.e.f 1.04.2002 to specifically include:
 - ◆ Inter-company Guarantees,
 - ◆ Advance payments, deferred payments, receivables,
 - ◆ Capital Financing/ Business restructuring / reorganization,
 - ◆ Purchase / sale/ use of intangibles such as customer lists, customer contracts, customer relationships,
 - ◆ Transfer / secondment of trained employees, etc.

Definition of Deemed International Transaction (Amendments by Finance Act, 2014)

- ◆ The Finance Act 2014, has broadened the scope of international transaction. Further, the amendment is effective from 1 April 2015
- ◆ Where a transaction is entered into by an enterprise with a person other than an AE and
 - ◆ There exists a prior agreement in relation to the relevant transaction between such other person and the AE or,
 - ◆ Terms of the relevant transaction are determined in substance between such other person and the AE, and
 - ◆ Either the enterprise or the AE or both of them are non-resident whether or not such other person is a non-resident
 - ◆ Such transaction will be deemed to be an international transaction

Specified Domestic Transactions

- ◆ The Finance Act, 2012 has introduced TPR for specified domestic transactions under section 92BA
- ◆ Specified Domestic Transactions to include :
 - ◆ Transfer of goods or services between two units, undertakings or companies which are related and one of them is eligible to avail deduction under Chapter VI-A, 80IA
 - ◆ Any transaction in Chapter VI-A or section 10AA to which the transfer pricing clause under section 80IA are specifically made applicable
 - ◆ Any other transaction as may be prescribed

** Omitted w.e.f. 1 April 2017 - any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A*

Secondary Adjustment (Section 92CE)



Secondary Adjustment

- ◆ Introduced by Finance Act 2017, applicable from AY 2018-19
 - ◆ “Secondary adjustment” as an adjustment that arises from imposing tax on a deemed basis by considering previous period’s transfer pricing adjustment itself as a separate international transaction
- ◆ Applicable to primary adjustments exceeding one crore rupees made in respect of the AY 2017-18 and onwards
- ◆ Whether primary adjustment made to the international transaction determines additional benefit transferred to the associated enterprise on a deemed basis?



Secondary Adjustment

CBDT Notification No. 52 /2017 dated 15 June 2017

Conditions

Time Limit for repatriation of excess money

If primary adjustment to transfer price has been made suo-moto by assessee in his return of income

In case APA entered into by the assessee u/s. 92CD

In case option exercised by the assessee as per Safe Harbour rules u/s 92CB

In case assessee has entered into a Mutual Agreement Procedure under DTAA u/s. 90 or 90A

In case the primary adjustment made as per the order of Assessing Officer (AO) / Appellate Authority has been accepted by the assessee

Within 90 days from due date of filing return of income u/s. 139(1) i.e. 30th November

From the date of order of AO/ appellate authority

Imputation of interest income on excess money not repatriated within time limit

Currency denomination of international transaction	Rate of imputation of interest income per annum
INR	1-year marginal cost of lending rate (MCLR) of SBI as on 1 st April of relevant previous year + 325 basis points
Foreign currency	6-month LIBOR as on 30 th September of relevant previous year + 300 basis points

Whether suo-motu payment of taxes on the primary transfer pricing adjustment is not a sufficient parameter for the revenue authorities?

Can income-tax department force a company to bring money into India or its role is restricted to collection of taxes on the money?

An Illustration

**Overseas Ltd. (AE
of India Ltd.)**

**Revenue from
software
development
services**

India Ltd.

Initial Year

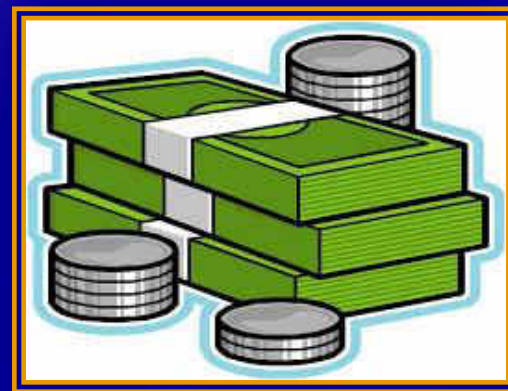
- **PLI of India Ltd. = 18%**
- **Comparable uncontrolled transactions = 24%**
- **TPO made an adjustment for the difference between the profit margin on sales of INR 100 crores**

Later Year

- **TP adjustment continues**
- **Overseas Ltd. does not pay the amount of TP adjustment to India Ltd.**
- **TPO makes a secondary TP adjustment**

Preliminary Issues on Secondary Adjustment

- ◆ Whether laws of other countries may allow free repatriation of money? i.e. Effect under FEMA
- ◆ Would lead to double taxation
- ◆ Effect of treatment under MAT / in the books of accounts maintained in India prepared as per Companies Act, 2013
- ◆ Whether interest income is a one time levy or will apply on a year to year basis until the amount related to the primary adjustment is brought into India?
- ◆ Is there a contradiction for agreements between competent authorities in the case of Bilateral APAs or MAPs
- ◆ In case assessee goes for appeal before ITAT / High court / Supreme court, at what stage secondary adjustment to be made?
- ◆ Whether secondary adjustment leads to discrimination under DTAA?



