

Annexure 1 – OECD Reference

Kindly find the extract of paragraphs 3.9 to 3.14 of OECD Transfer Pricing Guidelines 2022, as referred in the report.

“A.3.1. Evaluation of a taxpayer’s separate and combined transactions

3.9. Ideally, in order to arrive at the most precise approximation of arm’s length conditions, the arm’s length principle should be applied on a transaction-by-transaction basis. However, there are often **situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis**. Examples may include: a) some long-term contracts for the supply of commodities or services, b) rights to use intangible property, and c) pricing a range of closely-linked products (e.g. in a product line) when it is impractical to determine pricing for each individual product or transaction. Another example would be the licensing of manufacturing know-how and the supply of vital components to an associated manufacturer; **it may be more reasonable to assess the arm’s length terms for the two items together rather than individually. Such transactions should be evaluated together using the most appropriate arm’s length method**. A further example would be the routing of a transaction through another associated enterprise; it may be more appropriate to consider the transaction of which the routing is a part in its entirety, rather than consider the individual transactions on a separate basis. See example 26 of Annex I to Chapter VI.

3.10. Another example where a **taxpayer’s transactions may be combined is related to portfolio approaches**. A **portfolio approach is a business strategy consisting of a taxpayer bundling certain transactions for the purpose of earning an appropriate return across the portfolio rather than necessarily on any single product within the portfolio**. For instance, some products may be marketed by a taxpayer with a low profit or even at a loss, because they create a demand for other products and/or related services of the same taxpayer that are then sold or provided with high profits (e.g. equipment and captive aftermarket consumables, such as vending coffee machines and coffee capsules, or printers and cartridges). Similar approaches can be observed in various industries. Portfolio approaches are an example of a business strategy that may need to be taken into account in the comparability analysis and when examining the reliability of comparables. See paragraphs 1.134-1.138 on business strategies. However, as discussed in paragraphs 1.149-1.151, these considerations will not explain continued overall losses or poor performance over time. Moreover, in order to be acceptable, portfolio approaches must be reasonably targeted as they should not be used to apply a transfer pricing method at the taxpayer’s company-wide level in those cases where different transactions have different economic logic and should be segmented. See paragraphs 2.84-2.85. Finally, the above comments should not be misread as implying that it would be acceptable for one entity within an MNE group to have a below arm’s length return in order to provide benefits to another entity of the MNE group, see in particular paragraph 1.150.

3.11. While some separately contracted transactions between associated enterprises may need to be evaluated together in order to determine whether enterprises as a package may need to be evaluated separately. An MNE may package as a single transaction and establish a single price for a number of benefits such as licences for patents, know-how, and trademarks, the provision of technical and administrative services, and the lease of production facilities. This type of arrangement is often referred to as a package deal. Such comprehensive packages would be unlikely to include sales of goods, however, although the price charged for sales of goods may cover some accompanying services. In some cases, it may not be feasible to evaluate the package as a whole so that the elements of the package must be segregated. In such cases, after determining separate transfer pricing for the separate elements, the tax administration should nonetheless consider whether in total the transfer pricing for the entire package is arm’s length.

3.12. *Even in uncontrolled transactions, package deals may combine elements that are subject to different tax treatment under domestic law or an income tax convention. For example, royalty payments may be subject to withholding tax but lease payments may be subject to net taxation. In such circumstances, it may still be appropriate to determine the transfer pricing on a package basis, and the tax administration could then determine whether for other tax reasons it is necessary to allocate the price to the elements of the package. In making this determination, tax administrations should examine the package deal between associated enterprises in the same way that they would analyse similar deals between independent enterprises. Taxpayers should be prepared to show that the package deal reflects appropriate transfer pricing.*