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Transfer Pricing

Problems, Strategies and Documentation

Recent International Case Law on Transfer Pricing

by

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TRANSFER PRICING

Content

SELECT CASES ON TRANSFER PRICING

*-by Nishith Desai**

Stimulated by the technological advancements, trade has not remained restricted to geographical limitations. It has enhanced its scope to encompass the resources from around the world, giving rise to various issues from commercial, business and tax perspective. These trade transactions have predictably caused and continue to cause large amounts of transfer of tangibles and intangibles, all across the globe. Following this, it became essential for governments all over the world to bring under their tax net, the transactions resulting from the transfer of such resources. Thus, restricted regional economies have been transformed to global economies and now are fast moving to the 'One World – One Economy' concept. Consequentially, transfer pricing, resulting from these numerous transactions, has become the 'buzz' word moving in the corporate circles.

Multinational corporations are expanding their activities on a large scale through the incorporation of subsidiaries in various jurisdictions. Democratization of information, finance provisions and communication technology enables smaller companies, firms and even individuals to become global players. Intercompany transfer of goods and services are increasing substantially in the current era of globalisation. These dealings with their subsidiaries have attracted the attention of the tax authorities since they involve transactions between related parties and associated enterprises. Thus, transfer pricing is one of the most crucial areas affecting the financial statements and taxation of the MNCs. Transfer pricing also plays a critical role in case of double taxation avoidance agreements between countries. Thus, most of the MNCs are anticipating the influence of transfer pricing on their businesses to an enormous degree. Though transfer pricing regulations have been around for some time now, there still exists a confusion in the minds of the company officials on various aspects like documentation, local guidelines, methods to be used, etc.

It is pertinent to note that in dealing with transfer pricing, various issues involving economic, legal and commercial implications have to be borne in mind. Before addressing the issue of the use of methods of transfer pricing, it is imperative to take the assistance of economists, legal counsels, accountants, etc. Economist play a very important as they are important in the analysis of market trends, movement in prices in the markets, returns to be accorded to

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parties and various other functional analysis. Economists also help understand the overall monetary impact on the country as a whole. Equally important is the role of legal counsels in the issues surrounding transfer pricing. Counsels help in examination of the relevant information, appropriate documentation required for complying with the legal requirements, to verify if there exist appropriate legal basis for making adjustments, for drafting agreements between parties to safe guard them from the consequences of default, to aid in case of litigations, for structuring the transactions between parent and subsidiaries, etc. Accountants are required by the regulations to certifie in case of any international transaction the documentation and information as required are adhered to and complied with. It would be very interesting to note at this point an important ruling given in the US in the case of DHL. The DHL ruling gives valuable guidance with regards to the selection of the consultants and the importance of their independence in the valuations and implementation of the transfer pricing laws.[1]

II. *History*

One of the pioneers in application of the principles of transfer pricing is the Unites States of America ("**US**"). Transfer pricing transactions in the US are currently governed by section 482 of the Internal Revenue Code ("**IRC**"). This section authorizes the Internal Revenue Service ("**IRS**") to reallocate income and deductions among parties owned or controlled, either directly or indirectly, by the same interests, "in order to prevent evasion of taxes or clearly reflect the income of any organizations, trade, or businesses.[2] Thus, section 482 is generally applied by the IRS in case of a transaction between a controlling and a controlled party to ensure that the dealings are done at an arms length standard. However, it is note worthy that it was not the provisions of section 482 which brought into existence the provisions on transfer pricing. The earliest statutory predecessor of section 482 can be found in § 262 of the 1921 Revenue Act, which permitted the Commissioner to prepare consolidated returns on behalf of controlled entities so as to enable them to reflect their true tax liability.[3] Further, under § 45 in the 1928 Revenue Act, the scope of the § 262 of the earlier act, was widened. This code is the direct predecessor of the current § 482. It gave the Commissioner the powers to see that there would be no evasion of tax by the related parties in transactions between themselves and that their tax returns reflected their actual incomes and deductions. § 45 of the 1928 Act became § 482 in the IRC of 1954, which has since then continued as the relevant section for transfer pricing regulations. However, towards the turn of the second half of the 21st century companies started doing business globally. The revenue authorities decided that instead of introducing new regulations it would be easier to expand the scope of the sections on transfer pricing to provide more definitive guidance with respect to allocation of income and deductions. As a result in 1968, the Treasury Department issued the regulations as they stand (mostly) today under § 482. Following the Tax Reforms Act, 1986, a study of different issues of transfer pricing was undertaken and in January 1992, the proposed regulations were issued which brought forth two important features, earlier not touched upon. One, the parties to conduct business as uncontrolled parties in establishing transfer pricing policies. Next, the regulations brought about three new methods for establishing the arms length price, for transactions of intangibles, namely the matching transaction method, the comparable adjustable

[1] For more clarity, please refer to paragraph 3 on page 13 of this article which gives the ruling in the DHL case.
[2] IRC § 482.
[3] *International Tax Transactions*, § 5:02 (edition 1997)

transaction method and the comparable profit interval. In January 1993, the Treasury Department released the Temporary and Proposed Regulations with certain changes. Finally on July 1, 1994 the Temporary and Proposed Regulations were adopted and are effective from since then.

Following the US, the Organisation for Economic Co-operation and Development ("**OECD**"), also initiated the formulation of the transfer pricing guidelines. The first guidelines were issued in 1979, which were substantially revised in 1995 to include more clearly the concept of comparability and also introduced the profit method for calculation of transfer pricing. Subsequently, in 1996 it added another chapter on intangibles and services, in 1997 on cost contribution arrangements, in 1998 on it published annexes containing the procedures on monitoring the implementation of guidelines and in 1998 OECD issued its guidelines on advance pricing arrangements under the mutual agreement procedures.

In the United Kingdom, the earlier transfer pricing regulations were covered under sections 770 to 773 of the Income and Corporation Taxes Act, 1988 ("**ITCA**"). New transfer pricing regulations were introduced through the Finance Act, 1998 and can be found in sections 770A and Schedule 28AA of the ITCA, 1988. These new legislations are effective on and from July 1, 1999. These new regulations do not define the arms length standard, but clearly requires that the company make adjustments in the income, profits and losses in case there are any adjustments made in the transaction which would otherwise not have been made in case of transactions at arms length. These legislations very clearly exclude all transactions between associated enterprises within UK, except where one of the associated UK taxpayers carries on business abroad and claims double taxation relief.

Following the global movement in transfer pricing, the Government of India, introduced through the Finance Act, 2001 (the "**Act**") the transfer pricing regulations replacing the existing section 92 of the Indian Income-tax Act, 1961 (the "**ITA**"). Transfer pricing regulations find forbearance in the earlier Income Tax Act of 1922, under section 42 of the said act. The earlier regulations were enforced when there were business transactions between Indian residents and a person not resident or not ordinarily resident and there existed a close relation between them. These regulations concentrated more on the profits that would have been made had the resident done business on ordinary commercial terms.[4]

Amongst others, an earlier and pertinent judgment which requires mention, is the ruling given in the case of *Mazagaon Dock Ltd v CIT*[5] by the Supreme Court. This judgment held that it would be business of the resident which would be chargeable to tax under the section 42(2) of the 1922 Act, and not the business of the non-resident. According to the facts of the case, there subsisted an agreement between an Indian resident company, and a subsidiary company of two non-resident companies. These non-resident companies were in the business of plying ships, while the resident subsidiary in the business of ship repairing. The resident company did business on a no profit basis i.e. it operated on a cost basis.

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[4] N.A. Palkhivala, *The Law and Practice of Income Tax*, pg.1004-05 Eighth edition, 1990 has citied Cf. s. 80J(6C)
[5] *Ibid*., 34 ITR 368

The issue addressed in this case was whether the dealings between the parties were covered under the provisions of section 42(2) of the 1922 Act.

The Supreme Court held that the dealings between the parties formed concerted and organized activities of a business character and the non-resident companies carried on business with the resident company, and the provisions of old s. 42(2) were attracted. The fact that the dealings were such as to yield no profit to non-resident companies was held to be immaterial.

