IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1' NEW DELHI

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 980/Del/2017
AY: 2012-13

Louis Vuitton India Retail Pvt. Ltd., 901-A, Ninth floor, Time Tower, Mehrauli Gurgaon Road, Gurgaon-122002 (PAN: AAACL8230E)	vs	DCIT, Circle-2, Gurgaon.

Appellant by:	Shri Vishal Kalra, Adv. Shri Ankit Sahni, Adv. Shri S. Tomar, Adv.
Respondent by:	Shri Amrendra Kumar, CIT DR

Date of Hearing	10.07.2017
Date of pronouncement	06.10.2017

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

This appeal filed by the assessee is directed against the final Assessment Order dated 30.01.2017 passed by the Assessing Officer (AO) u/s 143(3) read with section 144C of the Income-Tax Act, 1961 (hereinafter called 'the Act') pertaining to assessment year 2012-13. The main issue of grievance is the addition on account of transfer pricing adjustment towards Advertisement, Marketing and Promotion expenses amounting to Rs. 97,539,656/-.

2. The facts of the case, in brief, are that the assessee is an Indian subsidiary of M/s Louis Vuitton Malletier SA, France and is engaged in the business of retailing the products of the group. The assessee imports material from its group companies and resells the same in the Indian markets. The products which are imported in India by the assessee are fashion accessories, leather bags and shoes.

2.1 For the year under consideration, the assessee filed return declaring Nil income and also reported certain international transactions. The AO referred the matter of determination of Arm's Length Price (ALP) of the international transactions to the Transfer Pricing Officer (TPO). The international transactions reported by the assessee included import of finished goods, import of window display, packaging material, brochures and catalogues of goods and reimbursement of expenses (received). For import transactions, the assessee applied Resale Price Method (RPM) as the Most Appropriate Method (MAM), whereas for the reimbursement of expenses, the assessee applied Comparable Uncontrolled Method (CUP). During the course of the proceedings, the TPO observed that the assessee had incurred Advertisement, Marketing and Promotion (AMP) expenses.

Treating this as an international transaction, the TPO proposed transfer pricing adjustment on account of AMP expenses at Rs. 9,75,39,656/- on substantive basis by intensity adjustment by applying the cost-plus method. As an alternate, the TPO proposed an addition of Rs. 6,64,95,995/- on protective basis by applying the Bright Line Test (BLT). No relief was allowed by the Hon'ble Dispute Resolution Panel (DRP) and the Hon'ble DRP directed that AMP adjustment should be made using the Bright Line Test and as an alternate, AMP intensity adjustment be made on a protective basis. The AO in the final assessment order, made the addition of Rs. 9,75,39,656/- on substantive basis but did not make any addition on protective basis. Now, the assessee has come up in appeal before us.

2.2 The grounds raised by the assessee are as under-

> *"1. That on the facts and circumstances of the case and in law, the AO erred in assessing the total income of the Appellant under section 143(3) read with section 144C(13) of the Act, for the relevant AY at INR 15,77,78,710 as against NIL income returned by the Appellant. Further, the DRP erred in upholding the same.*
>
> *2. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in making adjustment of INR 9,75,39,656 to the arm's length price of alleged international transaction of Advertisement, Marketing and Promotion ("AMP") expenditure.*

3. That on the facts and circumstances of the case and in law, the orders passed by the AO /TPO were bad in law as the pre-requisite for applying Chapter-X, i.e., existence of an international transaction between two Associated Enterprises ("AE") under section 92B of the Act, was not satisfied or existed as there was no agreement, understanding or arrangement between the Appellant and the AE for incurrence of such expenditure by the Appellant. Further, the DRP erred in upholding the same.

4. Without prejudice, the orders passed by the AO / TPO were bad in law as the unilateral AMP expenditure incurred by the Appellant was categorized as 'international transaction' under chapter X of the Act, by the AO / DRP / TPO, contrary to law in as much the AO neither granted the Appellant proper opportunity of being heard, nor recorded his satisfaction in respect thereof.

5. That on the facts and circumstances of the case and in law, the TPO erred in re-characterizing the unilateral AMP expenditure being payments made by Appellant to independent third parties as an 'international transaction' under chapter X of the Act and particularly when the jurisdiction of the TPO is only to compute arms' length price ('ALP') of the international transaction. Further, the DRP erred in not adjudicating the objections challenging the jurisdiction of the TPO in this regard.

