

Handpicked Transfer Pricing rulings - 2016

- By Rakesh Nangia (Managing Partner, Nangia & Co) and Amit Agarwal (Partner)

An Introduction

The year 2016 will be commemorated for mixed bag of various milestone and controversial TP rulings. The Indian courts dealt with various long pending as well as certain new TP issues during the year. In this article, we have attempted to delineate some of the key TP rulings by Indian courts which have sought to create a seethe in the Indian TP landscape, and in certain cases also provided the desired level of clarity and guidance. These rulings are significant from the perspective that they have either been able to settle or provided limpidity on long pending diversified TP issues. Further these rulings would apparently highlight the genuine efforts of the Indian Courts to find solutions to complex problems and resolve disputes. This can be seen from the conduct of Indian Courts' proceedings in the year 2016 which, to a large extent, were guided to assess actual conduct of taxpayers over their contractual obligations. Having said that, the Indian tax authorities are considered to be the most aggressive (after Japan) owing to the adoption of aggressive positions. India also accounts for more than half of the total number of TP cases around the globe.

Some of the key TP issues which were addressed in the following rulings by Indian courts in 2016 were pertaining to Base Erosion; deemed associated enterprise ("AE"); applicability of Indian TP regulations; re-characterization of transaction; excessive advertising, marketing & promotional ("AMP") expenditure leading to a marketing intangible; attribution of profits; and corporate guarantee etc.

Key TP Rulings that Shaped Indian TP Arena in 2016

A brief analysis of the few of important rulings (issue-wise) that have been pronounced by Indian courts in 2016 have been tabulated as under. Further, for the ease of the readers, the rulings highlighted in "green" are the pronouncements by the Indian Courts in favour of taxpayer and the rulings highlighted in "red" are against the taxpayers.

1. <i>Applicability of Indian TP provisions</i>	
1.1 IJM (India) Infrastructure Ltd. Vs. DCIT¹ - Transaction amongst Indian taxpayer and Indian Permanent Establishment ("PE") of overseas group entity does not fall within the ambit of 'international transactions' as defined under Indian TP provisions	
<i>Ruling of the Court</i>	The Hyderabad Income-tax Appellate Tribunal ("the Tribunal"/ "the ITAT") drew observation from provisions of Section 92A(1) and 92A(2) of the Income-tax Act, 1961 ("the Act") and held that that to qualify a transaction to be an international transaction, at least one among the entity must be non-resident and in the instant case as both the taxpayer and the Indian PE of its overseas group entity are subject to be taxed in India, any transaction between them will not constitute an international transaction.
<i>Key Takeaways (to capture the TP Issue addressed/settled)</i>	For Indian taxation purposes, the Indian PE of a foreign entity is considered to be non-resident . However, the ITAT, in instant case, has given due weightage to the merits of the case and conceived a contrary view of considering the Indian PE of an overseas entity as residents in the event of analyzing its transaction with Indian group entity. Such position taken by ITAT is welcomed by taxpayers who are facing similar issues while dealing with its foreign group entities' Indian PE.

¹ [TS-671-ITAT-2016\(Hyd\)-TP](#)

1.2 D B Corp Ltd. Vs DCIT² - For examining the applicability of Domestic TP (“DTP”) provisions, the High Court (“HC”) allowed the TP assessment proceedings to carry on further and to keep the debate open form analyzing shareholding pattern of the directors and their relatives

Ruling of the Court	Holding in favour of the Revenue, the Gujarat HC dismissed the taxpayer’s petition of setting aside the TP reference made by Assessing Officer (“AO”) in the instant case. The HC noted observations from Veer Gems vs. Assistant Commissioner of Income Tax [TS-670-HC-2011(GUJ)-TP] and stated that the AO must be completely satisfied that it is expedient to make reference to the TPO. The HC, keeping in mind the requisite evidences suggesting that directors (including their relatives) of the taxpayer, in aggregate held more than 20% of the shares in another Indian entity and the fact that aggregate value of taxpayer’s transaction with such other Indian entity exceeded INR 5 crores, allowed TP procedure to carry on further without disrupting it at intermediary stage.
Key Takeaways (to capture the TP Issue addressed/ settled)	As the first year of TP audit of transactions covered in Indian DTP provisions has embarked on, it is expected that the same will navigate the Indian TP regime towards new set of challenges with significant TP additions. In the instant ruling, the HC has kept the debate open for one of crucial aspects of examining the shareholding pattern (i.e. individual vs. aggregated) to analyze the applicability of DTP provisions. It would be interesting to see the construction of the appellate authorities (later during the course of proceedings) while analyzing provisions of Section 40A(2)(b) of the Act.