Another recent development which attracts attention in the Indian context is the case of Roussel India. Income-tax (I-T) authorities in Mumbai, have initiated penalty proceedings against Roussel India, on charges of allegedly over invoicing the intermediates it had imported from a related company in France. Interestingly, the Revenue department in this case did the transfer-pricing assessment much before the enactment of the new transfer pricing laws.

Roussel's control over the Indian Company is through its 100 per cent subsidiary Roussel Laboratories, in the UK, which has a 33.33 per cent stake in Roussel India. There are common directors in Roussel Uclaf, Roussel Laboratories UK and Roussel India, so as to be governed by the related party transaction norms. Roussel India had merged with pharmaceutical major Hoechst Marion Roussel in 1998. The transactions in this case were the import of cefotaxim sodium and roxithromycin, materials used for making Claforan and Rulide - both antibiotics, from Roussel Uclaf, France.

According to the I-T authorities, the pricing strategy adopted by Roussel Uclaf and Roussel India was intended to project revenues, which were less than the actual. The department has contended that the over-invoicing was done for the purpose of recording a loss and, thereby, evading taxes in India. The transactions relate to assessment years 1996-97 and 1997-98.

I-T authorities contended that Uclaf over invoiced exports to India to such an extent that Indian operation to manufacture Claforan appeared to be running in a loss. Roussel Uclaf and Roussel India are related companies and, hence, Roussel Uclaf controlled the transaction.

The alleged over invoicing of cefotaxim compared to other importer manufacturers were 88 per cent and 164 per cent for 1996-97 and 1997-98, respectively, according to the estimation of I-T authorities. Similarly, in percentile terms, import of roxithromycin was over invoiced 109 per cent and 103 per cent respectively, for assessment years 1996-97 and 1997-98.

The case is now pending before the Commissioner (Appeal), Income Tax, which is the first Appellate Level for litigation before the revenue authorities.[6]

The earlier regulations though not wrong in their assertions had not covered certain contentious issues such as definition of terms which are covered in the new regulations. The new provisions are encompassed in section 92 to 92F of the Act. The Raj Narain Committee (the "Committee") was set up by the Central Board of Direct Taxes in India

[6] Source: The Economic Times, June 12, 2001.

("CBDT") to draft the provisions under discussion. These provisions are effective from April 1, 2001. The CBDT announced the final rules on transfer pricing in August 2001 which contains the list of methods and their selection and application as it is to be adopted for pricing of transactions.

The concentration of these provisions is not on curbing of tax evasion policies but more on ascertaining of jurisdiction for taxing these transactions. The provisions of this section apply to transactions entered into with non-resident parties. This means that atleast one of the parties to the transaction has to be a non-resident. Previously, in contrast, it was necessary that at least one of the parties to the transaction was an Indian resident. The Committee has endeavored to keep in mind some essential characteristics while drafting the transfer pricing norms like simple management, differential tax rates that apply to associated enterprises in different jurisdictions, tariff differentials and so on. The provisions of these sections clearly define the terms 'arms length transaction', 'associated enterprises', etc. Transfer pricing provisions primarily require any income arising from an international transaction to be computed "having regard to the arm's length price".

Thus, it can be seen that transfer pricing has far and wide reaching impact in the business world. In this paper, an attempt has been made to bring out from the plethora of cases, a few select cases which stand as landmark judgments and bring forth various issues arising out of transfer pricing regulations in various jurisdictions like USA, Australia, UK and Canada, the thrust being on USA, since it has regulations dating back to 1921. The United States has taken a lead in enforcing its transfer pricing regulations for many decades. Consequently, the United States has a humongous volume of sophisticated judicial precedents in the transfer pricing arena.

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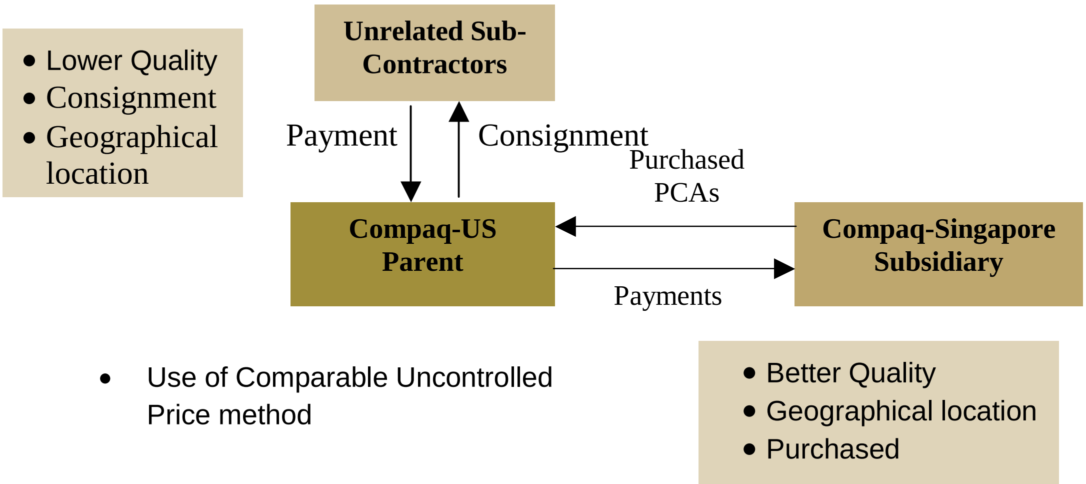
III. Select International Cases

United States of America

1. Compaq Computer Corporation V. Commissioner[7]



Facts

Compaq Computer Corporation ("**Compaq - US**") is a company incorporated in the state of Delaware, USA, and having its principal place of business in Houston, Texas. Compaq US had subsidiaries in varied jurisdictions *interalia* including Singapore ("**Compaq – Singapore**") and the United Kingdom. Compaq - US along with its aforesaid subsidiaries manufactured Central Processing Units ("**CPU**") for its personal computers. Printed Circuit Assemblies ("**PCAs**") are an essential component for the manufacture of the CPU. Compaq - US, in addition to manufacturing the PCAs itself, could source these from Compaq - Singapore or various other unrelated subcontractors located mainly in the US. Compaq – US contracted with Compaq-Singapore whereby Compaq-Singapore produced and sold PCAs to its U.S. parent.

Compaq-US used many advanced procedures in the manufacture of the PCAs. Compaq-Singapore was set up on lines similar to the already existing structure of Compaq-US. As result of this Compaq-Singapore was more advanced than other Singapore PCAs manufactures and hence did not compete with them.

Both, Compaq-US and Compaq-Singapore used standard costs system as a method of tracking their manufacturing costs. They assigned specific costs to arrive at a material standard, a labour standard and an overhead standard. These standards were based on forecasted production facility in their respective locations. A point to be noted here is that the *cost of production in Singapore was much lower than that in US*.

On an enquiry by the tax authorities for the sale price charged for the above transaction, Compaq presented a comparable uncontrolled price ("**CUP**") involving contract

[7] Dec, 53,443 (M), 78 T.C.M, 20: T.C. Memo, 1999-220.

manufacture relationships and unrelated companies. Three significant differences existed between the intercompany transactions involving Compaq-Singapore and the CUP transactions. First, the products were not identical. Second, there were important functional differences involving the purchase/consignment of raw material and, third, there were geographic market differences.[8] It was as a result of these differences that an adjustment was required in the prices of the transactions with unrelated sub-contractors, to arrive at an appropriate CUP.

Issue

The petitioner (Compaq-US) in the case had used the CUP method in its dealings with the Compaq-Singapore to arrive at an arm's length price. The CUP was arrived at by considering transactions that Compaq-US had with unrelated subcontractors. The respondent was of the opinion that the petitioner had used cost plus method in arriving at the return position and had used the CUP method only at the trial. The petitioner had the burden of proving that the respondent's claim of tax deficiency was arbitrary, unacceptable and capricious.

Held

The Court held that the petitioner had satisfied its burden of proving that the transactions were conducted at arms length and that the use of CUP was warranted. The Tax Court saw no problems with Compaq's application of the CUP method and allowed its use without further adjustment.