5.1 That on the facts and circumstances of the case and in law, the TPO erred in suo-moto benchmarking the alleged international transaction related to AMP expenditure without their being any order or reference from the AO in relation thereto.

6. That on facts and circumstances of the case and in law, AO / DRP have erred in holding that the Appellant has failed to demonstrate business purpose / benefit from incurrence of alleged excessive AMP expenditure without providing any cogent reasons and completely ignoring that incurrence of the AMP expenditure has

accelerated growth of Appellant's turnover over the years.

7. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in re-characterizing the Appellant as service provider rendering brand building services to its AE, without appreciating that it is a normal risk bearing distributor incurring AMP expenditure in the course of its own business to promote its sales in India.

8. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in not following the various decisions of the High Court. The DRP further erred in sustaining the order of AO / TPO on the premises that the Special Leave Petition against such decisions have been admitted by the Hon'ble Supreme Court.

9. That on the facts and circumstances of the case and in law, the DRP has grossly erred in sustaining the order of AO / TPO since the Department cannot file an appeal against the directions of the DRP.

10. That on the facts and circumstances of the case and in law, the DRP has grossly erred in upholding the order of AO / TPO with pre-conceived notion, without proper application of mind and in undue haste.

Notwithstanding and without prejudice to the above grounds that the AMP expenditure incurred by the Appellant does not constitute an international transaction under Chapter X of the Act, the Appellant craves to raise following grounds on merits:

Re: Additions made on substantive basis

11. That on facts and circumstances of the case and in law, the AO / DRP / TPO have erred in not appreciating that distribution and marketing are inter-connected and intertwined functions and should be benchmarked on an aggregate basis. The AO / DRP / TPO further erred in not appreciating that if the two functions are

segregated and benchmarked, then the same would result in over taxation and is contrary to the provisions of the Act.

11.1 That on facts and circumstances of the case and in law, the AO / TPO have erred in holding that the Appellant did not propose / furnish comparables which performed distribution as well as AMP function, without appreciating that the comparables companies furnished by the Appellant were undertaking AMP expenditure / function as well. Further, the DRP erred in summarily rejecting such comparables without providing any opportunity to the Appellant.

12. That on facts and circumstances of the case and in law, the AO / DRP / TPO erred in not appreciating that the operating margin of the Appellant was better than the average mean margin of the comparable companies submitted by the Appellant using TNMM, in the course of assessment.

13. That on facts and circumstances of the case and in law, the AO / DRP / TPO have erred in applying cost plus method to benchmark the AMP expenses, and further erred in applying the same de hors the Indian Transfer Pricing Regulations.

13.1 Without prejudice and notwithstanding, that on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in not granting set-off of excessive gross profit earned by the Appellant from distribution function, against TP adjustment proposed in relation to AMP expenses, even if segregate approach was to be adopted for benchmarking the AMP expenditure.

14. That on the facts and circumstances of the case and in law, AO / DRP / TPO have erred in not appreciating that the Appellant had not provided any value added / brand building services to its AE by incurring AMP expenditure, and therefore, no mark-up could have been charged / levied on such expenditure, even if the same was to be characterized as an 'international transaction'.

15. Notwithstanding and without prejudice to the above ground, even if the mark-up is to be applied, the same could have been charged only on the value added

expenses incurred by the Appellant for such alleged brand promotion service and not on the entire amount incurred / paid to third party vendors.

15.1 Without prejudice and notwithstanding, that on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in applying Appellant's gross profit rate as mark-up for alleged international transaction relating to rendition of brand building services (AMP expenditure).

16. That on facts and circumstances of the case and in law, the DRP has erred in not appreciating that AO / TPO failed to exclude direct marketing expenses, such as expenses relating to business promotion, public relations, window display, merchandising and brochures & catalogues; from the ambit of AMP expenditure while benchmarking the alleged international transaction of AMP expenditure on substantive basis, disregarding various decisions of the Hon'ble Delhi High Court

16.1 That on facts and circumstances of the case and in law, DRP has erred in directing AO / TPO to include sales relating expenditure while benchmarking the alleged international transaction of AMP expenditure, disregarding various decisions of the High Court.