Background of BEPS



Background

- ◆ Increased integration of national economies and markets has put a strain on the international tax framework, which was designed more than a century ago
- ◆ The current rules have revealed weaknesses that create opportunities for Base Erosion and Profit Shifting (BEPS)
- ◆ G20 countries mandated the Organisation for Economic Co-operation and Development (OECD) to come out with recommendations to prevent BEPS. With the intention of :
 - ◆ Restoring the trust of ordinary people in the fairness of their tax systems;
 - ◆ Creating a level playing field among businesses; and
 - ◆ Providing governments with more efficient tools to ensure the effectiveness of their sovereign tax policies

Introduction to BEPS

- ◆ The OECD released the final BEPS package in October 2015 to
 - ◆ Prevent double taxation
 - ◆ Prevent no or low taxation by shifting of profits
 - ◆ Ensure fair share of tax revenues
 - ◆ Prevent treaty abuse
- ◆ What's in the BEPS Package?
 - ◆ Minimum standards
 - ◆ Reinforced international standards on tax treaties and transfer pricing
 - ◆ Common approaches and best practices for domestic law measures
 - ◆ Analytical reports with recommendations (digital economy and multilateral instrument)
 - ◆ Detailed report on measuring BEPS



BEPS Action Plan 15 – Developing a Multilateral Instrument to Modify Bilateral Tax Treaties



Overview of BEPS Action 15

- ◆ Objective is to facilitate countries interested in implementing tax treaty-related BEPS measures
- ◆ A multilateral instrument (MLI) – over 100 countries – ‘modify’ bilateral tax treaties between them
- ◆ Minimum standard provisions – have to be applied; others – optional, reservations possible
- ◆ Treaty between 2 countries changed only if **both** countries accept the provisions (without reservations)
- ◆ Notification – countries need to notify existing treaties containing provisions referred to
- ◆ Interpretation – using existing treaty – otherwise explanatory statement
- ◆ Not an amending protocol – operates alongside existing treaties

Constitutional Framework of MLI



Constitutional framework

- ◆ The Constitution of India accepts the federal principle as the basis of constitutional organisation
- ◆ The division of powers and functions between the centre and states being one of the essential characteristics of our Constitution, it becomes incumbent to consider in their entirety and applicability the following issues:



- ◆ In whom does the power to make and implement treaties reside?
- ◆ What position do treaties enjoy under the Constitution? Are treaties superior to the Constitution or the law of the land?
- ◆ Do treaties under the Constitution, in order to be effective, require ratification and/or approval ?
- ◆ If yes, in whom does the power lie and what would be the effect of non-exercise of that power on treaties ?



Constitutional framework

- ◆ The various provisions that govern India's 'foreign affairs/ treaties' are laid down in Articles 51, 73 and 253 read with a number of entries enumerated in List I of Schedule VII of the Constitution
- ◆ By virtue of Articles 245 and 246 read with the above said entries of List I of Schedule VII, only Parliament has power to legislate on the subject of

“entering into treaties and agreements with foreign countries and implementing of such treaties, agreements and conventions”

Taxation of Digital Economy



Digital Economy

- ◆ What is Digital Economy
- ◆ Key Features and way forward
- ◆ What challenges are faced in taxing digital economy
- ◆ Steps as per BEPS
- ◆ Steps taken by India and

What is Digital Economy

- ◆ Key Features (para 4.3 of Action 1)
 - ◆ Mobility , with respect to
 - ◆ Intangibles
 - ◆ Users and
 - ◆ Business functions
 - ◆ Reliance on data and user participation
 - ◆ Network effects
 - ◆ Multi-sided business models
 - ◆ Flexibility
 - ◆ Reach
 - ◆ Tendency towards monopoly or oligopoly
 - ◆ Volatility

3 Options as per BEPS Action Plan to implement in Domestic laws

- ◆ A new nexus in the form of a significant economic presence,
- ◆ A withholding tax on certain types of digital transactions, and
- ◆ An equalisation levy subject to treaty obligations



India Introduced

- ◆ A new nexus in the form of a significant economic presence,
- ◆ An equalisation levy subject to treaty obligations



Section 9 – Business Connection

Finance Bill 2018

Section 9 is amended to provide that 'business connection' shall also include business activities carried through a person, who on behalf of the NR:

- habitually concludes contracts or
- habitually plays the principal role leading to conclusion of contracts by the NR.

The contracts should be:

- in the name of the NR; or
- for the transfer of the ownership of, or for the granting of the right to use by that NR; or
- for the provision of services by that NR

BEPS Action Plan 7

BEPS Action 7 provides that an agent would include not only a person who habitually concludes contracts on behalf of the non-resident, but also a person who habitually plays a principal role leading to the conclusion of contracts

Article 5(5) of the DTAA covers situations where even though the enterprise may not have a fixed place of business, a person who concludes contracts constitutes a 'dependent agency permanent establishment' (DAPE)

Section 9 – Business Connection

- ◆ **Section 9(1)(i)** is amended to provide that ‘significant economic presence’ in India shall also constitute ‘business connection’.
- ◆ Further, ‘significant economic presence’, shall mean -
 - ◆ any transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India if the aggregate of payments arising from such transaction or transactions during the previous year exceeds the amount as may be prescribed; or
 - ◆ systematic and continuous soliciting of its business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means.
- ◆ The transactions or activities shall constitute significant economic presence in India, whether or not the non-resident has a residence or place of business in India or renders services in India.