Rationale

Although this case was decided under the 1968 regulations[9], it is interesting to note that the court used the language from the 1994 regulations in its application of the comparable uncontrolled price (CUP) method.

The respondent had argued that the regulations required, the products to be identical or almost identical for the use of CUP in determining its arms length price. However, it was seen from all the evidences that the PCAs purchased differed on only two grounds, the cost of specific materials and components used and the amount of time required to process each of these PCAs. According to the regulations adjustments for these could be made to make these transactions comparable. Compaq made adjustments for these differences, and the Tax Court accepted the adjustments without modification. The physical differences in the categories of the PCAs purchased from Compaq-Singapore and those purchased from the unrelated subcontractors being minor were identifiable and reasonably adjustable. Thus, adjusting for minor physical differences and differences in production time in the case of Compaq-Singapore was warranted.

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[8] Wright. Deloris R. et al., "the DHL Case: What lessons can be learned?", 6 International Transfer Pricing Journal 3 (May/June 1999).

[9] I.R.C. regulation 482 issued in 1968

The second issue, the functional differences, is even more significant. Compaq consigned the key raw materials (boards and components) to the unrelated parties, while Compaq-Singapore purchased raw materials used in it. Compaq made adjustments to the third party transactions for this functional difference and as would be expected, the adjustments were quite large. The Tax Court accepted these adjustments.

Quality, is another area of difference which may affect the pricing of the PCA purchase. Compaq-US reworked the defective PCAs it received from Compaq-Singapore and the unrelated subcontractors. Thus, Compaq-US adjusted this difference in the amount it spend to rework the PCAs in calculating the CUP.

Compaq-US also purchased power supplies from the unrelated subcontractors and Compaq-Singapore. While the unrelated subcontractors only build power supplies to Compaq-US specifications, Compaq-Singapore had joint design responsibilities with Compaq-US. Thus, an adjustment in the CUP to the extent of value added was necessary to make the prices of Compaq-Singapore comparable with the unrelated subcontractors.

The geographic market difference was the third issue of importance in Compaq. The unrelated subcontractors worked from the US where conditions, pricing, labour, etc were different from those in Singapore. As seen earlier, Compaq-Singapore operated in a low cost environment. The Tax Court did not make any adjustments for difference, which means that, in effect, the labor savings inherent in the Singapore location benefited Compaq-Singapore.[10] Before the Compaq decision, most economist would have argued that, in arm's length relationships between unrelated parties, Compaq (the U.S. parent) would have negotiated in such a way as to obtain those labor savings for itself.

The respondent though had argued that the use of the CUP method was not satisfactory it did not give any alternative methods to be used by it.

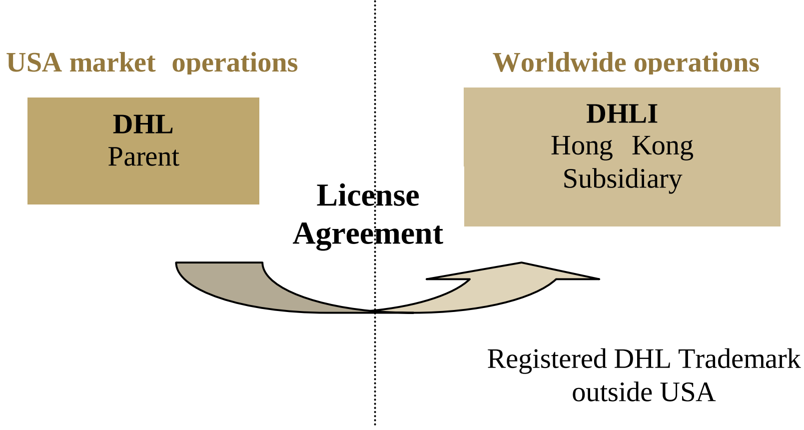
This is extremely goods news for multi-national companies. The CUP method is now significantly easier to apply than had previously been thought. It is worthwhile for companies to search their third party relationships for CUPs that in the past, would not have been acceptable. In addition, geographic market differences and significantly different cost bases should no be major concerns as they present a significant planning opportunity to multinationals.

The message to multinationals operating in the United States is that the transaction based methods are alive and well, although it is probably wise to use a comparable profits methods, or some other profit based method, as a 'sanity check' on the results produced by the transaction based methods[11]. Further, it is important for a multinational to have a consistent worldwide approach to transfer pricing determination and documentation. With the US tax court indicating a preference for transaction based

[10] The same point was also brought out in the case of Bausch & Lomb, Inc. and the judge noted that earning a large profit margin does not prevent the use of the CUP method.
[11] It is generally believed that sanity checks on CUPs are unnecessary, but sanity checks on other transaction based methods (resale price and cost plus) are wise.

methods, it is relatively easy for a multinational to satisfy the requirements of virtually all the taxing jurisdictions in which it operates.

2. DHL Corporation and Subsidiaries V. Commissioner[12]



- "Scorched Earth" approach [13]
- TP penalty legislation
- Legal Documentation
- Selection of outside advisors of and timing of valuation by them

[14]*The US Tax Court handed down its opinion in DHL on December 30, 1998. This case is important for several reasons. First, it addresses the wisdom of the "scorched earth" approach to transfer pricing audits. Second, it demonstrates that the Tax Court is willing to support the transfer pricing penalty legislation. Third, it illustrates the importance of clear and well -written transfer pricing documentation and, fourth, it demonstrates the care that needs to be used in managing outside advisors who prepare transfer-pricing documentation.*

Facts

DHL is a worldwide overnight package delivery company that was formed in the United States in 1969. In 1972, DHL formed a Hong Kong subsidiary, DHLI, that conducted DHLs international operations. DHL was responsible for handling the courier business in the U.S., and DHLI handled the courier business outside the U.S. Together with Middletown NV (MNV), a Netherlands Antilles company formed in 1979, DHLI managed the international operations, while DHL operated in the US market. The international operations were conducted through DHLI, its affiliates and a series of independent agents that agreed to do business within the DHL network, who were all required to use

[12] T.C. Memo. 1998-461, December 30, 1998

[13] "Scorched Earth" approach was the approach where the assessee is non-cooperative and refuses to provide information needed to evaluate transfer pricing penalties.

[14] For more information about this case, see Wright. Deloris R. et al., "the DHL Case: What lessons can be learned?", 6 International Transfer Pricing Journal 3 (May/June 1999).

the DHL trademark. By 1988, the DHL network was the third largest air courier company in the world and, by 1992, DHL operated in nearly 195 countries.

In the late 1970s, DHLI recognized the need to have a standard trademark or logo, and it commissioned and paid for the design of the first standardized DHL Logo, which was used by the worldwide network. In addition, beginning 1983, DHLI began process of registering the DHL name in countries outside the United States. The name was registered in the name of DHLI without reference to the fact that DHLI was a licensee of DHL. DHLI incurred the cost of trademark registration, protected the trademark against infringement outside the United States, and handled disputes with terminated agents related to trademark usage. Finally, DHLI bore the cost of advertising the DHL network outside the United States.

By the mid-1980s, DHL was experiencing serious cash problems, and it hired Bain and Company (Bain) to assist in returning the company to profitability. Bain recommended that DHL find a merging partner; therefore, from late 1986 through early 1988, DHL and DHLI, attempted unsuccessfully, to do that. In December 1988, a group of investors including Japan Air Lines company (JAL), Nissho Iwai Corp. (Nissho Iwai) and Deutshce Lufthansa Aktiengesellschaft (Lufthansa), began negotiating to buy a controlling interest in DHLI. On December 7, 1990, these foreign investors acquired a partial interest in DHLs international operations (DHLI and MNV). The foreign investors also obtained an option to purchase controlling interest in DHLs international operations. On August 18, 1992, they exercised their stock purchase option and became majority owners of DHLI and MNV. Pursuant to these purchases, the parties agreed on a price for the entire transaction.

During the due diligence activity that accompanied these transactions, concern was expressed that the IRS might seek to impute a royalty for DHLI's use of the DHL trademark. At the same time, DHL's continuing cash flow problems threatened the worldwide DHL network. For these reasons, the parties agreed that DHLI should purchase the DHL trademark as a vehicle for capitalizing DHL and to eliminate potential IRS audit exposure.