16.2 That on facts and circumstances of the case and in law, the DRP has erred in not affording opportunity of being heard to the Appellant, which is a sine qua non under section 144C(11) of the Act before issuing any direction which is prejudicial to the interest of the assessee, while directing AO / TPO to include sales relating expenditure as part of AMP expenditure while benchmarking the said international transaction.

17. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in not granting quantitative / economic adjustments (such as non-payment of royalty / expenses on product launches) while quantifying adjustments relating to alleged excessive AMP expenditure.

Re: Additions made on protective basis

18. Notwithstanding and without prejudice to the other grounds, the AO / DRP / TPO have erred in determining adjustments on protective basis by applying Bright Line Test ('BLT') method which has been jettisoned by the Hon'ble Delhi High Court.

18.1. Notwithstanding and without prejudice, on facts and circumstances of the case and in law, the DRP has erred in not appreciating that AO / TPO failed to exclude direct marketing expenses, such as expenses relating to business promotion, public relations, window display, merchandising and brochures & catalogues; from the ambit of AMP expenditure while benchmarking the alleged international transaction of AMP expenditure on protective basis, completely disregarding various decisions of the Hon'ble Delhi High Court

18.2 Notwithstanding and without prejudice, on facts and circumstances of the case and in law, the AO / TPO have erred in rejecting comparable companies proposed by Appellant for applying the BLT in the course of transfer pricing proceedings without proving any cogent reasons for the same. Further, DRP erred in upholding the order of AO / TPO.

19. Notwithstanding and without prejudice to the other grounds, the DRP has erred in not affording opportunity of being heard to the Appellant, which is a sine qua non under section 1440(11) of the Act, before issuing any direction which is prejudicial to the interest of the assessee, while directing AO / TPO to carry out alternative comparability adjustment.

19.1 Notwithstanding and without prejudice to the other grounds, the DRP has erred in arbitrarily selecting companies in market support services for carrying out comparability adjustment on account of differences in intensity of AMP expenditure of the Appellant vis-a-vis comparable companies, for determining the average

return on market support services and further, erred in considering companies which are functionally different.

Other grounds:

20. That on the facts and circumstances of the case and in law, the AO / DRP have erred in not granting / directing set-off of brought forward loss and unabsorbed depreciation, as per the provisions of section 72 and section 32 of the Act, before determining total income of the Appellant.

21. That on the facts and in the circumstances of the case and in law, the AO / DRP / TPO have erred in ignoring the provisions of Rule 10B, Rule 10CA and Rule 10D of the Rules and judicial pronouncements, which advocate usage of multiple year data of comparable companies for the purpose of determination of the arm's length price.

22. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in not providing the Appellant the benefit of (+/-) 5% range as provided by the proviso to section 92C(2) of the Act.

23. That on the facts and circumstances of the case and in law, the AO has erred in charging interest under sections 234A, 234B and 234C of the Act.

23.1 That on the facts and circumstances of the case and in law, the AO has further erred in incorrect calculation of interest under sections 234A, 234B and 234C of the Act.

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

The Appellant prays for leave to ad, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal."

3. The Ld. AR contended that the incurring of AMP expenses is not an international transaction at all and, hence, there can be no question of determining the arm's length price of this

transaction or making any addition thereon. It was submitted that there was no finding of the TPO on the issue of determination of international transaction and as such the addition was baseless. It was also submitted that no addition on account of AMP adjustment had been made in the preceding assessment year i.e. AY 2011-12. A copy of the ITAT's order in assessee's own case for AY 2010-11 was also placed before us wherein the ITAT in ITA 775/Mum/2015 had restored the issue of AMP adjustment to the file of the AO/TPO on the ground that when the TPO had held AMP expenses to be an international transaction, he did not have any occasion to consider the ratio laid down in several judgments of the Hon'ble Jurisdictional High Court which were later available. The Ld. AR submitted that, however, for the year under consideration, the situation was factually different, because in this year, the TPO as well as the Hon'ble DRP had the benefit of the various judgments of the Hon'ble High Court on the issue and, therefore, the issue be adjudicated by the ITAT itself.

