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India**India: Tax Disputes Over BMW, Suzuki Show Facts Work Best**

By Siri Bulusu

Multinational companies operating in India continue to face transfer pricing litigation due to the government's lack of guidance on the tax treatment of marketing intangibles, but practitioners say there are fact-based arguments that could help taxpayers in court.

Two recent Income Tax Appellate Tribunal decisions—involving BMW India Pvt. Ltd. and Maruti Suzuki India Ltd.—highlight how diverse transfer pricing facts can sway the judiciary either in favor of taxpayers or tax authorities, causing a great deal of uncertainty among subsidiaries performing some marketing and advertising functions for their parent companies.

The Income Tax Appellate Tribunal Bench 'I' in New Delhi on Nov. 9 ruled in favor of Maruti Suzuki India, where an income adjustment of 4.32 billion rupees (\$66,487,943) for advertising, marketing, and promotional (AMP) expenses was removed by the tribunal, which cited a previous High Court judgment with similar facts.

On Nov. 10, a different Income Tax Appellate Tribunal, based in New Delhi, cited a High Court judgment while upholding a transfer pricing adjustment of 858 million rupees (\$13,198,461) on the income of BMW India, stating that the payments were in the nature of advertising, marketing and promotional (AMP) expenses.

"In both cases, the ITAT benches have followed precedence in the line of past orders, so right now we have to wait for an outcome from the Supreme Court which is of utmost importance for both taxpayers and tax authorities," Nitin Narang, executive director for international tax and transfer pricing at Nangia & Co. LLP, told Bloomberg Tax Nov. 20.

The tribunal must compute the income adjustment based on facts from the transfer pricing authority, a major hurdle since there isn't yet a standard computing mechanism recommended by India's tax authority, Narang said. But the question of computing the adjustment could potentially not exist if the Supreme Court determines that AMP expenses aren't international transactions subject to tax in India in the first place, Narang said.

"If the ITAT has all the facts in front of them, it becomes easier to adjudicate, but without all the information it becomes a vicious circle between transfer pricing officers, tax payers and tax tribunals because they need to do the computation but don't have the tools," Narang said.

Finding the Facts

In the case of Maruti Suzuki India, a subsidiary of Japan-based Suzuki Motor Corporation, the transfer pricing adjustment was struck down since the facts of the case showed that the India subsidiary owned the trademark under which it was manufacturing cars and that AMP expenses incurred were incidental.

"In some cases it is possible for companies to say they are under no obligation to their parent company and that expenses incurred that could be viewed in the nature of AMP expenses are voluntary," Sumeet Khurana, director of direct tax at Lakshmikumaran & Sridharan Attorneys, told Bloomberg Tax Nov. 17.

An agreement dated Jan. 1, 2006 between BMW India and its parent company led Indian transfer pricing authorities to consider AMP expenses in assessment year 2010-2011 as international transactions, since the agreement specified that BMW India was expected to follow global guidelines "in terms of usage of BMW banners, specifications of release of print advertisement" and also because BMW India's ratio of AMP expenses to sales was "exorbitant."

Snapshot

- Advertising, marketing expenses for subsidiaries of BMW, Suzuki treated differently
- Contractual details should be reviewed by taxpayers, practitioners say

Practitioners said the agreement's details led the tribunal to uphold the adjustment since BMW India couldn't refute that the parent company gave explicit directions in the nature of advertising and brand promotion.

In similar cases decided in favor of the taxpayers, tax authorities were unable to produce such specific documentation, which Khurana said is a key factor when deviating from other High Court precedents.

Other Arguments

Several other legal arguments can help taxpayers succeed in similar litigation—like using the transactional net margin method initially where net profit is tested after charging AMP expenses, Khurana said. That way the the AMP expenses can't be tested under another transfer pricing method as it would lead to “unlawful double scrutiny.”

Khurana also said that if a transfer pricing adjustment is warranted on account of AMP expenses, the additional income beyond the arms-length price earned in other international transactions will be set off against the adjustment and a final adjustment to income will be confined to only the net amount.

If the Supreme Court deems AMP expenses aren't international transactions, the computational method will no longer be an issue. But until then, taxpayers should review their contracts and documentation when it comes to AMP transactions, since lack of legal guidance is unlikely to come soon, the practitioners said.

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