Several advisers valued the DHL name at the values ranging from USD 20 million to USD 200 million. Ultimately, a USD 20 million valuation was used, and the sale was consummated in 1992, one month after the foreign investors exercised their rights to purchase a controlling interest in DHLI. It is important to note that the total value of the transactions was not affected by the varying values for the trademark.

After the USD 20 million value was placed on the trademark, Bain was asked to prepare a valuation of the DHL trademark. Two days after being hired, Bain presented a draft letter stating that the value of the DHL trademark was USD 20 million. It appears that Bain confused both the date of valuation and whether it was to value the worldwide rights or just the US rights. DHLs legal advisers worked with Bain to clarify these matters, but the USD 20 million did not change.

Issue

A central issue in DHL, was the ownership of the DHL trademark. The ownership of the US rights to the trademark was not at issue- both sides agreed that DHL (the US company) owned those rights. Because, DHL was, at the outset, solely a US company, it is clear that the non-US rights to the DHL trademark were initially US property. From this point, the documentation is unclear, at best. A 1974 memorandum of understanding appointed DHLI as a foreign pickup and delivery agent for DHL, and DHL licensed the use of the DHL name to DHLI for no compensation. The memorandum of understanding was amended on six occasions, but the arrangement never included a royalty for use of the DHL name. There appear to be no other arrangements that address the intangible ownership issue.

Held

The Tax Court rejected both DHL's and the IRS determination of the value of the DHL name of USD 600 million. The Court decided that the value of the worldwide rights was USD 150 million, which it reduced to USD 100 million because of imperfections in DHL's ownership of the non-U.S. rights. In addition, the Court imposed a transfer pricing penalty because DHL's documentation was prepared by a consultant (Bain) who was doing work for DHL and was therefore, not independent. The Court stated:

"…….. it was not reasonable for [DHL] to rely on (or more properly hide behind) the Bain appraisal or comfort letter. If the parties to the transaction had given the valuation to an independent valuation entity before any values being placed on the trademark by the parties and/or not advised the evaluator of a value, it might have been reasonable for petitioners to rely on such an appraisal. As this trail has again demonstrated, parties can find experts who will advance and support values that favor the position of the person or entity that hired them."

The Tax Court's decision contained various references to the uncooperative and contentious behaviour of the parties. It seems reasonable to conclude that DHL's recalcitrance worked against the interests in the Court's holdings. On the issues of interest here, the Court held that DHL owned the worldwide rights to the DHL name, although the quality and value of those rights were lessened by the imprecision of the legal agreements and by DHLI's registration of name in various countries.

Rationale

DHL's tax years from 1990 to 1992 were audited in what appears to be a confrontational and acrimonious audit, involving both third party summonses DHL's refusal to extend the statute of limitations. In addition, the Tax Court noted that the pretrial and trial dialogue was equally contentious. During the audit, IRS argued that a royalty should have been paid to DHL for the international rights to the DHL name. The IRS also challenged the USD 20 million valuation of the trademark. The IRS auditor argued that the trademark's value was more than USD 600 million. At the trial, the IRS valuation fell to USD 300 million. DHL on the other hand argued that the USD 20 million value was an arm's length value because DHL did not own the international rights, in part DHLI had incurred the advertising costs outside the United States and had registered the name outside the United States.

Importance

This case is important to multinationals for at least three reasons. First, the strategy for handling IRS audit has changed. Before the transfer pricing penalty legislation, a "scorched earth" approach to audits was fairly common. Briefly, this approach appeared to be non-cooperative, refusing to provide the information needed to properly evaluate the transfer pricing issues in the case. Now, the burden of explaining why a transfer pricing system is appropriate is the responsibility of the tax payer if the tax payer wants to avoid transfer pricing penalties. Today, the "scorched earth" policy is less effective than it was before the penalty legislation, and DHL clearly indicates that the Tax Court is willing to impose penalties when it deems them appropriate. The Court's comments about DHL's behaviour suggest that a cooperative approach to an IRS audit may be more productive than the approach taken by DHL.

Second, documentation is very important. DHL demonstrates the importance of clear and well reasoned inter-company legal agreements. Other documents, such as "memos to the file", should also be very clear to establish the ownership of intellectual property as well as the functions and risks of each legal entity in the multinational group. Had DHL's documentation been less confusing, the outcome of this case might have been quite different.

Third, it is important that the outside advisers to be independent. DHL selected Bain to prepare the valuation of the trademark, even though Bain was significant other work for DHL. The Tax Court had serious concerns about whether Bain was independent under these circumstances. In addition, the timing of Bain's engagement led the court to question the validity of Bain's opinion, i.e. Bain was asked to value the trademark only after the value had been determined. Many times, companies hire transfer pricing experts after the end of the year to prepare documentation for the preceding year. Obviously, the prices have been determined at that point, and the advisor can only support what was actually done.[15] The Court seemed to suggest that advisers should be hired before the prices are determined or should not be told what number to support so that their independence is protected.

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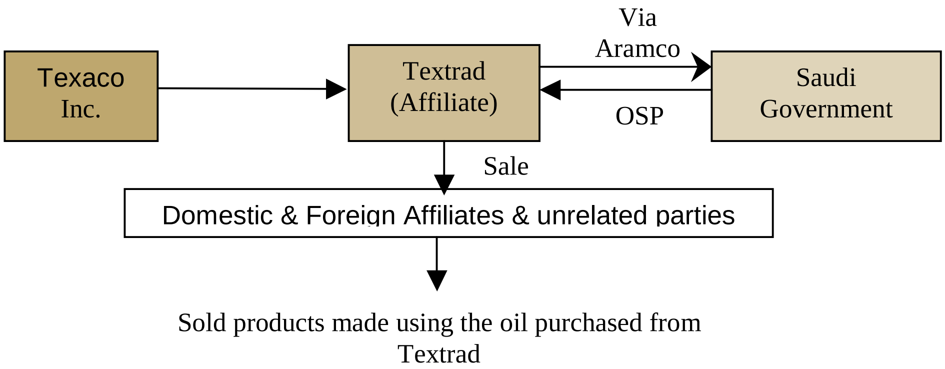
[15] This is too simple a statement in that such advisers may advise significant changes in the subsequent years to correct "errors" in the year in question. In addition, the advisor may support only a portion of what was done.

3. Texaco, Inc. And Subsidiaries v. Commissioner Of Internal Revenue[16]

This is a case where the Commissioner of Internal Revenue challenges the Tax Court's legal conclusion before the Appellate Court.



Facts

Texaco, Inc. is the parent corporation of a group of entities engaged in the production, refining, transportation, and marketing of crude oil and refined products in the United States and abroad. Texaco has a number of subsidiary/affiliate corporations under its umbrella. One of those affiliates is Texaco International Trader, Inc. ("**Textrad**"), which acted as the international trading company for the worldwide Texaco refining and marketing system during the period in question. As the trading company, Textrad purchased Saudi crude oil from the Saudi government by way of the Arabian American Oil Company ("**Aramco**") and resold that crude to both affiliates and unrelated customers.

From early 1979 through late 1981, Saudi Arabia permitted Texaco and the other Aramco participants to buy Saudi Arabian crude oil at below market prices. The Saudi government also established the official selling price ("**OSP**") for Saudi Arabian crude below the market price. The Saudi government took these actions in response to requests by the United States and other consuming countries to moderate the price of crude oil. To ensure its price regulation had its intended effect, the Saudi government prohibited Texaco and other participants in Aramco from re-selling Saudi crude at prices higher than the OSP vide Letter 103/z. The restrictions in Letter 103/z, however, applied only to Saudi crude, not to the sale of products refined from Saudi crude. As a result, the companies that bought Saudi crude from Textrad at the below market OSP, including Texaco's refining affiliates, earned large profits from the sale of refined products. Unlike its domestic affiliates, Texaco's foreign refining affiliates reported no taxable income in the United States.