2. Base Erosion Theory

2.1 Instrumentarium Corporation Ltd Vs ADIT³ - Imputing interest on an interest free loan advanced by a foreign entity to its Indian counterpart does not tantamount to re-characterization of transaction and the same does not result in Revenue’s Base Erosion in India

Ruling of the Court	<p>Suspending the taxpayer’s contentions on “Base Erosion” theory, the Special Bench of the Kolkata ITAT adjudicated that the actual “base erosion” will be the scenario of non-taxing of interest on an interest free loan wherein the Indian tax authority is certain to have its tax base eroded to the extent of arm’s length interest rate.</p> <p>The ITAT further clarified that assigning an arm’s length interest to an interest free loan does not tantamount to re-characterization of the transaction and thus the Revenue is correct in invoking the TP provisions and thereby computing the arm’s length interest rate on the loan advanced by the taxpayer to its Indian subsidiary. The Tribunal categorically emphasized that Indian tax laws nowhere provides for any circumstances which support a corresponding deduction in the hands of Indian entity in the event if the new income is brought to tax in the hands of its overseas counterpart.</p>
Key Takeaways (to capture the TP Issue addressed/ settled)	<p>This is for the first time when the Indian Courts have talked about the “corresponding/ correlative adjustment” on account of arm’s length price adjustment. The ITAT has also viewed the concept of “base erosion” in the light of Indian tax legislation rather than considering an overall holistic view in relation to the taxability of the taxpayer and its AEs in India.</p> <p>In addition to the above, the concept of erosion of India tax base from the stand point of intra-group services transaction has been discussed in the case of Mercer Consulting India Pvt Ltd [TS-495-ITAT-2016(DEL)-TP] wherein the ITAT held that TP provisions cannot be invoked in respect of intra group services which formed part of the cost base of the assessee, for the reason that, “for every rupee of ALP adjustment in intra group service, the revenue of the assessee, on the basis of application of arm’s length price, will stand reduced by one and one fifth times of the ALP adjustment”, and thus application of ALP adjustment will result in erosion of Indian tax base as per</p>

² [TS-607-HC-2016\(GUJ\)-TP](#)

³ [TS-467-ITAT-2016\(Kol\)-TP](#)

	Sec 92(3) of the Act. Additionally the same base erosion theory, from the standpoint of intra-group transaction pertaining to the import of finished goods in the case of Merck Ltd [TS-608-HC-2016(BOM)-TP] wherein the HC held that accepting Revenue's argument (i.e. assessee's import price was lower than the fair value), would result in TP adjustment of allowing higher purchase price to the assessee-company & thereby reducing income taxable in India, which is not permissible as per Indian TP regulations.
2.2 Cummins Inc Vs Assistant Commissioner of Income Tax⁴ - The scenarios wherein the arm's length price determination of the international transactions results in decline in the Indian tax base, the Indian TP provisions are not applicable in such instances	
Ruling of the Court	While deleting the TP additions made in respect of the provision of services by taxpayer to its Indian subsidiary, the Tribunal held that the aforesaid action of the TPO, by using actual cost method, would result in recovering more from the Indian concerns. Thus, the taxpayer recovering more money from its Indian AEs would lead to erode the overall tax base in India which eventually would result in violation of the provision of Indian TP provisions outlined in Section 92(3) of the Act.
Key Takeaways (to capture the TP Issue addressed/ Settled)	While analyzing the applicability of provision of Section 92(3) of the Act, the ITAT did not consider the findings of the Special Bench of the Kolkata Tribunal in case of Instrumentarium Corporation Ltd Vs ADIT [TS-467-ITAT-2016(Kol)-TP] wherein the tax base erosion theory was analyzed from Indian perspective. Further the ITAT, in the instant case remained completely silent on the concept of "correlative adjustment provisions" which do not form part of India tax legislation. The similar view has been taken by the ITAT in case of Woco Motherson Advanced Rubber Technologies Limited Vs DCIT [TS-896-ITAT-2016(Rjt)-TP] wherein the Tribunal held that while evaluating the arm's length price of intra-group service, the real question that needs to be analyzed by lower tax authority is whether the price of services is what an independent enterprise would have charged in an independent economic scenario regardless of the tax jurisdiction of the service providing entity.
3. Deemed AE	
3.1 Page Industries Limited Vs DCIT⁵ - While examining the applicability of the definition of 'AE', the parameters articulated in sub-section 1 and 2 of Section 92A of the Act should be simultaneously fulfilled	
Ruling of the Court	The Bangalore ITAT, while setting aside the contentions of TPO for invoking the provisions of deemed AE [under Section 92A(2) of the Act], observed that the TPO's findings is merely based on the upper layer of facts surrounding Section 92A(2) of the Act without demonstrating the conditions laid down in the aforesaid section actually being satisfied or not. The Tribunal further held that the words of Section 92A(2) are amended by the Finance Act, 2002 which explained that unless the requirements of sub section (2) are fulfilled, the sub section (1) cannot be applied at all. To corroborate the same, the Tribunal stated that "while interpreting a provision in a taxing statute, a construction which would preserve the purpose of the provision should be adopted" .
Key Takeaways (to capture the TP Issue addressed/ Settled)	It seems to be landmark ruling wherein the Tribunal, for the first time, has made an in-depth analysis of the concept of deemed AE. The ITAT underlines the fact that while interpreting any provision in a taxing statute, wherein one or more construction are possible, then the construction upholding the purpose of the provision must be adopted so that the purpose of interpretation is not defeated.

⁴ [\[TS-751-ITAT-2016\(PUN\)-TP\]](#)

⁵ [\[TS-382-ITAT-2016\(Bang\)-TP\]](#)

3.2 Orchid Pharma Lt⁶ - Evaluating the extent of “influence” by one enterprise over another is significant for treating them to be deemed AE

Ruling of the Court	The Tribunal, on invoking the provisions of deemed AE [under Section 92A(2)(i) of the Act], adjudicated that although the provisions of Section 92A(2) of the Act are satisfied, but the mandate of Section 92A(1) of the Act is not much satisfied since the scale of business relations is quite insignificant. Based thereon, the Tribunal was of the view that there is no element of de facto control (in the light of influencing the price of goods) of the overseas entities over the taxpayer and thus, the same does not satisfies the mandate of Section 92A(1) of the Act. While concluding the same, the ITAT further analyzed the term ‘influence’ which should reasonably be construed by way of ‘strong negotiation power’ rather than influence simpliciter .
Key Takeaways (to capture the TP Issue addressed/ Settled)	This judgment can be seen as an extension to the ITAT ruling in case of Page Industries Limited Vs DCIT [TS-382-ITAT-2016(Bang)-TP] and Suttati Enterprises Pvt. Ltd. Vs. JCIT [TS-234-ITAT-2016(PUN)-TP] wherein it was held by the ITAT that provisions of sub-section 2 of Section 92A of the Act should read in consonance with provisions of sub-section 1 in order to consider an entity as a deemed AE. In the instant ruling the Tribunal put forward a close analysis of Section 92A of the Act by defining the provisions of sub-section 2 in distinct segments which clearly exposit the participation of one enterprise in management, control and capital of the other enterprise.

4. Attribution of profits

4.1 Adobe Systems incorporated Vs Assistant Director Of Income Tax and ANR⁷ - The Indian TP provisions can’t be read to impute hypothetical income in the hands of taxpayer

