

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: '1-2', NEW DELHI**

**BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 6299/Del/2017
Assessment Year: 2013-14

M/s. Nikon India Pvt. Ltd., Plot No. 71, Sector -32, Institutional Area, Gurgaon,	Vs.	DCIT, Circle -3(1), Gurgaon
PAN : AACCN5100F		
(Appellant)		(Respondent)

And

S.A. No. 570/Del/2017
[In ITA No. 6299/Del/2017]
Assessment Year: 2013-14

M/s. Nikon India Pvt. Ltd., Plot No. 71, Sector -32, Institutional Area, Gurgaon,	Vs.	DCIT, Circle -3(1), Gurgaon
PAN : AACCN5100F		
(Appellant)		(Respondent)

Assessee by	Sh. Gourav Gupta, Adv.
Department by	Sh. H.K. Choudhary, CIT(DR)

Date of hearing	17.10.2017
Date of pronouncement	06.11.2017

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 28/09/2017 passed by the Deputy Commissioner of Income-tax, Circle-3, Gurgaon (hereinafter called as ~~the~~ Assessing Officer) pursuant to the direction of the Id. Dispute Resolution Panel (DRP), raising following grounds:

1. That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant under section 143(3) of the Act, for the relevant assessment year at INR 46,73,05,373 as against the returned income of INR 3,82,78,270.

2. 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 and the Dispute Resolution Panel ("DRP") erred in upholding the same.

2.1 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 full risk bearing distributor incurring AMP expenditure in the course of its own business to promote its sales in India.

3. That on the facts and circumstances of the case and in law, the orders passed by the AO/DRP/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 any opportunity of being heard to the Appellant, nor passed a speaking order recording his satisfaction in relation to characterization/categorization of the AMP expenditure as an 'international transaction'.

4. 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, particularly when section 92CA of the Act enables the TPO only to compute the arm's length price ("ALP") of 'international transaction'. Further, the DRP erred in not adjudicating the objections challenging the jurisdiction of the TPO in this regard.

4.1 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.

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:

5. That on facts and circumstances of the case and in law, the AO/DRP/TPO have erred in making an adjustment in respect of alleged international transaction of AMP expenditure, without appreciating that adjusted gross profit margin as well as operating margin of the Appellant was better than the comparables.

6. That on the facts and circumstances of the case and in law, the AO/DRP/TPO grossly erred in applying Bright Line Test ('BLT') to propose transfer pricing adjustment amounting to INR 42,90,27,103, on protective basis, without appreciating that BLT has been expressly rejected by the Hon'ble Tribunal in Appellant's own case for earlier AYs.

7. 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'.

7.1 Notwithstanding and without prejudice that no mark-up could have been levied, on the facts and circumstances of the case and in law, AO/DRP/TPO have erred in law and facts, by cherry picking the comparable companies for purpose of computing mark-up for the alleged international transaction and without providing an opportunity of being heard in this regard.

7.2 That on the facts and circumstances of the case and in law, the AO/DRP/TPO has erred in not granting set-off of excess profit from distribution of products while benchmarking the alleged international transaction of incurrance of excessive AMP expenditure.

8. 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 incurred on new product launches) while quantifying arm's length price of the alleged international transaction of AMP expenditure.

9. That on the facts and circumstances of the case and in law, the AO have erred in levying / charging interest under sections 234B of the Act.

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

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

2. The briefly stated facts of the case are that, assessee is a wholly-owned subsidiary of %Nikon Corporations, Japan+. It was engaged in business of import, distribution and sales for ~~the~~ Nikon Imaging Products in India and also provided after sales service for the complete range of Nikon imaging, vision and instrument products. The assessee filed return of income electronically, declaring total income of Rs.3,82,78,270/- on 29/11/2013. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short ~~the~~ Act) was issued and complied with. During the course of assessment proceedings, the Id. Assessing Officer noticed the international transactions carried out by the assessee with the Associated Enterprises (AE), and accordingly he referred the determination of arm's length price of the international transaction to the Id. Transfer Pricing Officer (TPO) in terms of section 92CA(1) of the Act. According to the TPO, the assessee incurred expenses on Advertising, Marketing and Promotions (AMP) of the brand of the Associated Enterprise (AE), and thus there existed on international transactions, which need to be benchmarked. The learned TPO compared the intensity of AMP functions of the comparables and the

assessee and proposed AMP adjustment on substantive basis amounting to Rs.33,08,51,870/-. The learned TPO also computed AMP adjustment on the bright line test (BLT) and proposed an adjustment of Rs.42,90,27,103/- on protective basis in his order dated 09/11/2016. After taking into consideration the proposed transfer pricing adjustments, the Assessing Officer passed draft assessment order on 09/11/2016 under section 143(3) r.w.s. 144C of the Act. The assessee filed objections against the draft assessment order before the Ld. DRP. After taking into consideration the objections of the assessee, the Ld. DRP issued directions to reduce the AMP adjustment on substantive basis to nil against the addition proposed of Rs.33,08,51,870/- by the Assessing Officer. The Ld. DRP, however, upheld the proposal of the Assessing Officer to make an adjustment for AMP on protective basis amounting to Rs.42,90,27,103/-. In view of the directions of the Ld. DRP, the Assessing Officer passed final assessment order on 28/09/2017 in terms of section 143(3) r.w.s. 144C of the Act, in which he made AMP adjustment amounting to Rs.42,90,27,103/- on protective basis. Aggrieved with the order of the Assessing Officer, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. In the grounds raised, the only effective issue is, whether AMP adjustment could be made in the case of the assessee on protective basis following the Bright Line Test (BLT).