During the period in question, Textrad sold approximately 34 percent of its Saudi crude or about 780,000,000 barrels to its refining affiliates. Of these, approximately 275,000,000 barrels were sold to Texaco's domestic refining company and 505,000,000 barrels to Texaco's foreign refining affiliates. Textrad also sold 15-20 percent of its Saudi oil at the

[16] U.S. Court of Appeals for the Fifth Circuit's Decision (No. 95-60696, Filed 10/17/96)

below market OSP to customers that were completely unrelated to Texaco. This was consistent with the pattern and volume of Textrad's sales to unrelated customers in earlier years.

Issue

The Commissioner contended that Textrad unduly shifted profits to its foreign affiliates during taxable years 1979-81, and consequently increased Textrad's U.S. taxable income for those years under § 482 and 61 of the ("IRS") to reflect those profits

Held

The appellate court agreed that Letter 103/z had the effect of a legal restriction in Saudi Arabia. These restrictions applied to all sales of Saudi crude by the Aramco participants and others. The restrictions were in effect during the period at issue and were followed by Texaco. The appellate court fully supported the findings of the Tax Court's and supported its conclusion that Letter 103/z should be given the effect of law for purposes of § 482 and 61 of the IRS.

Rationale

The Court supported this conclusion with a number of factual findings, including the following:
1. The Saudi government, with the approval of the King, issued Letter 103/z prohibiting the resale of Saudi crude at amounts exceeding the OSP.
2. Texaco was subject to that restriction and faced severe economic repercussions, including loss of its supply of Saudi crude and confiscation of its assets, if it violated Letter 103/z.
3. This mandatory price restriction applied to all sales of Saudi crude, including sales to affiliated entities.
4. Neither Texaco nor any other Aramco participant had any power to negotiate or alter the terms of this restriction.

The relevant IRS regulation explains that the purpose of § 482[17] is "to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer" and to ensure that controlling

[17] In First Security, the Court held that °482 did not authorize the Commissioner to allocate income to a party prohibited by law from receiving it. 405 U.S. at 404. In that case, two related banks offered credit life insurance to their customers. Federal law prohibited the banks from acting as insurance agents and receiving premiums or commissions on the sale of insurance. The banks referred their customers to an unrelated insurance company to purchase this insurance. The insurance company retained a small percent of the premiums for administrative services and transferred the bulk of the premiums through a reinsurance agreement to an insurance company affiliated with the banks, which reported all of the reinsurance premiums it received as income. The Commissioner reallocated 40% of the related insurance company's income from these reinsurance premiums to the banks as compensation for originating and referring the insurance business. Id. at 396-99.
The Court concluded that due to the restrictions of federal banking law, the holding company that controlled the banks and the insurance affiliate did not have the power to shift income among its subsidiaries. In so holding, the Court emphasized that the Commissioner's authority to allocate income under °482 presupposes that the taxpayer has the power to control its income: "The underlying assumption always has been that in order to be taxed for income, a taxpayer must have complete

entities conduct their subsidiaries' transactions in such a way as to reflect the "true taxable income" of each controlled taxpayer. But where, as here, the taxpayer lacks the power to control the allocation of the profits, reallocation under º482 is inappropriate. It is precisely this ability to control the flow of its income that Texaco lacked

The appellate court thus concluded that Texaco was obligated to comply with the Saudi government's price restrictions and that Texaco's pricing policy to its foreign affiliates as well as its unrelated customers was due to these restrictions and not to any attempt to distort its true income for tax purposes. The proposition of this appellate court was supported by the Tax Court. For the reasons stated above, the Appellate Court properly concluded that the Commissioner was without authority to reallocate Texaco's income under º482.

4. Exxon Corporation and Affiliated Companies, et al V. Commissioner[18]

Facts

Exxon Corporation ("**Exxon**") is a company having its principal place of business in New York engaged in the business of producing, refining and marketing of crude oil and petroleum products in US and other countries over the world. In 1979 Mediterranean Standard Oil Co., Inc (MEDSTAN) a wholly owned subsidiary ("**WOS**") of Exxon was incorporated in the United States to purchase oil from Saudi Arabia via Arabian American Oil Company (Aramco). In the next year Exxon International Trading Co., Inc (EITCO) another WOS of Exxon was incorporated in US to carry the functions of MEDSTAN. Later, in 1981 Exxon International Saudi Arabia ("**EISAI**") was incorporated in the US to perform similar function of purchasing oil from Saudi Arabia. This company made these purchases pursuant to an oil incentive agreement which entitled Exxon to purchase additional oil from Saudi Arabia.

The oil purchased from Saudi Arabia was the largest source of oil purchase for Exxon. Saudi Arabian Government ("**SAG**") set prices for sale of the crude oil purchased from Saudi, which was lower than the market price of the crude oil. SAG had placed a restriction on the selling price on the oil purchased from Saudi. In light of the same Exxon Corporation and its affiliates sold oil at the restricted price as set by the SAG.

Issue

Exxon sold crude oil it purchased from Saudi Arabia to third parties and affiliates at a price which was lower than the market price. Consequently, the Commissioner was of the opinion that Exxon be charged on extra profits it earned on dealings with its affiliates involving sale of crude oil and therefore be assessed under section 482. Thus, the issue

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dominion over it." Id. at 403. Indeed, as the Court noted, the Commissioner's own regulations for implementing º482 contemplate that the controlling interest "must have 'complete power' to shift income among its subsidiaries." Id. at 404-05 (quoting 26 C.F.R. º1.482-1(b)(1) (1971)).

[18] T.C.Memo. 1993-616

evolved, whether Exxon was liable since it complied with restrictive regulations laid down by SAG.

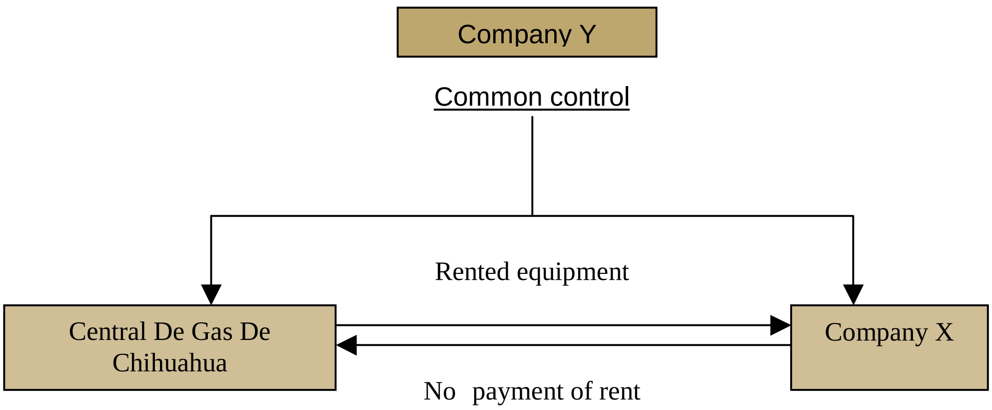
Held

The contention of the Commissioner was found to unacceptable and hence was precluded from attributing such profits presumably earned by Exxon in its dealings with its refining subsidiaries.

Rationale

SAG had in its letter 1031Z clearly prohibited the sale of Saudi crude oil at prices higher than official selling price as laid down by it. It had also, clearly stated that this restriction applied equally to transactions with affiliated and unaffiliated entities. Also, these restrictions were mandatory in nature. There was evidence that non-adherence to these restrictions would culminate potentially serious consequences for the defaulters. Thus, in selling at a price lesser than the current market prices, Exxon had only followed the restrictions by which it was bound.

5. Central De Gas De Chihuahua, S.A., V. Commissioner of Internal Revenue[19]



Facts

Central De Gas De Chihuahua, S.A., (the "**CG**") rented equipment to Company X ("**X**"), where both CG and X were under the common control of Company Y ("**Y**"). X did not pay any rent for the use of the equipment to CG. CG did not file a federal income tax return for the year 1990. Commissioner of Internal Revenue ("**CIR**") acting under 482 allocated to CG the fair rental value of the equipment for 1990 and further determined that CG was liable for the 30% tax, as per section 881, on the fair rental value of the equipment.

