



THE CHAMBER OF TAX CONSULTANTS

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CERTIFICATE COURSE ON THE MULTI LATERAL INSTRUMENT ON 13TH OCTOBER, 2018

Panel Discussion

Case Studies by – CA Vishal J. Shah

Case Study I – Agency PE

X Ltd a UK incorporated company, is a leading player in the branded medical appliance business around the world. It has several branded high value medical appliance products as part of its product portfolio. Y Ltd is a company set-up in India. Y Ltd is held 40% by X Ltd and balance 60% by an Indian joint venture partner unrelated with X Ltd

In terms of the arrangement between X Ltd. and Y Ltd :

- Y Ltd will provide marketing and distribution support to X Ltd in relation to sale of its branded medical appliance products in India. Indian customers will place orders directly with X Ltd
- Y Ltd has also nominated X Ltd an approved agency to provide post sale technical and maintenance support directly to the Indian customer for the X Ltd products. For this purpose, Y Ltd will independently engage with the Indian customers.

Besides the marketing, distribution and after sales services as above, Y Ltd is also engaged in trading of medical appliances of other brands (besides that of X Ltd). In relation to the traded products, Y Ltd enters into sales contract with Indian customers in its own name.

On an overall basis, the total revenue and profit proportion of Y Ltd from the above 3 activities is as under:

Activity	Revenue Proportion	Net Profit Proportion
Distribution and Marketing support to X Ltd	Marketing and distribution support service fee – 30%	80%
After sales support for X Ltd products to Indian customers	After sales service fee – 10%	10%
Trading of other brand products	Sales revenue from traded products – 60%	10%

As part of the marketing and distribution support, the employees of Y Ltd engage in the following activities in relation to the products of X Ltd

- Market research and analysis
- Advertisement and promotional events
- Participation in industry exhibitions
- To spread awareness about the product
- Identify new potential customers and provide technical and commercial information about the products of X Ltd
- Provide information about the customer and their product requirement to X Ltd personnel in the UK
- Hold meetings with customers in India to provide price and other sales related information, technical specifications, (delivery schedule, payment terms, warranty, etc.) as conveyed by X Ltd personnel
- Participate in joint negotiation meetings between the Indian customer personnel of X Ltd and Y Ltd for the purposes of finalizing the sales contract and the key terms thereof
- Carry out logistics and account management activities involving delivery and schedule, invoicing and accounts settlement co-ordination between X Ltd and the Indian customers

On the other hand, X Ltd personnel engages in customer evaluation (market standing, credit analysis, profile, etc.) as they are extremely conscious that their products are sold through appropriate customers only. The final sale of products is approved by X Ltd's sales manager in UK.

Issues arising for consideration

- Whether the activities of Y Ltd will result in business connection under the amended provisions of Section 9 (1)(i) of the Income Tax Act, 1961 ('the Act')

- Whether the activities of Y Ltd will result in PE under the provisions of the India UK tax treaty

- Whether the MLI amendment vide Article 7 (Agency PE) will impact the conclusion under the treaty, assuming the same are incorporated in the India-UK tax treaty without any reservations

Case Study II – Anti-fragmentation

P Ltd is the parent entity of a leading kidswear group headquartered in France. P Ltd sells its products across the globe by appointing low risk distributors in the respective countries.

For the Indian market, P Ltd has set up Q Ltd, a 100% subsidiary in India. Q Ltd will act as trader distributor for P Ltd's products in India. In turn, Q Ltd will purchase the products from P Ltd and / or its associates around the world.

Q Ltd will sell the products to the Indian retailers in its own name. However, the product will be sold as per the standard guidelines and parameters provided by the brand owner – P Ltd in terms of:

- Pricing guidelines
- Marketing schemes and incentives to be rolled out to distributors
- Adherence to the packaging and delivery / logistics related operational guidelines of P Ltd
- Approval of the retailers to whom Q Ltd sells the products must be obtained from P Ltd
- Imposition of in-store operating guidelines on the Indian retailers
- Season-wise introduction of products and specific discount schemes as per the global roll-out plans approved by P Ltd's marketing team in France

Besides, the employees of Q Ltd will be trained by P Ltd in terms of the global best practices relating to the usage and sale of the branded product to support the marketing and sales activities of Q Ltd in the Indian market.

Q Ltd is entitled to return its unsold inventory to P Ltd under a sales return scheme

P Ltd is separately indemnified by way of a separate compensation for any foreign exchange differences and bad debts arising in the course of import into and sale of the products in India.

P Ltd has also appointed an advertising agency to promote its brand in India by way of advertisement in local media, hoardings and events as also identifying and appointing brand ambassadors. P Ltd spends a considerable amount of advertising budget for this purpose in India. Q Ltd is not involved in the brand advertisement activities.

P Ltd is also evaluating hiring warehouse space from a third party clearing and forwarding agent so as to be able to meet the just-in-time inventory demands of the Indian market.

P Ltd sends its personnel for periodic review of the Indian market and meeting the large retailers in India. During these meetings, no sales discussions are carried out.

Separately, P Ltd has also set up a branch office in India for the procurement of its products from approved Indian vendors (contract management). A separate procurement team of P Ltd operates from the branch office in India. The product so procured through India are for sale in the global markets and are shipped to a warehouse of P Ltd in Indonesia. It may be possible that some of the India procured products are shipped back for sale in the Indian market as part of the global supply chain management of P Ltd. However at the time of export from India, it is not clear as to whether the goods will be shipped back to India.

Issues for consideration

- Whether the above arrangement will lead to a PE of P Ltd in India under the India-France tax treaty post the MLI amendments are given effect to.

Case Study III – PPT impact on specific exemptions in tax treaties

A Ltd is a global business conglomerate with business interest in the Industrial products, Aerospace, FMCG, Insurance and Financing sectors spread across the globe. A Ltd has set up / acquired nearly 200+ subsidiaries / joint ventures across different countries.

A Ltd’s management is evaluating setting up a new Aircraft leasing business which will cater to the leading airlines operating in several countries globally. For this purpose, the tax head of A Ltd has suggested that A Ltd set up a 100% entity in Ireland and fund it largely by way of loans from the parent A Ltd.

One of the key reasons is that Ireland is an established hub in the equipment leasing industry. Besides, Ireland also has a vast tax treaty network with several countries (where the potential airline customers of A Ltd will be rendered) which specifically exclude “**payment for use of industrial commercial or scientific equipment**” from the scope of royalty taxation under the said tax treaty between the country of A Ltd and

Ireland. Further, the tax treaty between the country of A Ltd and Ireland provide for zero withholding tax on interest payments by a company resident of a contracting state to a resident of the other contracting state.

You have been approached by A Ltd to provide your recommendation on the suitability of the above proposal.

Issues for consideration

Please help management of A Ltd to identify the factors relevant to evaluating the suitability of setting up the aircraft leasing company in Ireland and funding it by way of debt in the context of Irish Co receiving aircraft lease rentals from Airlines resident in India.

