Marketing Intangibles?

COMMENTS ON THE SCOPING OF THE OECD’S FUTURE PROJECT ON THE TRANSFER PRICING ASPECTS OF INTANGIBLES

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INTRODUCTIONS

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AGENDA

• Summary of definitional and economic ownership issues

• Critical issues arising in practice
  1. TM Royalties
  2. Business restructurings
  3. “Elevated” marketing expenses
  4. Recognizing and assessing value

• Whether existing guidance is adequate

• Conclusion and Questions
SUMMARY OF DEFINITIONAL AND ECONOMIC OWNERSHIP ISSUES

• Definitional issues
  – Local marketing intangibles beyond traditionally recognized marketing intangibles grounded in IP or assets/rights
  – Intangible property vs. intangibles
  – Relationship between goodwill and marketing intangibles
SUMMARY OF DEFINITIONAL AND ECONOMIC OWNERSHIP ISSUES

• Economic ownership issues
  – High profile cases (GSK in US; Maruti Suzuki in India)
  – Lack of consensus
    • Legal relationships over economic substance
    • Common law vs. civil law concept of property ownership
  – Parameters for application of the concept
    • Hallmarks/features
    • Example: Extent to which mere performance of an activity may or may not give rise to full or partial economic ownership of a marketing intangible
CRITICAL ISSUES ARISING IN PRACTICE

1. TM Royalties

- Refusal of TM royalties paid to IP owner, on basis that the local distributor created value in the local market (e.g., established brand recognition of the TM)
2. Business Restructuring

- Claims that compensation is due to local distributor in context of business restructuring, on the basis that it had developed marketing intangibles deserving of compensation upon conversion to LRD.
3. Elevated marketing expenses

- “Elevated” marketing expenses of the distribution entity (e.g., SG&A to sales ratio greater than those of the benchmark comparables)
  - Claimed by tax authorities to justify treatment of local distributor as entrepreneur, or to refuse deductibility of “excess” marketing expenses, etc.
4. Recognising and assessing value

- Focus should be on where local marketing intangible rights/property can be established as likely to have resulted from arm’s length dealings.
- Clear parameters are needed to (1) recognize and (2) assess the value of any such marketing intangibles.
- Important to maintain link with arm’s length realities.
  - Examples
WHETHER EXISTING GUIDANCE IS ADEQUATE

• Current OECD references
  – Simple recognition of difficult questions insufficient
  – Current references may further fuel disagreement and misunderstanding (open to very wide interpretation)

• Existing guidance needs clarity
  – True nature and definition of a marketing intangible
  – Criteria for creation of marketing intangibles
  – Determining value
CONCLUSION

• Need clear guidance on local marketing intangibles
  – Real-life examples that address critical issues
  – Practical solutions
  – Solid analytical framework to make it fair and reasonably predictable (e.g., definitions, criteria, relative value)
QUESTIONS?