[19] Docket No. 18370-91.

Issue

The issue was whether the applicability of section 881 was restricted to actual payment or whether it would also apply in cases of deemed payment. The contention of CG was that in order for section 881 to apply, there must be an actual payment by X of the fair rental values of the equipment. However, CIR asserted that there is no requirement of actual payment under section 881 and that the allocation of rent to CG under section 482 provides a sufficient basis for imposing the 30% tax. CG further contended that the allocated fair rental value would amount to constructive dividend to Y and a non taxable contribution of capital to CG. Therefore, the issue as it stood before the authorities was, whether or not CG was liable to pay tax on the income which it did not receive.

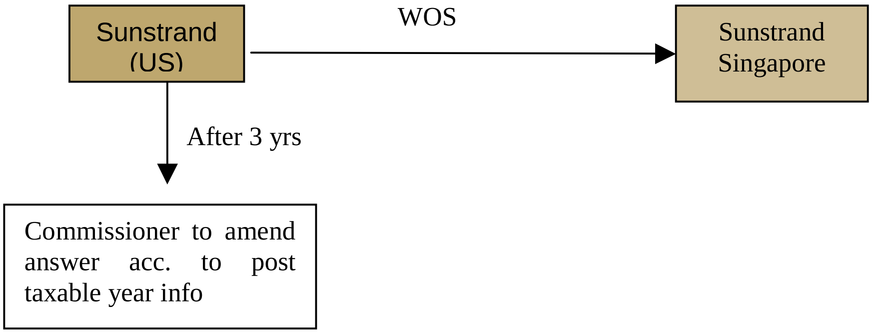
Held

It was held that the Section 881 was applicable in cases of deemed payment and the actual payment was not required for its application. It was held that the word “received” in section 881 included the fair rental value of the equipment even though the amount thereof was not actually received by CG from X. It was also held that the allocation of fair rental value would not amount to constructive dividend to Y and a non taxable contribution of capital to CG, thereby making CG liable to pay tax on fair rental values of the equipment.

Rationale

The reasoning given by the authorities in their ruling was that, if the interpretation of the words (‘an amount received’ under section 881) were confined only to the actual payment, then it would significantly undermine the effectiveness of the aforesaid section, more particularly where foreign corporations were involved. Further more, such restricted interpretation would permit foreign corporations to utilize property in the United States without making any payments towards it and thereby avoid any liability under section 881. The authorities further considered whether the allocation of fair rental value would amount to constructive dividend to Y and a non taxable contribution of capital to CG. The authorities contended that the ruling on which CG relied for the aforesaid purpose was not binding on them. Further, in the aforementioned ruling, there was an actual transfer of property involving the allocation of inter corporate payments and the consequent presence of a constructive dividend, both of which were absent in the present case.

6. *Sunstrand Corporation and Subsidiaries V. Commissioner of Internal Revenue*[20]



Facts

Sunstrand Corporation ("**Sunstrand Corp**") is a company incorporated in the State of Delaware in the United States having its principal place of business in Rockford, Illinois, having a public holding. Sunstrand Corp was engaged in the business of designing, manufacturing and selling of a variety of products for diversified aerospace products and industrial markets. Sunstrand Corp had a wholly owned subsidiary Sunstrand Pacific (PTE) Ltd. ("**SunPac**") incorporated in Singapore and was engaged in the business of manufacture and sale of parts required in aircraft transmission. There were certain sale transactions between Sunstrand Corp and SunPac, where the Commissioner was of the view that the same were not done at arms length and that certain part of the income of SunPac is to be allocated to Sunstrand Corp. On the expiry of three years from the date of submitting its answer the Commissioner applied to the Court seeking its permission to allow it to amend its answer to provide the imposition of interest on substantial underpayments attributable to tax on the basis of financial information related to post taxable years.

Issue

The main issue in the present case was whether leave should be allowed to the commissioner to amend his answer so as to provide the imposition of interest on substantial underpayments attributable to tax on the basis of financial information related to post taxable years. Sunstrand Corp filed its objections to the granting of the aforesaid leave under Rule 403 of the Federal Rules of Evidence.

Held

It was held that the post taxable years financial information should be excluded under Rule 403 of the Federal Rules of Evidence. Rule 403 provides exclusion of evidence on the grounds of prejudice, confusion or waste of time.

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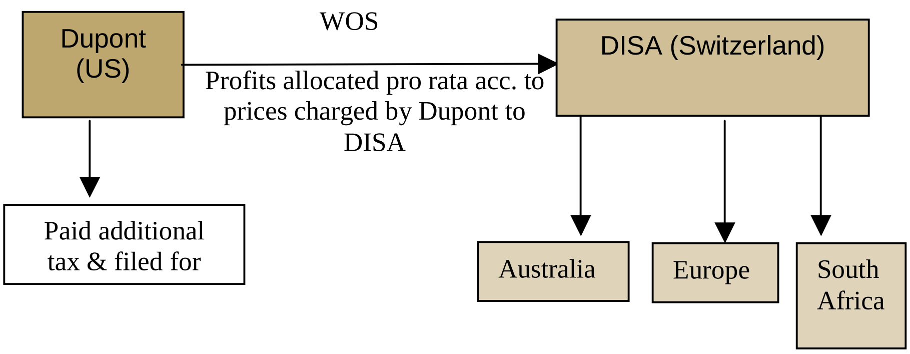
[20] 89 T.C. No. 58

Rationale

This case was justified using the principle laid down in Rule 403 of the Federal Rules of Evidence. Its substantiates the rationale on the consideration that;

1. Undue delay and waste of time significantly diminishes the probative value of the post taxable years financial data.
2. The aggregate figures of the post tax financial years do not bear a direct relation to the prices, sales and profits associated with the sale in any of the previous years in question.

7. E. I. Du Pont De Nemours and Company V. The United States[21]



Facts

E.I. Dupont De Nemours and Company ("**Dupont**") is a company incorporated in USA having a wholly owned subsidiary Du Pont International S.A. ("**DISA**") in Switzerland. Dupont sold its products to DISA, who resold them in the international market through independent distributors. Dupont used the resale price method as its method for the allocation of profits on these sales between itself and DISA. Dupont divided these profits between itself and DISA on the basis of the prices charged by it to DISA.

For 1959 and 1960 the Commissioner of Internal Revenue, found that these divisions of profits were economically unrealistic, since it was giving DISA a bigger share of profits then it earned. He reallocated a substantial part (USD 18 million) of DISA's income to Dupont, thus increasing the Dupont's taxes by considerable sums. The additional taxes were paid by Dupont under protest and this refund suit was brought before the court in due course.

The revenue department contended that the purpose of the formation of DISA was to accumulate in it larger profits and thereby finance its capital improvement operations in Europe. Internal DuPont memos indicated that it planned to sell goods to DISA a prices

[21] Nos. 256-66, 371-66 United States Court of Claims

lower than the market price, so that on resale most of the profits would be reported in a jurisdiction having lower tax implication than DuPont in US. It further observed that in order to provide for the above aim it sold goods at lower prices, so that DISA could benefit from the sales made at higher prices. Dupont made an effort to show that the profits earned by DISA were comparable to the profits earned by other uncontrolled enterprises on similar resales.

Issues

The Court re-allocated the profits earned by DISA to Dupont for the years 1959 and 1960, and charged additional tax on the same to Dupont. The Court of claims asserted that DISA performed no activity worth the profits attributable to it. The Commissioner held that the sales made by Dupont to DISA were not at arms length and hence chargeable to tax on the profits diverted to DISA. Dupont however, contended that the sales were at arms length and hence was liable to a refund on the tax paid.

Held

The court concluded as a matter of law that Dupont was not entitled to recover as refund the taxes paid by it on reallocation by the Commissioner.

