

Day 3, Session 2

Transfer Pricing Audits - Workshop



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Advanced Transfer Pricing Course (General Topics), April 15-19, 2024

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I. Starbucks case

- Starbucks case: Timeline
- Starbucks case: Facts
- Questions
- Answers
- Starbucks case: TP challenges by the Commission
- Starbucks case: Court judgement (24 September 2019)

Section I

Starbucks case

WU

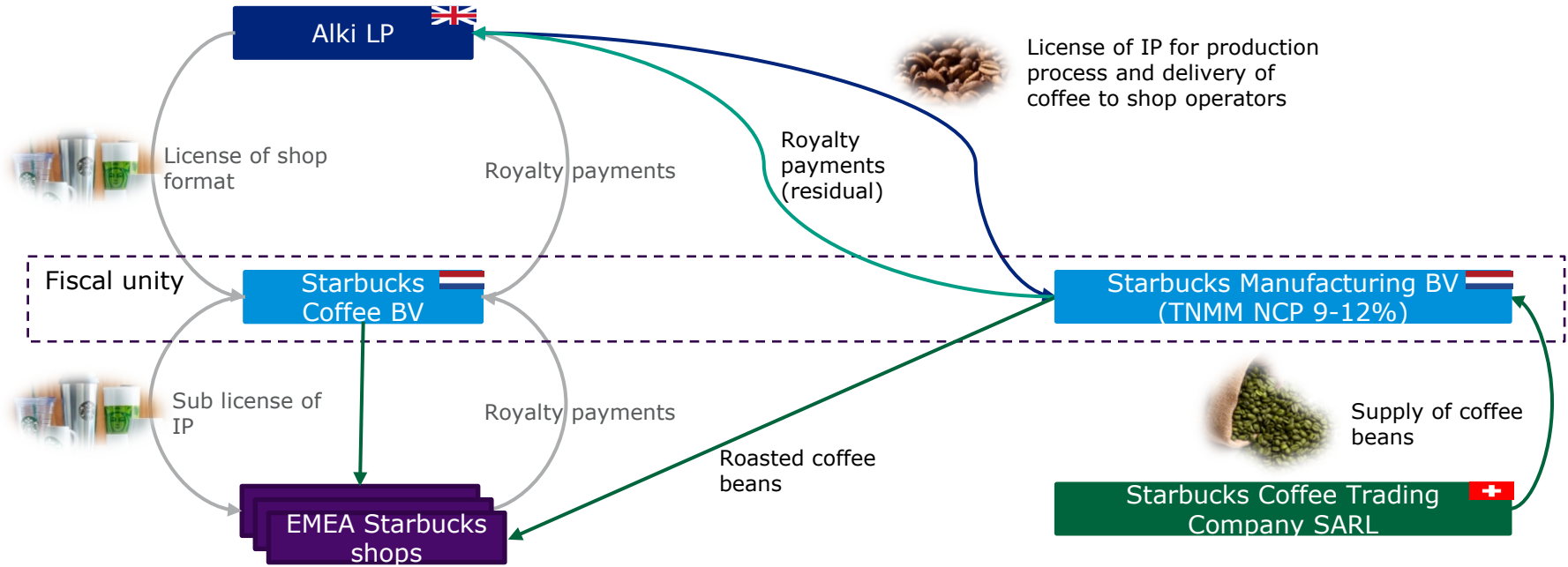
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Starbucks case: Timeline

➤	2001	First agreement on tax treatment between NL/Starbucks
➤	2002	Starbucks Manufacturing EMEA BV starts coffee roasting in NL
➤	2007	APA Starbucks Manufacturing EMEA BV (from October 1, 2007 – October 31, 2017)
➤	2008	Agreement on tax treatment converted into 2 APAs (one for each NL BV)
➤	2013	EU Commission starts asking questions to NL about APAs
➤	2014	EU Commission decision to officially open investigation + publication of decision
➤	2015	EU Commission decision: State Aid report
➤	2019	Ruling in favour of the Netherlands, no appeal

Starbucks case: Facts



Questions

- What were the transfer pricing challenges by the Commission to the taxpayer and the government of the Netherlands?
- The line of defense of the taxpayer is not public, however it can be derived from the comments



Transfer pricing challenges by the Commission

- The APA did not analyse the royalty payment, which was the main IC transaction
- For the royalties, the CUP method has priority over the TNMM
- BV did not use IP of the group and if they did the payment for it should have been zero or lower than the actual payment
- Variable royalties do not happen between third parties and the royalties were too high
- For the mark up on manufacturing, the internal CUP method has priority over TNMM
- The price of green beans sold from Switzerland was too high
- The choice of the tested party was wrong
- The choice of PLI was wrong, it should have been sales related not costs related
- The cost base adjustment was not appropriate
- The use of working capital adjustments was not appropriate



Starbucks case: Court judgement (24-9-2019)

- The Commission came up with its own version of the ALP: dismissed
 - The Commission needs to take into account ALP is approximate and the NL government must not take the wording of the Commission literally or out of context
- The Commission use evidence available only after APA was signed and contradicted itself in several lines of argument: agreed
 - The Court is very focused in looking for holes in the argumentation of the Commission
 - The Commission lost overall case so they had to pay the expenses of Starbucks and NL government
- The APA ignored or did not analyse the royalty payment, which was the main IC transaction: dismissed
 - The APA and supporting reports substantiate the royalty indirectly
- BV did not use IP of the group and if they did the payment for it should have been zero or lower than the actual payment: dismissed
 - The Commission seems to contradict itself on this proposition
 - The BV clearly used IP of the group
 - A variable royalty is unusual but if the ultimate result is arm's length it is possible
 - Some confusion about the financials of BV used by the Commission and used by defense lawyer



Starbucks case: Court judgement (24-9-2019)

- For the royalties paid for the IP, the CUP method was ignored and CUP has priority over the TNMM: dismissed
 - The Commission was not able to prove that the possible internal and external CUPs for royalties were good CUPs
 - The Commission was not able to prove that the CUP was a preferred method
- For the mark up on manufacturing, the internal CUP method has priority over TNMM: dismissed
 - The internal and external CUPs proposed by the Commission were not comparable enough
- The price of green beans sold from Switzerland was too high: dismissed
 - This was not part of the APA and therefore cannot be part of the state aid challenge
- The choice of the tested party was wrong: dismissed
 - The 1995 OECD Guidelines did not have much guidance on this and the only paragraph referring to this point said that the party with intangibles (Alki) would not be the tested party
 - The result could have been the same if Alki was the tested party (?)

Starbucks case: Court judgement (24-9-2019)

- Wrong PLI: dismissed
 - Commission look at revenue only, not profit
 - Third party revenue was not excluded by the Commission
- Cost base adjustment: dismissed
 - The Commission failed to prove that excluding costs from the cost base provided an advantage
- Working capital adjustments: dismissed
 - The Commission failed to measure the impact of the WC adjustments

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