4. Before us, the learned counsel submitted that identical addition made on protective basis applying Bright Line Test (BLT) in assessment year 2010-11 has been deleted by the Tribunal in the case of the assessee itself; accordingly, the addition in the year under consideration is not sustainable.

5. The Ld. CIT(DR), on the other hand, submitted that addition was made on protective basis to safeguard the interest of Revenue as the issue of applying BLT for benchmarking international transactions of AMP, is pending in higher appellate court.

6. We have heard the rival submission and perused the relevant material on record. We find that in the case of the assessee in assessment year 2010-11, the learned TPO made AMP adjustment amounting to Rs.22,30,18,964/- on protective basis applying the BLT. On further appeal, the Tribunal in ITA No. 4574/Del/2017 deleted the addition with following observation:

*“15. TPO by applying the Bright Line Test (BLT) proposed adjustment of Rs.22,30,18,964/- on protective basis. The Id. AR for the assessee by relying upon the decisions rendered by the coordinate Bench of the Tribunal in **Tianjin Tianshi Biological Development Company Ltd. vs. DCIT – (2014) 52, ITA No4574/Del/2017 TAXMANN.COM 518 (Delhi-Trib, ITO vs. M/s. Fussy Financial Services Pvt. Ltd. in ITA No.4227/Del/2014 dated 05.06.2017, Perfetti Van Melle India Pvt. Ltd. vs. DCIT in ITA No.1073/Del/2017 dated 24.05.2017, decision rendered by Hon’ble Delhi High Court in Sony Ericsson Mobile Communications India (P.) Ltd. vs. CIT-III – (2015) 55 taxmann.com 240 (Delhi) and decision rendered by Hon’ble Gujarat High Court in Veer Gems vs. ACIT – (2011) 15 taxmann.com 355 (Gujarat) contended that TP adjustment on protective basis is not sustainable and order is itself void ab initio. The Id. AR for the assessee further contended that BLT could have been applied at the first stage.***

*16. The coordinate Bench of the Tribunal in case cited as **Perfetti Van Melle India Pvt. Ltd. vs. DCIT in ITA No.1073/Del/2017 dated 24.05.2017** determined the issue as to applying the BLT for determining the ALP of AMP expenses and observed as under :-*

“13. We want to clarify 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, as has been done on protective basis, because of Hon’ble High Court has not approved the application of the bright line test in several decisions.”

17. Furthermore, Hon'ble Delhi High Court in **Sony Ericsson Mobile Communications India (P.) Ltd. vs. CIT-III – (2015) 55 taxmann.com 240 (Delhi)** also determined the identical issue as to applying the BLT for determining ALP of the AMP in favour of the assessee and has categorically held that BLT has no statutory mandate and it is not obligatory to subject AMP expenses to BLT and considered non-routine AMP as separate transactions by making following observations :-

“III. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Adjustments - AMP expenses) - Assesseees were several Indian subsidiaries of Multi National Enterprises (MNEs) engaged in distribution and marketing of imported and branded products, manufactured and sold to them by foreign AEs - They had applied TNMM/RPM for computing ALP - TPO accepted methods so applied by assesseees, however, found that assesseees had incurred AMP expenses towards promotion of brand in India, however, no reimbursement of expenses was made from AEs - Hence, he used bright line test by segregating non- routine expenses and by deducting amount representing bright line from value of gross sales and determined excess AMP incurred by assessee and added same to income of assessee :- Whether where comparables adopted by assessee, with or without making adjustments as a bundled transaction had been accepted by TPO, it would be illogical and improper to treat AMP expenses as a separate transaction - Held, yes- Whether bright line test has no statutory mandate and it is not obligatory to subject AMP expenses as a bright line test and consider non-routine AMP as a separate transaction – Held, yes”

7. We find that BLT has been discarded as a method for computing arm's length price for international transactions of AMP by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India Private Limited Vs. CIT (2015), 374 ITR 118 (Delhi), thus, no addition could be sustained applying the BLT even on protective basis. Since in the year under consideration also, the only addition of AMP adjustment amounting to Rs.42,90,27,103/- made applying BLT on protective basis has been challenged before us, respectfully following the

above decision of the Tribunal, we direct the Assessing Officer to delete the said addition.

8. Accordingly, ground No. 6 of the appeal is allowed. Since the addition in question has already been deleted by us, the remaining grounds raised by the assessee are merely academic in nature and accordingly dismissed as infructuous.

9. In the result, the appeal of the assessee is allowed partly.

10. Since we have already deleted addition made by the Assessing Officer, the Stay Petition of the assessee (i.e. S.A. No. 570/Del/2017) seeking stay of recovery of demand is rendered infructuous.

The decision is pronounced in the open court on 6th Nov., 2017.

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Dated: 6th November, 2017.
RK/(D.T.D)

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi