Tax Hotline

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AAR DENIES RULING ON A TRANSFER PRICING APPLICATION

Recently, the Indian Advance Ruling Authority ("**AAR**") had an opportunity to adjudicate upon transfer pricing questions raised for the first time in an advance ruling application by Instrumentarium Corporation ("**the Applicant**"), a Finnish resident. The AAR stated that adjudication on the issue raised by the Applicant was outside its scope and that the Applicant would be required to adhere to the Indian transfer pricing regulations.

The Applicant had given interest-free loan to its wholly owned subsidiary ("**Datex**") in India and raised, inter alia, the question before the AAR that applying arm's length price to this transaction would be detrimental to the Indian revenue base and hence this transaction should be outside the purview of the Indian transfer pricing regulations .

The Applicant contended that the fact that the loan was an interest free loan would work out to the benefit of the Indian Tax Authorities since under the India-Finland Double Taxation Treaty ("**Treaty**") any interest income of the Applicant would be taxed at a concessional rate, while under the Income Tax Act, 1961("**ITA**") the income of Datex would be taxed at the rate of 35%. This argument sprung from the fact that the interest free loan would enhance the profits of Datex and would thus increase the taxes collected in India on the transaction. The Applicant relied on Section 92(3) of the ITA which states that the transfer pricing provisions would not apply if the transaction carried out between two parties would lead to the erosion of the taxable revenue in India, if carried out at an arm's length. The Applicant also relied on the non-discrimination provisions under the Treaty and stated that as transfer pricing provisions did not apply to transactions between two Indian residents, applying them to the Applicant would be discriminatory.

The AAR held that the question raised did not relate to tax liability of the Applicant arising out of this transaction but related to consequences of implementation of transfer pricing provisions on the Indian exchequer. Therefore, the AAR was not bound to rule on the same. The AAR further held that even if the impact of applying arm's length price between two parties was detrimental to the tax revenue, it was for the income tax authorities to determine the same and thus allow the parties to the transaction not to carry out the same at an arm's length price and not the AAR.

The AAR also dismissed the non-discrimination contention raised by the Applicant and stated that non-discrimination provisions can only be invoked by the nationals (i.e. individuals) of the contracting states and not by a company. The AAR held that in any case, it was not open to either the Applicant or the AAR to determine the issue of the applicability of the transfer pricing provisions under ITA and the same would have to be determined by the income tax authorities at the time of assessment of Datex. The AAR took the view that determination of arm's length price involves determination of fair market rate of interest and that the same is outside its purview.Accordingly, the AAR stated that it cannot give a ruling on this issue. However, it ruled that the Applicant would be required to adhere to the transfer pricing regulations under the ITA.

It must also be borne in mind that an advance ruling is binding only on the parties to the ruling. As regards third parties, such a ruling would have only a persuasive value. This decision does not throw sufficient light on the ability of foreign companies to seek advance ruling on the applicability of transfer pricing provisions in India.

Source: Judgement of AAR in the matter of INSTRUMENTARIUM CORPORATION (A.A.R. No. 609 of 2003)

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