Ruling of the Court	The HC held that a holding company exercises control and management over a subsidiary would not render the subsidiary as a PE of the holding company. It is also held that since entire income of the Indian subsidiary of the taxpayer (which was taxed in India) was at arm’s length, it is undisputed that the “ real income ” of Indian subsidiary which is related to the activities carried out by the taxpayer has been brought to tax in India. In the light of the same, the HC clarified that provisions of Chapter X of the Act cannot be read as provisions to impute any hypothetical income in the hands of taxpayer.
Key Takeaways (In the form of TP Issue addressed/ Settled)	<p>The concept of applying the provisions of Chapter – X of the Act on real/ hypothetical income has been dealt for the first time by Indian Courts in the instant ruling. The Indian TP provisions can be applied to provide the framework to tax the real income of a taxpayer derived from the international transactions with its AE.</p> <p>Accordingly, the instant ruling may be considered as an extension to the earlier rulings in relation to the attribution of income to the Indian PE. One of such ruling is Taj TV Ltd [TS-1014-ITAT-2016(Mum)-TP] wherein the ITAT observed that application of arm’s length principle on the attribution of income in the case of a PE was first clarified and adjudicated by the Supreme Court in the case of Morgan Stanley & Co [TS-5-SC-2007] wherein SC, after analyzing the provisions of Article 7 and the TP provisions, held that where a PE has been remunerated on arm’s length basis, taking into account all the risk-taking functions of the enterprise, nothing further would be left to be attributed to the PE. The ITAT, in case of Taj TV Ltd (supra) also observed that this principle had been reiterated by Bombay HC in the case of Set Satellite (Singapore) Pte Ltd [TS-10-HC-2008(BOM)-TP] and B4U International [TS-246-HC-2015(BOM)]. The ITAT thus observed that if Taj India is being remunerated at arm’s length, then, no further income/profit can be said to be attributable to the assessee in India from PE. Noting that TPO had accepted the transaction between the assessee and Taj India at an arm’s length price, ITAT followed the SC ratio in Morgan</p>

⁶ [\[TS-943-ITAT-2016\(CHNY\)-TP\]](#)

⁷ [TS-243-HC-2016\(DEL\)-TP](#)

Stanley and held that “if the arm’s length price of the transaction has been accepted, between the assessee and Taj India, then nothing further should be attributable to the assessee which is to be taxed in India”.

5. Corporate Guarantee

5.1 Tega Industries Ltd. Vs DCIT⁸ - Extending corporate guarantee by Indian entity its overseas subsidiary is a ‘shareholder activity’

Ruling of the Court	The Kolkata Tribunal found merits in taxpayer’s contentions and stated that the taxpayer opted for providing a guarantee tête-à-tête blocking its own funds to facilitate furtherance of its own business and get return in terms of appreciation in value and dividends. The ITAT relied upon judicial precedents wherein it was held that corporate guarantee by an Indian entity to its overseas subsidiary is a “shareholder’s activity” and hence, no TP adjustment is required.
Key Takeaways (to capture the TP Issue addressed/ Settled)	The captioned ruling find support from the case of Micro Ink Limited [TS-568-ITAT-2015(Ahd)-TP] which confirms that providing corporate guarantee in respect of a loan extended to an AE cannot be covered under the ambit of TP provisions without placing emphasis upon the aim of the guarantor. If the intent of the taxpayer is furtherance of his own business objective, it will be wise to classify it as a shareholder activity. At the same time this ruling also refutes the ITAT pronouncements like Xchanging Solutions Ltd [TS-910-ITAT-2016(Bang)-TP] which considered the corporate guarantee to be an international transaction. Thus, the issue pertaining to guarantee remains unsettled and it is a high time when the Indian Government needs to provide certain guidelines to unclutter the ambiguity in this regard.

6. Foreign entity as ‘Tested Party’

6.1 GE Money Financial Services Pvt Ltd Vs. DCIT⁹ - Rejection of adoption of Foreign AE as “Tested Party”

Ruling of the Court	The Delhi Tribunal, while making reference to the provisions of Section 92B of the Act read with Rule 10B of the Income-tax Rules, 1962, held that whilst Transactional Net Margin Method is used to benchmark the transaction entered into between the taxpayer and its AEs, then it is the profit margin realized by the Indian taxpayer from the transaction with its foreign AE which is compared with that of the comparables. The ITAT opined that the underlying object and spirit of TP provisions is to avoid shifting of profits from the Indian tax base. In view of the same the consideration of foreign AE as the tested party “misses the wood from the tree by making the substantive section 92 otiose and the definition of ‘international transaction’ u/s 92B and rule 10B redundant and has no statutory sanction, is sans merit and hence jettisoned” under the Indian TP law.
Key Takeaways (to capture the TP Issue addressed/ Settled)	<p>This ruling makes a departure from the earlier rulings in the case of General Motors India Pvt Ltd [TS-215-ITAT-2013(Ahd)-TP] and TNT India Pvt Ltd [TS-920-ITAT-2016(Bang)-TP] and Ranbaxy Laboratories Limited Vs. ACIT [TS-173-ITAT-2016(DEL)-TP] wherein the ITAT allowed the taxpayers to consider their foreign AE as the tested party.</p> <p>The present ruling clearly focuses on the fact that the selection of foreign AE as tested party for the purpose of benchmarking a related party transaction has no sanction under the Indian TP laws. The ITAT has further made a close observation that when the profit margin of the Indian entity had to be ascertained at arm’s length price, the substitution of profit realized by the foreign AE with the profit realized by the Indian entity is patently unacceptable position.</p>