3.1 The Ld. AR relied on the following judgments/orders in the cases of Sony Ericsson Mobile Communications India Pvt. Ltd Vs. CIT of the Hon'ble Delhi High Court reported in 276 CTR 97

(Del), Toshiba India (P) Ltd. Vs. DCIT of ITAT Delhi reported in 2015- TII-191 – ITAT – DEL – TP, Zimmer India (P) Ltd. Vs. DCIT of ITAT Delhi reported in 2015 – TII- 222- ITAT- DEL- TP, Baush & Lomb India Pvt. Ltd. Vs. DCIT of ITAT Delhi reported in 2015- TII- 244- ITAT- DEL- TP, Casio India Company Pvt. Ltd Vs. DCIT of ITAT Delhi reported in 2015- TII- 268 – ITAT – DEL- TP, Nikon India P Ltd Vs. DCIT of ITAT Delhi reported in 2015 – TT- 424- ITAT- DEL- TP and Haier Appliances India Ltd. Vs. DCIT of ITAT Delhi reported in 2015 – TII – 461- ITAT – DEL- TP and submitted that there was no international transaction of AMP expenses on the basis of principles laid down in these judgments and, hence, the entire exercise of determining its ALP and, consequently, making transfer pricing adjustment, be deleted.

3.2 The Ld. AR also submitted that a remand to the TPO to adjudicate the issue afresh was not suitable.

4. The Ld. CIT DR, in response, relied on the judgment of the Hon’ble Delhi High Court in the case of Sony Ericson Mobile Communications (India)Pvt. Ltd. vs. CIT reported in (2015) 374 ITR 118 (Del) in which AMP expenses have been held to be an international transaction and the matter of determination of its ALP was restored. He also relied on a later judgment of the

Hon'ble Jurisdictional High Court in the case of Yum Restaurants (India) P. Ltd. vs. ITO reported in (2016) 380 1TR 637 (Del) and still another judgment dated 28.1.2016 of the Hon'ble Delhi High Court in the case of Sony Ericson Mobile Communications (India) Pvt. Ltd. (for the AY 2010-11) in which the question as to whether AMP expense is an international transaction had been restored for a fresh determination. The Ld. CIT DR submitted that the judgment in the case of Yum Restaurants and Sony Ericson (for AY 2010-11) delivered in January, 2016 is later in point of time to the earlier judgments in the case of Maruti Suzuki and Whirlpool, etc. and, hence, the matter should be restored for a fresh determination. It was further submitted that there is no blanket rule of the AMP expenses as a non-international transaction. He stated that the Hon'ble High Court in Whirlpool (supra) has made certain observations, which should be properly weighed for ascertaining if an international transaction of AMP expense does exist. It was argued that the ITAT in several cases, including the assessee's own case for AY 10-11, had restored this issue to the file of TPO to be decided afresh in the light of the available judgments of the Hon'ble Delhi High Court. He also relied on another judgment

dated 28.1.2016 of the Hon'ble Delhi High Court in Sony Ericson Mobile Communications (India) Pvt. Ltd. (for the AY 2010-11) in which the question as to whether AMP expense is an international transaction, had been restored for a fresh determination. He still further referred to the three later judgments of the Hon'ble Delhi High Court, viz., Rayban Sun Optics India Ltd. Vs. CIT (order dated 14.9.2016), Pr. CIT VS. Toshiba India Pvt. Ltd. (order dated 16.8.2016) and Pr. CIT VS. Bose Corporation (India) Pvt. Ltd. (order dated 23.8.2016) in all of which similar issue had been restored for fresh determination in the light of the earlier judgment in Sony Ericsson Mobile Communications India Pvt. Ltd. (supra). The Ld. CIT DR argued that the Hon'ble Delhi High Court in its earlier decision in Sony Ericson Mobile Communications (India) Pvt. Ltd. vs. CIT reported in (2015) 374 ITR 118 (Del) had held AMP expenses to be an international transaction. It was argued the matter should be restored for a fresh determination.

5. We have heard the rival submissions. We find that when the TPO held AMP expenses to be an international transaction, he had the benefit of only some of judgments of the Hon'ble Jurisdictional High Court. Now, several other judgments on the

issue, including those which have been delivered after the passing of the order by the TPO, are available for consideration. As the entirety of the judicial position, as laid down by the Hon'ble High Court, is now required to be applied to the factual position prevailing in this case, we direct that a fresh determination of the ALP of AMP expense be done at the end of the TPO/AO.