Equalisation Levy

- ◆ Indian Budget 2016:
 - ◆ introduced an EQL of 6% on B2B transactions
 - ◆ where the payment exceeds INR 100,000
 - ◆ by an Indian resident (& carrying on business or profession)
 - ◆ for specified services
 - ◆ Online advertisements
 - ◆ Provision for digital advertising space
 - ◆ Any other facility or service for the purpose of online advertisement
 - ◆ Any other service as notified
 - ◆ to a non-resident (NR)
 - ◆ No EQL if NR service provider has a PE in India; and specified services is effectively connected to such PE

Interest deduction u/s 94B (Thin Capitalisation)



Thin Capitalisation

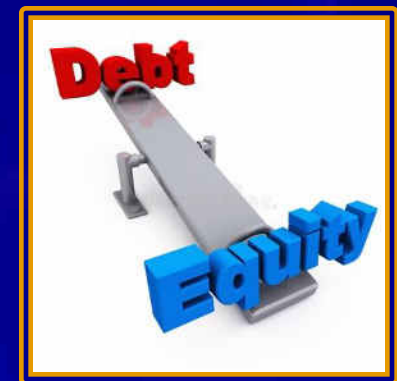
- ◆ Sec. 94B born out of recommendation from Report on Action 4 of the BEPS Project (Limiting Base Erosion involving Interest Deductions and Other Financial Payments)
- ◆ Introduced by Finance Act 2017 and applicable from Financial Year 2017-18
- ◆ What is thin capitalisation?
 - ◆ Thin Capitalisation means having highly disproportionate debt capital in comparison to equity capital
 - ◆ Companies tend to borrow in high-tax jurisdictions to avail higher tax deductions
 - ◆ What is a debt?
 - ◆ any loan, financial instrument, finance lease, financial derivative, or an arrangement that gives rise to
 - ◆ interest, discounts or other finance charges that are deductible as business expenditures



Thin Capitalisation

Why debt over equity?

- ◆ No stamp duty required for infusion of debt capital, unlike equity capital
- ◆ In most countries, dividends are subjected to economic double taxation, whereas interest is not; on the contrary interest is tax-effective
- ◆ Easy and tax effective repatriation of borrowed funds as compared to capital infusion
- ◆ Debt is more flexible; it can be converted into equity, when required
- ◆ Debt can be borrowed in foreign currency to avoid currency fluctuation risk



Thin Capitalisation

- ◆ Year of disallowance beginning from AY 2018-19
- ◆ Expenditure of Interest or similar nature over INR 1 crore which is allowed as a deduction under '*profits and gains from business and profession*'
- ◆ Borrowed by: Indian Company/PE in India of foreign company (LLPs/ Partnerships/ trusts, etc. not covered)
- ◆ Borrowed from: AE of Indian company

94B(2): Excess interest (amount to be disallowed)

Lower of:
Total interest paid in excess of 30% of earnings before interest, taxes, depreciation and amortisation; **OR** Interest paid / payable to AE for the year

Thin Capitalisation – Impact analysis

Particulars	Zero Debt	Debt-Equity Ratio of 1:1	Zero Equity
Debt	0	500	1,000
Equity	1,000	500	0
Total Capital	1,000	1,000	1,000
PBIT	200	200	200
Less: Interest (Assumed @10%)	0	-50	-100
PBT	200	150	100
Less: Tax @ 30% (approx) (A)	-60	-45	-30
PAT	140	105	70
Less: DDT @ 20% (approx) (B)	-28	-21	-14
Net profit distributed to equity shareholders	112	84	56
Amount distributed for total capital	112	134	156
Total tax paid (A + B)	88	66	44
Effective rate of tax (Total tax to PBIT)	44%	33%	22%

An Illustration

- ◆ A Ltd. has borrowing of INR 1000 crore from its overseas AE i.e. B Ltd. @ 12% p.a.
- ◆ Interest paid / payable to AE is INR 120 crore
- ◆ EBITDA of A Ltd. for year ended 31.03.2017 is 300 crores

Impact u/s 94B:

- ◆ Disallowance u/s 94B = Total deductible interest exceeding the 30% of EBITDA i.e. 30 crores [$120 - (300 \times 30\%)$]

TP proceedings:

- ◆ Arm's length interest rate determined by TPO @ 10% and hence, made a transfer pricing adjustment of 20 crores [$(12\% - 10\%) \times 1000$ crores]

What would be the amount of interest allowed to be carried forward u/s 94B(4), INR 10 crores or INR 30 crores)

Thin Capitalisation

- ◆ Exception: borrower is a banking or insurance company (Whether NBFCs will be granted an exception?)
- ◆ Interest expenditure to the extent not wholly deducted, shall be carried forward to the following assessment year, subject to the maximum allowable expenditure as per s. 94(2)
- ◆ No interest shall be carried forward for more than 8 assessment years, immediately succeeding the assessment year for which such excess interest was first computed



Thin Capitalisation

- ◆ Whether LCs, compulsorily convertible debentures which are hybrid instruments should be considered as debt?
- ◆ Whether premium on option contracts (financial derivative) would be considered as 'other finance charges'?
- ◆ What is the mode of computation of EBITDA?
 - ◆ Earnings as per Accounting Standards?
 - ◆ Earnings as per IND-AS?
 - ◆ Earnings as per the Act?
 - ◆ Earnings as per ICDS?
- ◆ What is implicit and explicit guarantee?
- ◆ Whether borrowing of real funds and availing of guarantee for borrowing could be classified in the same basket?
- ◆ Whether interest is to be understood, net of interest income?

Master file and Country-by-Country report



Master File and Country-by-Country Report (Indian Perspective)

- ◆ India's incorporated Action 13 of the BEPS into its transfer pricing legislation in the Finance Act, 2016 (as amendments to the Income-tax Act, 1961).



- ◆ Central Board of Direct Taxes (CBDT) on October 31, 2017 issued Final Rules (Rule 10DA and 10DB) in respect of keeping, maintaining and furnishing information and documents with respect to Country-by-Country (CbC) report and Master File

- ◆ Rule 10DA - thresholds for applicability, timelines, requirements and procedure in relation to Master File. The relevant information and intimation related to Master File is required to be filed in Form No. 3CEAA and 3CEAB

Master File and Country-by-Country Reporting (Indian Perspective) cont...

