

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "I-1" BENCH, NEW DELHI
[Coram: Pramod Kumar AM and Suchitra Kamble JM]**

SA No.619/Del/2017
In ITA No. 6565/Del/2017
Assessment year: 2013-14

MSD Pharmaceuticals Private Limited**Appellant**
*1544, Level 15, Eros Corporate Towers
Nehru Place, New Delhi 110 019 [PAN: AAECM1106C]*

Vs.

Additional Commissioner of Income Tax
Special Range 6, New Delhi**Respondent**

ITA No. 6565/Del/2017
Assessment year: 2013-14

MSD Pharmaceuticals Private Limited**Appellant**
*1544, Level 15, Eros Corporate Towers
Nehru Place, New Delhi 110 019 [PAN: AAECM1106C]*

Vs.

Additional Commissioner of Income Tax
Special Range 6, New Delhi**Respondent**

Appearances by:

Rashmi Chopra *for the appellant*
Kumar Pranav *for the respondent*

Date of concluding the hearing : November 10, 2017
Date of pronouncing the order : November 10, 2017

O R D E R

Per Pramod Kumar, AM:

1. This appeal, filed by the assessee, is directed against the order dated 26th September 2017 passed by the Assessing Officer under section 143(3) r.w.s. 144C

of the Income Tax Act, 1961, after incorporating the directions of the Dispute Resolution Panel, for the assessment year 2013-14. As the issues requiring our adjudicated in this appeal are neatly identified legal issues within a very narrow compass of relevant material facts, with the consent of the parties, this appeal itself has been taken up for hearing alongwith the stay petition which was listed before us today.

2. Grievance of the assessee, in substance, is twofold- first, against the addition of Rs 23,83,92,783 made by the Assessing Officer, in respect of arm's length price adjustment for advertising promotion and marketing (AMP) expenses by applying the bright line test (BLT), made on protective basis; and- second, against denial of set off in respect of brought forward business losses to the extent of Rs 26,25,85,933 by holding that, in view of the additions made by the Assessing Officer to the returned in the preceding assessment years, no part of the business losses, incurred in the preceding years, survives for adjustment in the present assessment year.

3. So far as the "protective addition" in respect of ALP adjustment of Rs 23,83,92,783 is concerned, we have noted that, in the Transfer Pricing Officer had held that an ALP adjustment of Rs 51,06,32,341 is required to be made to the AMP Expenses on the basis of Intensity Adjustment. However, this adjustment, as a result of the working capital adjustment etc directed by the DRP, has now been deleted by the Assessing Officer himself. In the TPO's order, however, it has been noted that so far as the application of Bright Line Test is concerned, though this issue is decided against the assessee by Hon'ble jurisdictional High Court, the "protective" addition is being made on this basis to protect the interests of the revenue, since the matter is pending before Hon'ble Supreme Court. When matter travelled to the DRP, it was noted the DRP confirmed this stand by observing as follows:

The TPO/AO has carried out protective assessment in respect of AMP adjustment. The same is also retained as a secondary approach; accordingly, it shall remain protective assessment. The TPO has carried out protective assessment by invoking Brightline method. This is a

protective action taken by the TPO/AO. The (*income tax*) department is agitating the issue before Hon'ble Supreme Court. The panel finds no infirmity in this (*protective assessment*).

4. It was in this backdrop that the Assessing Officer reiterated the ALP adjustment of Rs 23,83,92,783 by observing as follows:

Thus, the transfer pricing adjustment using intensity adjustment, applying TNMM in the case of the assessee stands revised to NIL, while Rs 23,83,92,783, following the Bright Line Method, stands confirmed following the DRP order.

5. The assessee is aggrieved and is in appeal before us.

6. Having heard the rival contentions and having perused the material on record, we are unable to see any merits in the impugned ALP adjustment of Rs 23,83,92,783 on, what has been termed as, protective basis. Learned Departmental Representative has not even disputed that the issue is covered against the revenue authorities by binding judicial precedents, but his worry is about protecting legitimate interests of the revenue. These apprehensions, however, are not really justified. There is no dispute that the application of bright line test, for making ALP adjustments in respect of the AMP expenses, is held to be unsustainable in law by Hon'ble jurisdictional High Court, and the TPO himself states so in so many words. It is also elementary that it is not, cannot be, open to us to disregard the binding judicial precedents and uphold the application of bright line test, for determining the ALP adjustment in respect of AMP expenses, merely because a binding judicial precedent from Hon'ble jurisdictional High Court has been challenged by the revenue authorities before the Hon'ble Supreme Court. The binding nature of a judicial precedent, as long as it holds the field i.e. is not overturned, remains unaffected by whether or not it has been challenged before a higher forum. As a corollary to this legal position, the impugned addition of Rs 23,83,92,783 must stand deleted. The very concept of protective addition is relevant only when an income is

to be added in the hands of more than one taxpayer, in a situation in which there is an element of ambiguity as to in whose hands the said income can be rightly brought to tax. That's not the case before us. In our humble understanding, therefore, the concept of 'protective assessment', as is known to the income tax law, has no application in the cases like the one before us.

7. In view of the above discussions, the addition of Rs 23,83,92,783 stands deleted.

8. So far as the question of set off of the brought forward business losses is incurred, learned representatives fairly agree that the matter is required to be remitted to the file of the Assessing Officer for fresh adjudication in the light of the result of the appellate proceedings in respect of the preceding assessment years in which the related disputed additions have been made. It is pointed out by the learned counsel that, in any event, the assessee has claimed set off of the loss of Rs 26,25,85,933 incurred in the assessment year 2012-13 which could not have been set off for the prior years, and the only year following the said assessment year is the year before us. It is also pointed out that the ALP adjustment, in respect of AMP expenses by applying the bright line test (BLT), which is now decided in favour of the assessee. While learned Departmental Representative did not really address on all these aspects, he fairly agreed to our suggestion that the matter is required to be examined afresh by the Assessing Officer in the light of outcome of the appellate proceedings for the other assessment years as also by way of a speaking order dealing with the specific contentions of the assessee. In the light of this undisputed position within a narrow compass of material facts, we remit the matter to the file of the Assessing Officer for fresh adjudication in the light of our above observations. We also direct the assessee to fully cooperate with the Assessing Officer in expeditious disposal of the remanded proceedings. Ordered, accordingly.

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

10. As the appeal itself is disposed of, the stay petition, seeking a stay on collection/ recovery of the related unpaid tax and interest demands impugned in this appeal, is rendered infructuous. The stay petition is thus dismissed as infructuous.

11. To sum up, while the appeal is partly allowed in the terms indicated above, the stay application is dismissed. Pronounced in the open court today on the 10th day of November, 2017

Sd/xx

Suchitra Kamble
(Judicial Member)

Sd/xx

Pramod Kumar
(Accountant Member)

New Delhi, the 10th day of November, 2017

Copies to: (1) *The appellant* (2) *The respondent*
(3) *Commissioner* (4) *CIT(A)*
(5) *Departmental Representative* (6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi benches, New Delhi