Rationale

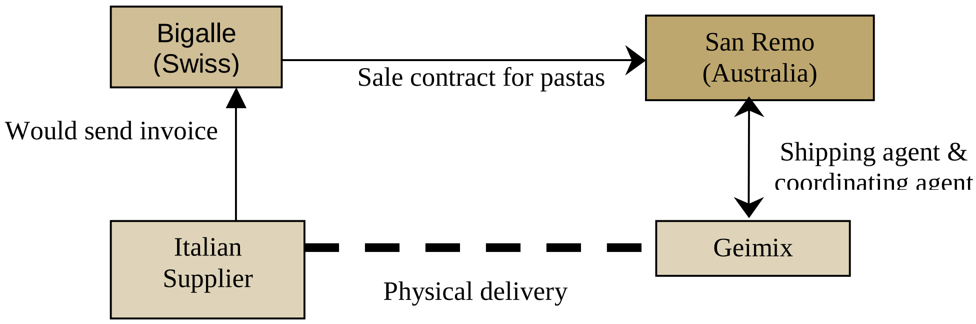
It was proved by the court that DISA undertook minimal work on the products of Dupont before it re-sale. The transaction was so structured so that DISA would enjoy 75% of the profits without performing any special services on the same. This was in contrast to the practices elsewhere among other distributor or advertising service agencies. DISA's selling "expertise" was not employed on any of these goods, and the sole reason to sell them through DISA seems to have been to increase the volume of profits for it.

DuPont also tried to show that the profits earned by it were similar to those earned by other retail distributors. However, it can be seen there was no geographic or economic similarity between them and DISA. It was shown that the average selling price of these companies was much higher than DISA’s selling cost. Also, these companies were engaged in business different from those of DISA.

Another point brought forth is that sales, which could otherwise be done directly through Dupont, were also routed through DISA, to increase its profitability. Above all of these specific indications that DISA did not earn its profits is the overriding fact that Du Pont's prices to DISA were deliberately set high and with little or no regard to economic realities.

Australian case

1. San Remo Macaroni Co Pty Ltd V. CMR of Taxation[22]



Facts

San Remo Macaroni Co Pty Ltd ("**San Remo**") is a company incorporated in Australia engaged in the business of manufacturing and selling pasta products. The company purchased pastas from Italy. San Remo entered into a contract with Mr. Fernando Segilias, a Swiss accountant for the purchase of pastas from them. Segilias incorporated a Swiss Company, Bigalle SA ("**Bigalle**") which would be the exclusive supplier for the pastas to San Remo. These pastas were to be manufactured by Italian manufacturers and Bigalle was to perform the activity as only an invoicing agent. No additional services were to be performed on the pastas by Bigalle. Geimix, the Italian shipping agent of San Remo was to act as the coordinator and forwarding agent between San Remo and Bigalle. San Remo was to purchase the entire quantity of pastas from Bigalle at a price which was set for a period of 12 months. This price was not subject to change, and if at any point of time a change was required the same could be done only after a 6 months notice. During the period of contract there was a revaluation of the Swiss Franc, which resulted in difference in the price of purchase when calculated in terms of the Australian Dollar. The amount paid by San Remo to Bigalle in Australian Dollars was higher than the amount paid by Bigalle for the same to the Italian manufacturer. This resulted in mark-up of 40% to 50% when all the amounts were considered in liras. Consequentially, the Commissioner contended that this mark-up has resulted in transactions not being done at arms length.

Issues

There were two main issues involved in the above case. One, the price difference as a result of the revaluation of Swiss francs had resulted in additional profit to Bigalle. Hence, there was a violation of transfer pricing regulations by San Remo. Another issue contended in the above case was that the Commissioner had acted in bad faith and manuplalated the accounts.

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[22] NG 27 of 1998 BC9906927

Held

There was transfer pricing violation with the result that the profits earned by Bigalle were in excess of what would have been attributable to it. The transactions between San Remo and Bigalle were not an arms length.
It was further held that the Commissioner had neither acted in bad faith nor manipulated the accounts.

Rationale

The following were the reasons that are attributable to violation transfer pricing provisions;

- The mark-up was excessive and commercially unrealistic
- The price charged by Bigalle failed to reflect the true market realities. Also after analyzing the comparable transactions it was apparent that the price charged by Bigalle exceeded the arms length price.
- Bigalle did not provide any additional services nor did it have any expertise, to justify the demand of the superior prices it charged to San Remo in comparison to those charged to it by the Italian suppliers.

The following were the reasons that are given to prove that the Commissioner did not act in bad faith;

- From the evidence put before the Court it was held that the Commissioner had not manipulated any accounts nor had acted in bad faith.
- Not only did San Remo fail to exhibit before the court the reason why the Commissioner would act in bad faith or manipulate the accounts, also the judges during the course of their findings were unable to determine the reason why the commissioner would act in bad faith.

United Kingdom

1. Rochester (UK) Limited and Another v Pickin[23]

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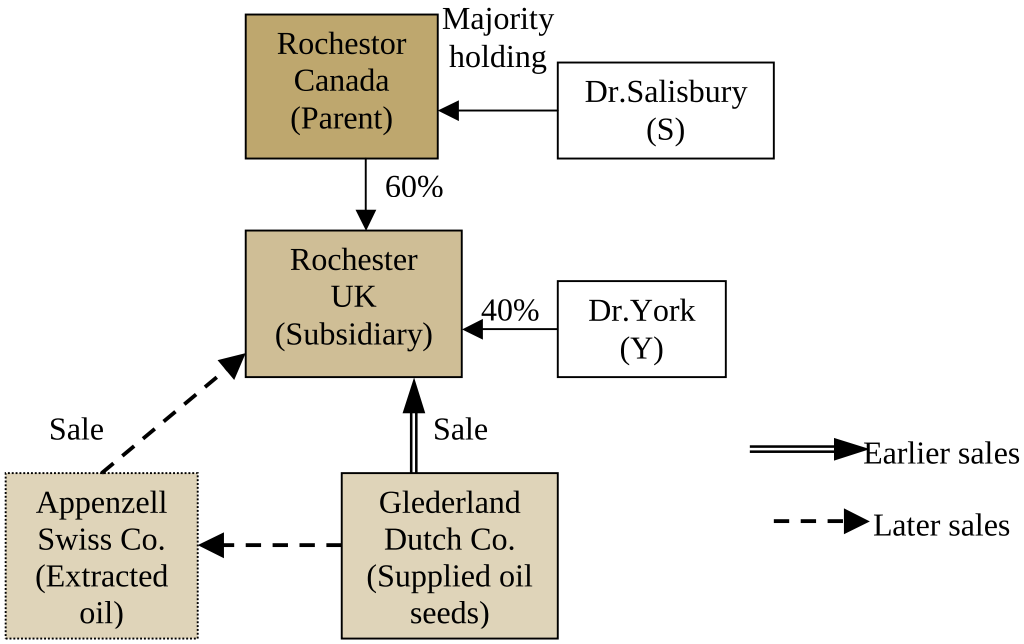

Facts

Rochester UK was formed with Mr. York ("**Mr. Y**") holding 40% and the Canadian parent Rochester Canada holding the balance 60%. Mr. Salisbury ("**Mr. S**") was the majority shareholder of Rochester Canada. Mr. S was a director of Rochester Canada and chairman and director of Rochester UK. Mr. Y was the managing director of Rochester UK. Rochester UK purchased oil seeds from a Dutch supplier, Glederland BV (the "**Dutch Company**"), for the purpose of extracting oil. After a couple of years the Dutch Company agreed to supply the seeds to a newly incorporated Swiss company, Appenzell AG (the "**Swiss Company**"). The Swiss company made arrangements for the extraction of the oil, which it in turn supplied, to the UK and Canadian companies. The revenue contended that the profits earned by the Swiss company had been applied for the benefit of Mr. Y and Mr. S, by purchasing sterling certificate deposits, which were further deposited with the banks as a security for the loans taken by Mr. Y and Mr. S. the loans taken were used to purchase shares of Rochester Canada.

Issue

The Inland Revenue of UK considered that arrangements had been fraudulently made for the Swiss company to be inserted in the chain as a device to enable the UK company to pay excessive prices for the oil supplied by the Swiss company, thereby evading UK tax on the UK company's profits. They also argued that certain payments made by the UK Company to the Swiss company relating to medical research were for no consideration.