Re-characterization of transaction

7.1 Taurian Iron & Steel Co. Pvt. Ltd. Vs. ACIT¹⁰ - Refunded share application money (advanced by taxpayer to its

⁸ [TS-780-ITAT-2016\(Kol\)-TP](#)

⁹ [TS-457-ITAT-2016\(DEL\)-TP](#)

AE) is as good as a loan transaction	
Ruling of the Court	The Mumbai ITAT is of impression that <i>“re-characterization of a transaction is permissible only where the economic substance of a transaction differs from its form”</i> . Referring to the present case, the Tribunal pronounced that factum of advancing the amount by Indian entity to its AE and its subsequent repayment by the AE would fall within the ambit of awarding <i>simplicitor</i> advance, which consequently would render the color and character to transaction under review, as that of being a 'loan transaction'.
Key Takeaways (to capture the TP Issue addressed/ Settled)	<p>This ruling is completely controverts the earlier ITAT rulings viz. <i>Aditya Birla Minacs Worldwide Ltd [TS-114-ITAT-2015(MUM)-TP]</i>; <i>Mylan Laboratories Limited [TS-399-ITAT-2015(HYD)-TP]</i> etc. wherein the Tribunal had disregarded the lower tax authorities' view of re-characterization of share application money as loan and imputing interest on inordinate delay in share allotment or even no allotment.</p> <p>This ruling significantly departs from the established positions with respect to commercial expediency, substance over form, and also to a certain extent disregards the Supreme Court's ruling in case of <i>Vodafone India Vs. Union of India [TS-23-SC-2012]</i> which primarily considered the principle of “look-at” for examining an intra-group transaction from arm's length perspective</p>
7. Capacity Utilization Adjustment	
8.1 Frigoglass India Pvt Ltd Vs. ACIT¹¹ - Allowing the adjustment on account of underutilization of Capacity to the taxpayer; and reiterating that the economic adjustments can be made in the figures of the comparable entities and not of the tested party.	
Ruling of the Court	The Delhi ITAT allowed the economic adjustment owing to underutilization of capacity to the taxpayer post noting serious issues with respect to taxpayer's products and a fall in the production by over 64%. While doing so, the Tribunal set aside the TPO's contention that <i>“in the event of significant dip in profits of the taxpayer, its AE should have provided some price support to the taxpayer”</i> .
Key Takeaways	This ruling has clarified it is not necessary that any fall in utilization of capacity is required to be subsidized by the taxpayer's AE. This ruling makes a clear distinction from the ITAT's findings in the case of <i>DCIT Vs EDAG Engineers & Designs India Pvt Ltd [TS-318-ITAT-2014(DEL)-TP]</i> which provided that the scenarios of the AE supporting the taxpayer may exist or is applicable in case if the taxpayer is acts a one hundred percent captive unit (i.e. working exclusively for its AE).
8. TP reference made by AO is invalid	
9.1 Alpha Nipon Innovatives Limited vs DCIT¹² - The compliance of guidelines provided in CBDT's Notification No. 3/ 2016 is must for referring a case by the AO to the files of the TPO	
Ruling of the Court	The Gujarat HC, while upholding the contentions made by the petitioner, explained that the guidelines outlined in Para 3.4 and Para 7 of the notification No.3/ 2016 of CBDT, clearly provides that it is mandatory for AO to first provide an adequate opportunity to the taxpayer to show-cause as to why the reference should not be made to the TPO and thereafter, is required to pass a detailed speaking order while making such reference.
Key Takeaways (to capture the TP Issue)	The CBDT's Notification No.3/ 2016 has clearly paved way in respect of circumstances under which the cases selected for scrutiny by the AO may be referred to the TPO for determining the arm's length prices of international as well as specified domestic transactions of the taxpayer. The ruling brings clarity to the taxpayers' fraternity that the aforementioned guidelines clearly provide that AO