- ◆ Rule 10DB - the requisite details and procedures for CbC Report filing. The relevant information and intimations are required to be filed in Form No. 3CEAC, 3CEAD and 3CEAE
- ◆ In line with the BEPS Action 13, India has become a signatory to the Multilateral Competent Authority Agreement (MCAA) for the automatic exchange of CBC Report with the other signatories of the Agreement on 12 May 2016 and notified on 28 July 2017
- ◆ Master File requirements provided in Part A of Form No. 3CEAA are applicable to every constituent entity of the international group, whether or not it satisfies the dual thresholds

Master File Applicability (Rule 10DA)

Master File requirements provided in Part B of Form No. 3CEAA are applicable, if :

Constituent Entity

Consolidated Revenue of the International Group in the accounting year $>$ INR 500 crores

AND

Aggregate value of International Transaction in accounting year

OR

As per Books of Accounts $>$ INR 50 crores

In relation to Intangible property $>$ INR 10 crores

Master File Applicability (Rule 10DA) cont...

- ◆ Master File is an onerous documentation which depicts sensitive information and is supposed to provide a bird's eye view of the working of the group
- ◆ Where there is more than one constituent entity of an international group, resident in India, then the information would need to be filed by the designated constituent entity and intimation of the same is required to be filed by the designated CE in Form No. 3CEAB before the Director General of Income-tax (Risk Assessment) (DGIT-RA)



Master File Applicability (Rule 10DA) cont...

- ◇ Information and documents prescribed in Form No. 3CEAA would need to be kept and maintained for nine years from the end of the previous year



- ◇ The telegraphic transfer buying rate (same meaning as assigned in the Explanation to Rule 26 of the Income-tax Rules, 1962), on the last day of the accounting year shall be used for the calculation of the value in Indian rupees of the consolidated group revenue available in foreign currency
- ◇ Form No. 3CEAA should be verified and signed by the person who is competent to verify the income-tax return of the constituent entity under the Act

Country-by-Country Report (Rule 10DB)

- ✦ CbC report is applicable to an international group having total consolidated group revenue of more than INR 5,500 crore (approx. \$ 750mn) in the accounting year preceding the FY 2016-17, i.e., group revenue threshold should be tested for accounting year 2015-16
- ✦ Every parent entity or an alternate reporting entity, resident in India, would need to furnish CbC reporting prescribed under Form No. 3CEAD.
- ✦ Intimation under Form no. 3CEAC has to be filed by every constituent entity resident in India, of an international group, the parent entity of which is not resident in India



CbC Report (contd..)

- ◆ For high-level transfer pricing risk assessment purposes, the CbC report may be useful. Tax administrations may also use it to evaluate other BEPS related risks and for economic and statistical analysis
- ◆ The information in the CbC report is not be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis
- ◆ The information in the CbC report on its own does not constitute conclusive evidence that transfer prices are not appropriate
- ◆ The information in the CbC report may be used as a basis for making further enquiries into the MNE's tax structure and allied matters.
- ◆ However, it should not be used by tax authorities to propose transfer pricing adjustments based on a global formulary apportionment of income

CbC Report (contd..)

Establishing substance/
Confidentiality

Risk and readiness
assessment

Defend the overall
design of the group

CBC report will enable the tax authorities to compare the revenue/income accruing in a tax jurisdiction vis-à-vis, the tangible and intangible assets situated in the tax jurisdiction, the number of employees, the income tax actually paid on the earnings in that jurisdiction

Identify the availability of data and potential weaknesses in the tax structures or in control over certain (business) processes

The methodology of doing business, the structuring of the operations, the housing of assets and income in various entities and having robust documentation to demonstrate control manifest in each legal entity

CbC Report (contd..)