5.1 It is seen that a similar issue came up for consideration before the ITAT in assessee's own case for assessment year 2010-11 and ITAT Delhi Bench, vide its order dated 01/03/2017 in ITA No.775/Mum/2015, restored such matter to the file of TPO/A.O. for a fresh consideration. Despite the above position settled by the ITAT in assessee's own case for AY 2010-11 restoring the matter to the TPO/AO for a fresh determination, the Ld. AR argued that the matter be decided by the Tribunal itself as, in his opinion, there were certain distinguishing features prevalent for this year *vis-a-vis* the preceding years. The first such issue brought to our notice by the Ld. AR is the view canvassed by the Hon'ble DRP on AMP intensity adjustment. The Ld. AR argued that in none of the earlier years, did the Hon'ble DRP direct the

carrying out of AMP intensity adjustment. It is true that the issue of AMP intensity adjustment has been considered by the Hon'ble DRP, as an alternate, for the first time in the proceedings for the instant year which was not there in earlier years. However, the pertinent fact to be noted is that the AO has not made any addition on the basis of intensity adjustment on a protective basis as directed by the Hon'ble DRP and, thus, no addition by applying AMP intensity adjustment has been eventually made in the impugned order. Without going into the merits of the decision of the Hon'ble DRP on this issue and, therefore, the same has no impact in the proceedings for the year under consideration. This contention of the Id. AR, ergo, fails.

5.2 The other point urged by the Ld. AR was to decide this issue at our end as the TPO had passed order on 29.01.2016 in which he had considered certain High Court judgments on the point. Once such judgments were taken into consideration, the Ld. AR argued, that there was no point in again directing the TPO to consider the effect of the judgments delivered by the Hon'ble High Court on the point. The argument put forth on behalf of the assessee in this regard is partly correct. It is seen that though

the TPO has referred to certain rulings of the Hon'ble jurisdictional High Court on the point in coming to the conclusion that there was a separate international transaction, yet, there are certain other important judgments of the Hon'ble High Court, delivered after the passing of the order by the TPO, which could not be considered, as those were not in existence at that point of time. In this regard, it is noted that there are at least three later judgments of the Hon'ble Delhi High Court, referred to above, viz., Rayban Sun Optics India Ltd. Vs. CIT (order dated 14.9.2016), Pr. CIT VS. Toshiba India Pvt. Ltd. (order dated 16.8.2016) and Pr. CIT VS. Bose Corporation (India) Pvt. Ltd. (order dated 23.8.2016) in all of which similar issue has been restored for fresh determination in the light of the earlier judgment in Sony Ericsson Mobile Communications India Pvt. Ltd. (supra). Accordingly, the contention of the Ld. AR, claiming departure from the earlier year, on this score, is not tenable. Therefore, in light of the non-sustainability of the objections taken by the Ld. AR and following the earlier view taken by the ITAT in assessment year 2010-11 in the case of the assessee, we set aside the impugned order and remit the matter to the file of TPO/AO for a fresh determination of the question as to whether

there exists an international transaction of AMP expenses. If the existence of such an international transaction is not proved, the matter will end there and then, calling for no transfer pricing addition. If, on the other hand, the international transaction is found to be existing, then the TPO will determine the ALP of such an international transaction in the light of the relevant judicial position, after allowing a reasonable opportunity of being heard to the assessee.

5.3 It is further clarified that if a situation for determining the ALP of AMP expenses arises, then no transfer pricing adjustment should be made by applying the Bright Line Test because the Hon'ble Jurisdictional High Court has not approved the application of the bright line test in several decisions.

5.4 Accordingly, the impugned order is set aside and the matter is sent back to the TPO/AO for a fresh determination of the ALP of AMP expenses, if warranted, in the instant case in the light of the detailed discussion made above.

6. In the final result, the appeal of the assessee stands allowed for statistical purposes.

Order pronounced in the Open Court on 6th October, 2017.

Sd/-	Sd/-
(R.S. SYAL)	**(SUDHANSHU SRIVASTAVA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

DT. 06th October, 2017
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By Order

Asstt. Registrar