¹⁰ [TS-768-ITAT-2016\(Mum\)-TP](#)

¹¹ [TS-500-ITAT-2016\(DEL\)-TP](#)

¹² [TS-950-HC-2016\(GUJ\)-TP](#)

**addressed/
Settled)**

cannot refer a case to the TPO without providing an adequate opportunity to the taxpayer in this regard. Subsequently, the AO is required to pass a speaking order in this connection.

The Immortal AMP Issue

The issue of incurrence of excessive AMP expenditure by taxpayer and thereby benefitting its overseas group entity in promoting its brand/ trademark is one concerning the fundamentals of economics and TP. After couple of HC rulings¹³ passed in favour of the taxpayer in the year 2015, it was believed that the Indian Courts, to certain extent, have settled the issues revolving around marketing intangibles arising on account of excessive AMP spent. However, The AMP controversy seems refuse to die, as in 2016, the India's Apex Court had admitted the Revenue's Special Leave Petitions ("SLP") in case of excessive AMP expenditure in case of **CIT, Range – 6 Vs. Maruti Suzuki India Limited¹⁴; DCIT Vs. Honda Sael Power Products¹⁵; and CIT – 1 Vs. Amadeus India Private Limited¹⁶** which have created a new buzz in the Indian TP arena. Considering the divergent views by various judgments settling the AMP controversy, the likelihood of Revenue approaching the Supreme Court was significantly high. This move by the Revenue is seen as a setback in resolution of this long standing AMP issue.

The principle fall out of the admission of Revenue's SLPs by Hon'ble Supreme Court would be with respect to action of the lower level of AO/ TPO who would be now inclined to consider this as a basis to disregard the Delhi High Court judgments¹⁷ and proceed to make adjustment by considering the AMP expenditure as the "international transaction".

What the year 2017 has in store for Indian Transfer Pricing jurisprudence

The Indian Government has also taken steps to accelerate its efforts to improve the transparency of its tax administration and dispensation processes, in order to help businesses to operate unhindered by needless regulatory burdens, without impairing government revenue streams. This notion has been further fortified by the consultative process adopted prior to implementing changes in the tax legislation (including TP regulations). Releasing drafts for public comments before finalizing important rules and acceptance of court rulings signifies immense maturity and has rightly been proclaimed by the business and professional fraternity. With passage of time, the Indian TP regime has gradually evolved into a complex yet predictable regime. We anticipate that this will be another eventful year during which the subject of TP will continue to be at the centre of continuing controversy in corridors of Tax Head and CFO's office around the world. A combination of public debates on the ethics of tax planning, political and economic pressures, and increasingly well trained and networked TP officers will all contribute to a continuing rise in the number of TP disputes, especially with heightened transparency and disclosure requirements and free exchange of information amongst jurisdictions.

As the world is progressing, it becomes imperative for the tax administration as well as for the taxpayer community to contemporize their efforts in evolving a new epitome where the interest of the state is balanced with the ease of doing business. The year gone by has shown the way and it is expected all stakeholders to stay this course in the best interest of the nation.

¹³ Sony Mobile Ericsson Communications [\[TS-96-HC- 2015\(DEL\)-TP\]](#); and Maruti Suzuki India Limited Vs. CIT [\[TS-595-HC- 2015\(DEL\)-TP\]](#)

¹⁴ [TS-93-SC-2010](#)

¹⁵ [TS-631-SC-2016-TP](#)

¹⁶ [TS-478-HC-2015\(DEL\)-TP](#)

¹⁷ Sony Mobile Ericsson Communications [\[TS-96-HC- 2015\(DEL\)-TP\]](#); and Maruti Suzuki India Limited Vs. CIT [\[TS-595-HC- 2015\(DEL\)-TP\]](#)

(Amit Bhalla (Senior Manager), Hansa Bansal and Aakanksha Gupta provided valuable inputs in preparation of this article).