Identification of
resources

Planned policy

Preparedness

Undertake the
exercise of
documentation

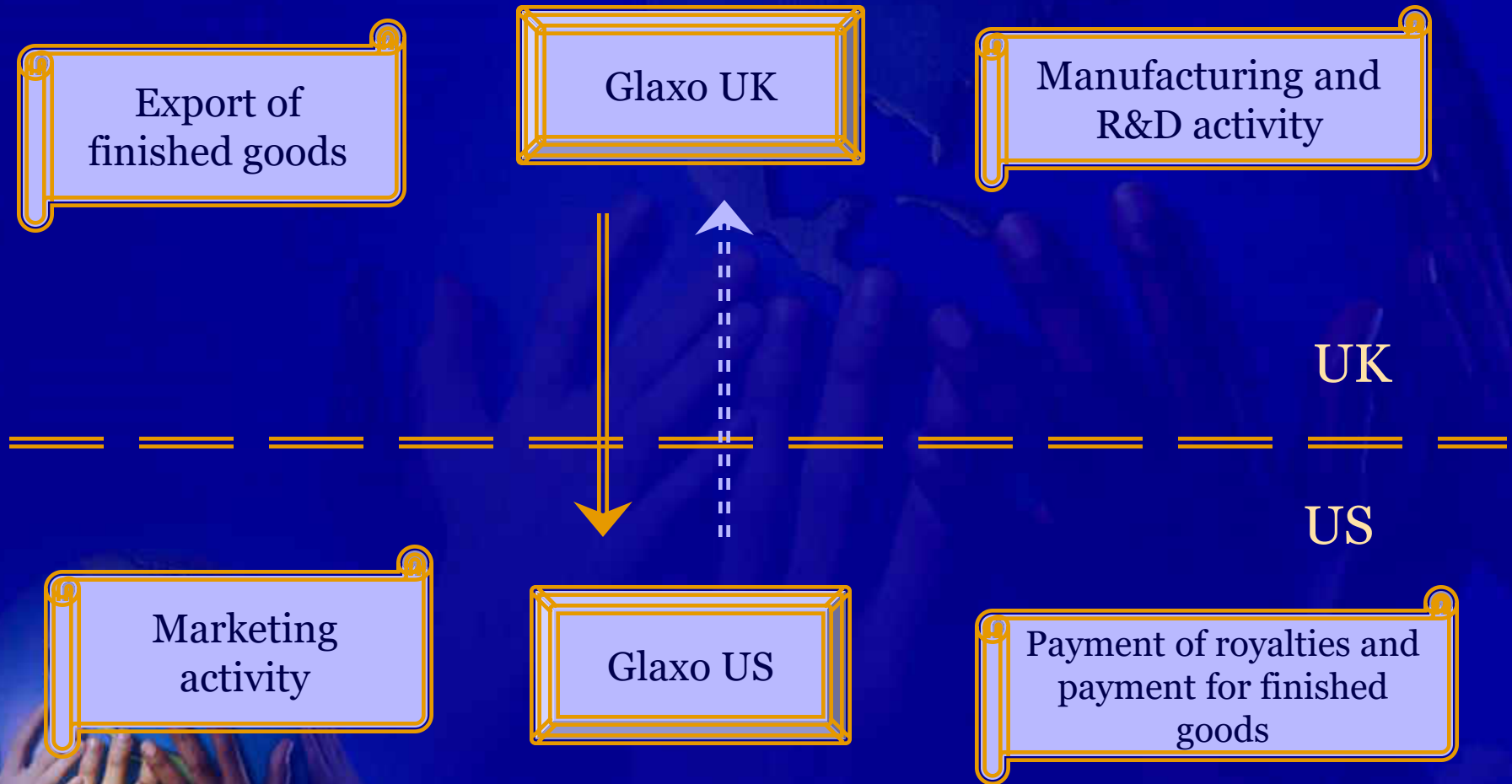
Exchange of requisite
information and to
facilitate the co-
ordination of the
same between all the
legal entities and the
reporting entity

The tax, finance and
IT departments are
in a state of
preparedness for
CBC reporting.

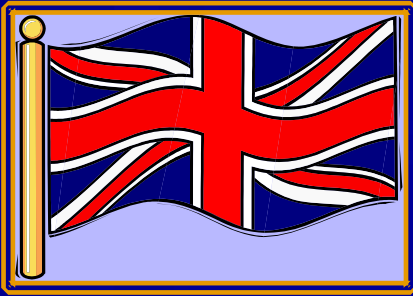
Case Study - Glaxo



Glaxo....

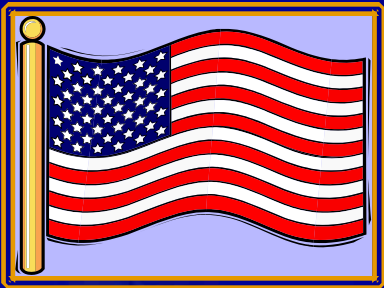


Glaxo.....



◆ Glaxo UK

- ◆ engaged in manufacturing activity
- ◆ heavy investment in R&D
- ◆ 1975-1985, R&D cost of GBP 60 million



◆ Glaxo US

- ◆ reseller for finished goods
- ◆ undertakes marketing and distribution activities

Glaxo.....