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[23] [1998] STC (SCD) 138

The UK company was assessed on the basis of the part of the price paid to the Swiss company which exceeded a reasonable price for the oil and for the payments relating to medical research on the basis that they were not incurred wholly and exclusively for the purpose of the UK company's trade within Corporation Taxes Act, 1988, s74 (1)(a). They were therefore not deductible and remained profits of the UK Company. The assessments were made for the years from 1985 to 1991.

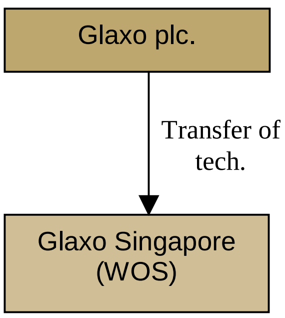
Held

Much of the case considered assessments out-of-time and the Special Commissioners concluded that the Revenue had failed to discharge the burden of proving fraudulent or negligent conduct in relation to the out-of-time assessments. In relation to the in-time assessments, the Special Commissioners found that the payments had been made as part of a commercial arrangement and that they had been made wholly and exclusively for the purposes of the trade of the UK company. Also there was no evidence that the profits earned by the Swiss company were used to fund the loans taken by Mr. Y for the purchase of shares of Rochester Canada.

Rationale

Although the Inland Revenue failed in this instance to establish the violation of the transfer pricing regulations, the case is illustrative of several aspects of modern transfer pricing practice. Firstly, the facts and documentation determined the outcome of the case. Secondly, other statutory weapons available to the Inland Revenue to tackle non-arm's length and related party transactions may be used. Thirdly, the Inland Revenue will test cross-border structures and arrangements thoroughly.

2. *Glaxo Group Ltd and others V. Inland Revenue Commissioners*[24]



Facts

Glaxo Group Ltd, Glaxo Pharmaceuticals UK Ltd and Glaxo Operations UK Ltd were wholly owned subsidiaries ("**WOS**") of Glaxo Wellcome plc, formally subsidiaries of Glaxo

[24] [1996] STC 191, 68 Tax Cas 166

plc. The appellants had open assessments going back a few years. The principal transaction, which resulted in the present dispute, was the transfer of technology by Glaxo plc to its WOS in Singapore. The revenue suspected that these transfers were not at arms length price. The revenue was of the view that since the assessment was open and there was a subsequent direction under Section 485(3) of the Income and Corporation Taxes Act, 1970, an adjustment in the return could be made for the differences caused due to transfer pricing. However, the authority was out of time for making any further assessments in relation to the accounts of many of the years under dispute. The appropriate period within which an adjustment can be made in an assessment is a period of six years from the end of the chargeable period to which the assessment relates.

Issue

The main issue was whether the adjustments arising on account of transfer pricing provisions could be given effect in the open assessments without any further assessment. The appellants contended that in order to give effect the revenue is required to make further assessments before adjustments arising from transfer pricing are given effect to in the income, profits or losses of the company and the same could not be undertaken by the Revenue since it was time barred. The Revenue on the other hand felt that the adjustments as arising from transfer pricing can be given effect in the assessments already open.

Held

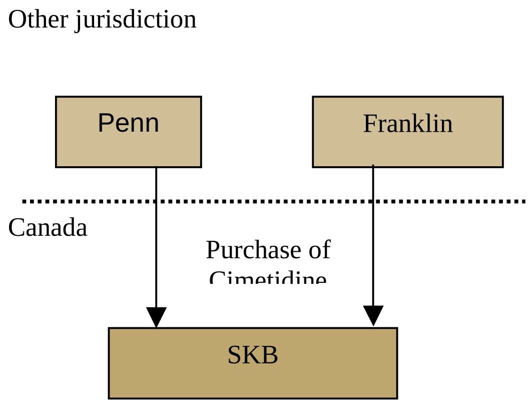
The Court of Appeal held that the commissioner could make the necessary adjustments to increase the assessment at the hearing of the appeal.

Rationale

It was seen that section 485(3) made it mandatory to make all adjustments that were necessary in the income, profits and losses of the assessee. Also, the commissioner had the power by virtue of section 50(7) of the Income and Corporation Taxes Act, 1970 to increase an open assessment at the hearing of an appeal. This makes it apparent that the commissioner was entitled to receive evidence which would lead to an increase in the assessment. Another point to be noted is that the taxpayer cannot withdraw his appeal without the consent of the inspector. The only effect of withdrawal of the appeal would be to leave the assessment as it stood, shows that as the inspector had not given his approval to withdraw the appeal the intention was to ask for an increase in the assessment. Also, there was no additional disadvantage by virtue of increasing the open assessment at the hearing of the appeal.

Canadian Case

1. SmithKline Beecham Animal Health Inc. v. Canada[25]



Facts

SmithKline Beecham Animal Health Inc. ("**SKB**") was a company incorporated in Canada. It acquired cimetidine from two corporations, Penn and Franklin, which were group companies of SKBs parent company and resident outside Canada. The prices paid by SKB for these purchases were high while the prices at which the product was been sold at in Canada were drastically lower than the prices at which it was been sold in the world markets. The parent company and Penn and Franklin sold cimetidine, a product used in Tagamet, to SKB at the price which was higher than the prices charged by existing competitors in the local markets from other major pharmaceutical companies. Besides this, SKB also paid service fees and royalties to members of the parent Group (other than Penn and Franklin) for supposed benefits that it derived from its membership in that group. SKB had also incurred substantial loss from its activities of making and selling Tagamet in Canada and due to the heavy prices it paid for cimetidine it did not earn a rate of return commensurate with its activities. The respondent in the court brought out these facts. In response to the same SKB requested the respondent to bring forth the documents it had relied on to support its argument on pricing to be followed by SKB.

Issue

The application was made in respect of an income tax appeal filed in respect of the question whether the amount which was paid by SKB to its non-resident affiliates was greater than the amount that would have been paid in normal circumstances if the dealings were at arms length. The respondent disputed SKB's request for the documents relied on, saying that it was not required to ask what particular documents were relied by him. There was also a question of whether the respondent is required to categorize the documents for the benefit of the opposing party according to the issue they relate to.

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[25] Canada Tax Court Ruling, Docket: 95-1077-IT-G

Held

The parties to the litigation are obliged to file and serve a list of 'all the documents' as contemplated under section 82(1) of the Rules. However, the party are not required to segregate which the party has produced and to identify for the benefit of the opposite party those documents which relate to a particular issue.

Rationale

On the issue of asking for a list of all documents, it was held that it is a question of fact that is of importance. If the facts are not known then the entire purpose of the examination is defeated. Questions of this nature are essential for properly defining the issues and avoiding the element of surprise.

There is nothing expressly stated under section 82 which supports the fact that a party is required to segregate the documents for the benefit of the opposite party. If such liberal interpretation were given it would go far beyond the ambit of pre trial production as contemplated by the section. Therefore a party is not entitled to an expression of the opinion of counsel of the opposite party regarding the use which may legitimately be made of the documents produced by the party.

IV. Book Closure

Globalisation has brought along with it the boon of the use of resources from around the world. But it has also brought forth the draconian effect of transfer pricing. Not only multinational corporations can feel the impact of transfer pricing but also the small and medium sized enterprises have come under the powerful grip of the regulations. With the density of complexities increasing with every growing day and the incidence of penalty being momentous, it is sending jitters in the industry with regards to the implementation of transfer pricing regulations. As is well know, the key to transfer pricing is documentation, industries should bear in mind that a well documented transaction could be the greatest saviour in times of a revenue audit. Most countries have introduced their transfer pricing regulations or are in the process of introducing the same. In the Indian context, the next three or four years will be the "Darwinian era" for these regulations. While majority of the countries have regulations on similar themes, there exists differences which need to resolved. It requires a cohesive effort of economists, accountants and legal experts. It calls for a legal process engineering to enable companies to integrate their differences arising from wide spread global transactions. Differences, inconsistencies and inequalities will lead to increased cross border disputes and hence transfer pricing would be a vital subject of negotiations between countries while formulating or altering their treaties. It is palpable to one and all that transfer pricing today has become a 'food for thought'.