◆ Facts Of The Case

◆ SmithKline drug – ‘Tagamet’ – leading anti-ulcer drug

◆ Enter ‘Zantec’ – Glaxo competitor

◆ Year 1986 - Zantec overtakes Tagamet as best-selling prescription

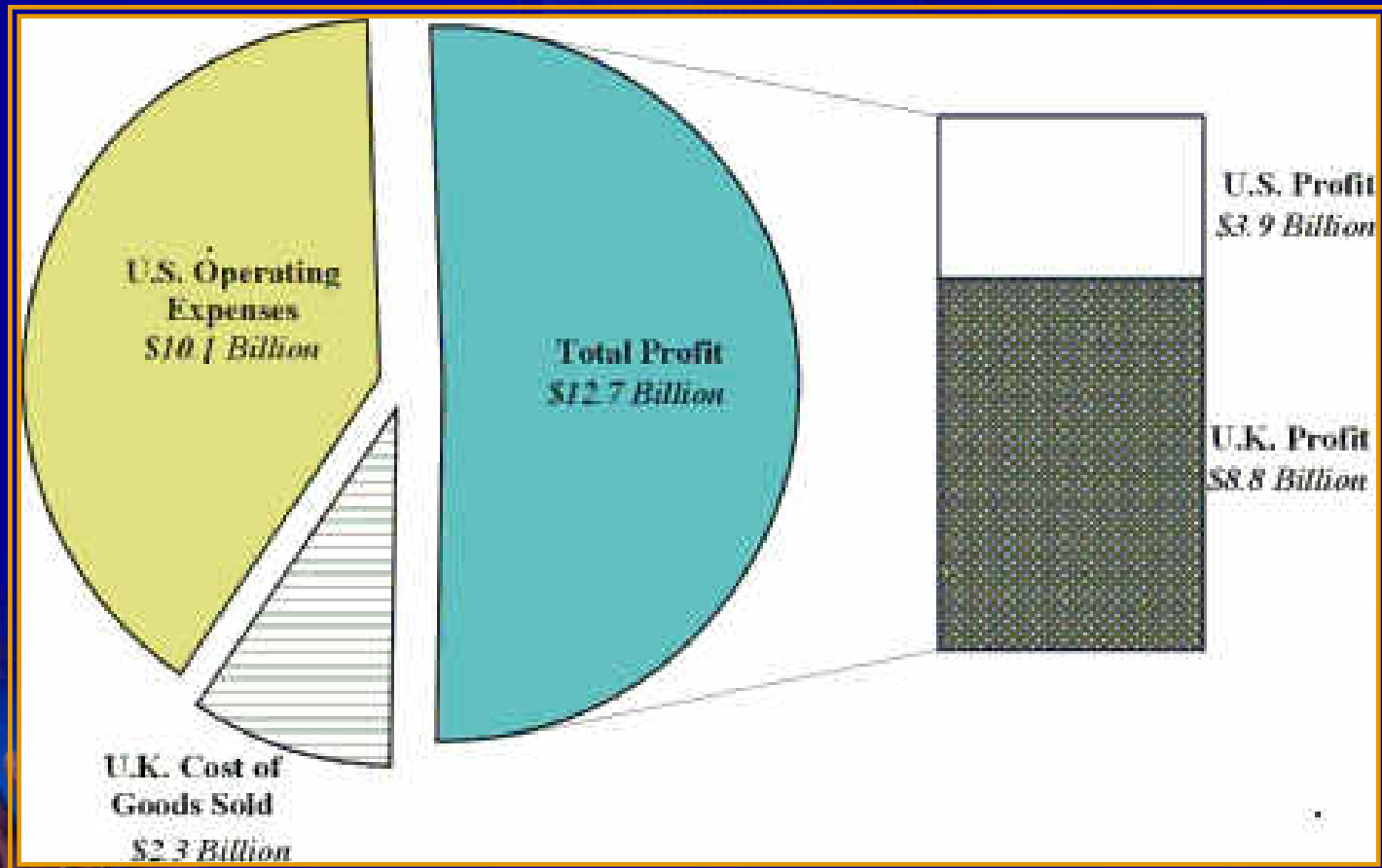
◆ R&D facility

◆ Marketing and distribution functions carried out by Glaxo US



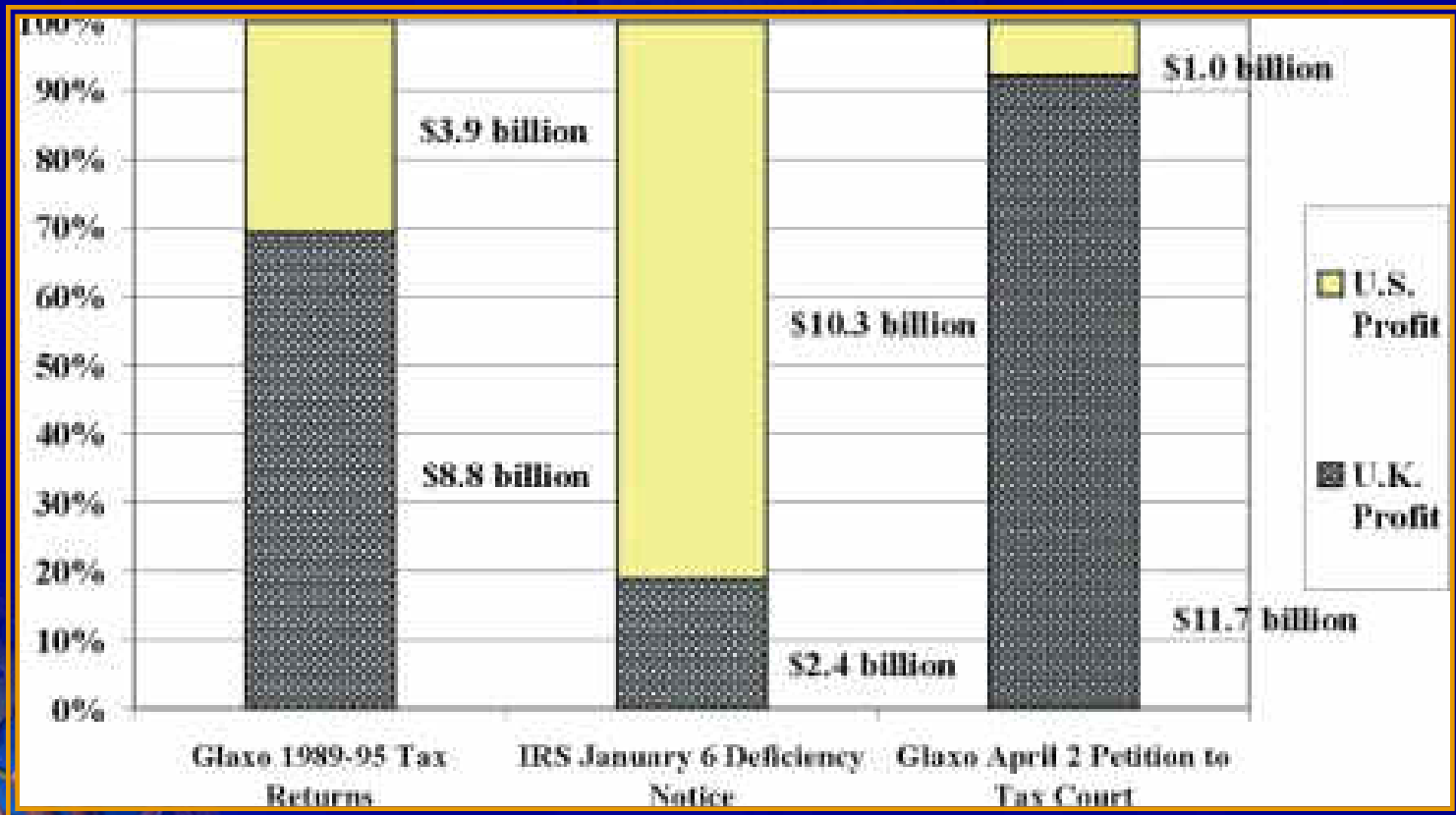
Glaxo.....

Cost And Profit Allocation For 1989-1996



Glaxo.....

IRS & GLAXO Standpoints – A Comparison



Glaxo...

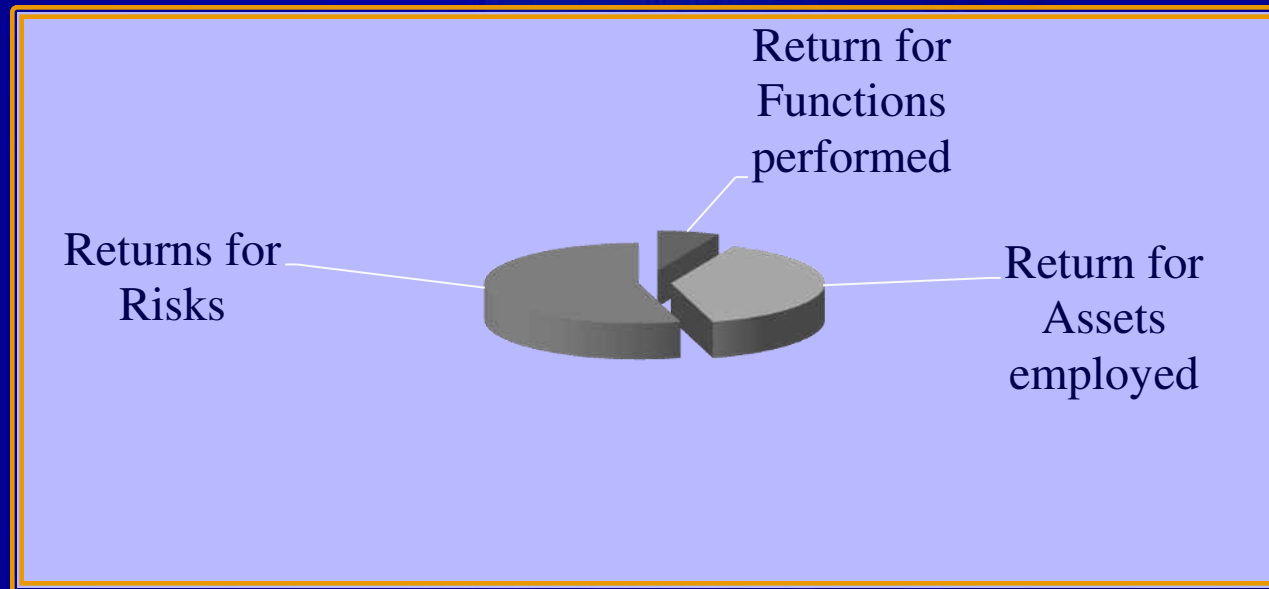
◆ Key Issues

- ◆ What are the drivers for making healthcare professionals prescribe Zantec?
- ◆ What is the extent of the role played by marketing?
- ◆ For the pharmaceutical industry, where does the value lie – in R&D or marketing?
- ◆ What are the attributes of marketing or R&D in an industry like pharmaceuticals?



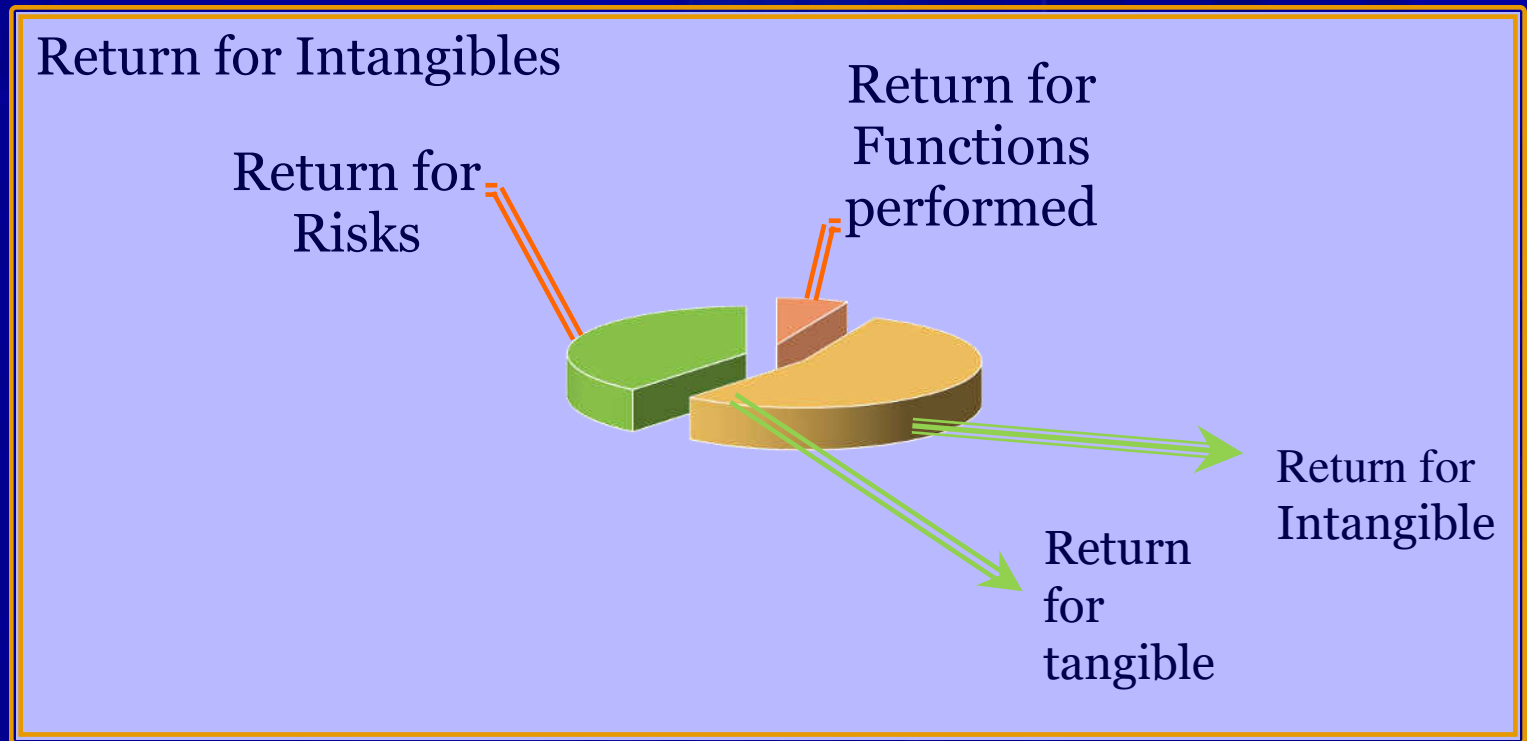
Glaxo.....

Key Issues – Returns To Risk Vis-à-vis Intangibles



- ◆ Intangibles Returns - a function of Functions performed, Assets employed and Risks borne
- ◆ Traditionally, Risks attributed maximum return

Ratio of the case...



- ◆ Assets employed include intangibles contributing significantly
- ◆ Hence, intangibles to be attributed substantial share of return

Case Study – GE Energy Parts Inc.



Delhi High Court
(HC)

GE Energy Parts Inc. (HC)

◆ Facts of the case:

- ◆ GE Energy Parts Inc (GEPI or assessee) is incorporated in USA and is a tax resident of USA engaged in the business of manufacture and offshore sale gas turbine parts and sub-assemblies
- ◆ General Electric International Operations Company Inc. (GEIOC) another US incorporated company, set up a liaison office (LO) in 1991 in New Delhi only to act as a communication channel and not carry on any business activity
- ◆ GE India Industrial Pvt. Ltd (GEIPL) is incorporated in India and provides marketing support services
- ◆ GEIPL entered into a global service agreement (GSA) with GEIOC for providing marketing support services to GE affiliates including GEPI

GE Energy Parts Inc. (HC)

- ◆ The GSA forbids GEIPL from:
 - ◆ entering into any contract on behalf of GE Group
 - ◆ from acting as an agent for any GE Group
- ◆ A survey was conducted on the premises of the GEIOC (AIFCAS building) and later on summons were issued under section 131. Based on the information gathered, the assessee was held to have fixed place PE (FPPE) and dependent agent PE (DAPE)
- ◆ The assessing officer (AO) deemed 10% of the supplies to Indian clients as profits and attributed 35% of such profit to GEPI, considering it a PE in India
- ◆ The CIT(A) upheld the order of the AO

GE Energy Parts Inc. (HC)

Observations, Analysis and Decision of the ITAT:

- ◆ On further appeal by the assessee, the ITAT held that AIFCAS was a fixed place from which the business of the assessee was partly carried on. It further held that the activities carried out from such fixed place were not of preparatory or auxiliary character
- ◆ ITAT observed that the nature of activities done by GE India, were of a core nature, and they demonstrated its authority to conclude contracts on behalf of GE overseas entities. So GE India constitutes DAPE of all GE overseas entities
- ◆ The ITAT attributed 26% of profits to GEPI instead of 35%, as estimated by the AO

GE Energy Parts Inc. (Delhi HC)

Observations, Analysis and Decision of Hon'ble HC :

◆ Fixed place PE

◆ The HC observed that GEPI is engaged in manufacturing and supply of highly specialized and technically customized equipments

◆ The HC held that the “core activity” of :

◆ developing the customer,

◆ approaching that customer,

◆ communicating the available options,

◆ discussing technical and financial terms of the agreement,

◆ price negotiations,

was a collaborative process in which the potential client along with the employees of GEIPL and its experts, had to intensely negotiate the intricacies of the technical and commercial parameters of the contracts

GE Energy Parts Inc. (Delhi HC)

◆ Observations, Analysis and Decision:

◆ Fixed place PE

◆ The HC concluded that the discharge of vital responsibilities relating to finalization of commercial terms, or at least a prominent involvement in the contract finalization process, discussed by the revenue authorities, in the present case, clearly revealed that GEPI carried on business in India through its fixed place of business (i.e. the premises/ AIFCAS)

GE Energy Parts Inc. (Delhi HC)

◆ Observations, Analysis and Decision:

◆ Dependent Agent PE

◆ The HC further held that, where technical officials having varying degree of authority involve themselves – along with local managerial and technical employees, in:

◆ contract negotiation,

◆ core or “key” areas,

◆ modification of technical specifications

◆ the negotiations for it

◆ to fulfill local needs and even local regulatory requirements,

◆ the complexities of price negotiation, etc.

clearly show that GEPI carries out business through the PE in India

GE Energy Parts Inc. (Delhi HC)

◆ Observations, Analysis and Decision:

◆ Attribution of profits to PE in India:

◆ The HC having regard to the facts of the case upheld the attribution of income to the extent of 10% and apportionment of 3.5% of the total values of supplies made to the customers in India as income



Thank You

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