

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

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.1515/Del/2014
Assessment Year : 2009-10

M/s Haier Appliances India
Limited,
B-1/A-14,
Mohan Coop Indl. Estate,
Mathura Road,
New Delhi – 110 044.
PAN : AABCH3162L.
(Appellant)

Vs. Deputy Commissioner of
Income Tax,
Circle-12(1),
New Delhi.

(Respondent)

Appellant by : Shri Ajay Vohra, Senior Advocate,
Shri Neeraj Jain, Advocate and
Shri Abhishek Aggarwal, CA.
Respondent by : Shri Sanjay I. Bara, CIT-DR.

Date of hearing : 14.11.2018
Date of pronouncement : 03.12.2018

ORDER

PER G.D. AGRAWAL, VICE PRESIDENT :-

This appeal by the assessee for the assessment year 2009-10 is directed against the directions of learned Dispute Resolution Panel-1, New Delhi dated 19th December, 2013.

2. Brief facts are that the assessee as well as Revenue both had filed appeals against the assessment order dated 16th January, 2014. The ITAT disposed of both the appeals by a common order dated 8th September, 2016 whereby the issues raised in the assessee's appeal vide ITA No.1515/Del/2014 was set aside to the file of the Assessing Officer for examination afresh in the light of the decision of Hon'ble

Delhi High Court in the case of Sony Ericsson Mobile Communications Vs. CIT – [2015] 374 ITR 118 (Del). The Revenue's appeal vide ITA No.1582/Del/2014 was dismissed. The assessee, aggrieved with the order of the ITAT, filed appeal before Hon'ble Jurisdictional High Court, which, by order dated 1st September, 2007, set aside the order of the ITAT and restored the matter for fresh adjudication by the ITAT. The relevant findings of Their Lordships read as under :-

“6. Mr. Ajay Vohra, learned Senior counsel for the Assessee, points out that the ITAT committed a factual error in recording that the Assessee is a distributor of various consumable durable products of its AE. He points out that the Assessee is in fact a manufacturer through other entities. Secondly, it is pointed out that at the time the ITAT passed the order, it did not have the benefit of order subsequently passed by this Court in Sony Ericsson Mobile Communications v. CIT (order dated 28th January 2016 in ITA 638 of 2015) and Daikin Airconditioning India Pvt.Ltd. (order dated 27th July 2016 in ITA 269/2016) wherein this Court had emphasized that prior to commencing a TP exercise, the existence of an international transaction involving the Assessee and its AE has to first be established. This Court has in the above cases remanded the matter to the ITAT for that purpose.

7. Mr. Asheesh Jain learned counsel for the revenue has been unable to dispute that the ITAT has failed to examine in the first place whether there does exist an international transaction involving the assessee and its AE.

8. In the absence of such a finding, there would be no purpose in remanding, as the ITAT has done by the impugned order, the issue concerning TP adjustment to the TRPO for a fresh determination.

9. For the aforesaid reasons, the Court sets aside the impugned order of the ITAT and restores the assessee's appeal, ITA No.1515/Del/2014 for AY 2009-10, to the file of ITAT.

10. Mr. Vohra submitted a chart indicating that the subsidy/grant received by the Assessee from its AE during

the AY in question exceeded the net AMP expense incurred by the Assessee thereby obviating any TP adjustment on that score as proposed by the TPO. The said details will be taken into consideration by the ITAT while dealing with the appeal on merits. This Court is not inclined to express any opinion on the merits one way or the other.

11. The ITAT will decide the Assessee's appeal afresh without being influenced by anything said in this order on merits or in the previous order of the ITAT that has been set aside by this order. The Assessee's aforementioned appeal shall be listed before the ITAT on 18th September, 2017 for directions.

12. The appeal is disposed of in the above terms."

3. The appeal has been fixed for hearing today for giving effect to the above order of Hon'ble Jurisdictional High Court.

4. At the time of hearing before us, Shri Ajay Vohra, learned Senior Advocate stated that the grant received by the assessee from its AE during the assessment year in question exceeded the net AMP expenses incurred by the assessee thereby obviating any TP adjustment on that score as proposed by the TPO. He furnished a chart giving details of grant received from AE and the AMP expenses excluding selling and distribution expenses. He submitted that the same chart was furnished before Hon'ble Jurisdictional High Court which is also mentioned in paragraph 10 of their Lordships' order. He stated that it is now a settled law that the selling and distribution expenses are not to be considered for the purpose of any AMP adjustment. In this regard, he relied upon the decision of Hon'ble Jurisdictional High Court in the case of Sony Ericsson Mobile Communications (supra). He further stated that on the above net AMP expenses if the mark up of 9% is applied, then also the grant received by the assessee is more and therefore, no TP adjustment would be required. He stated that though Hon'ble High Court while setting aside

the matter to the file of the ITAT has observed that before making any TP adjustment, it has to be first established that there is an international transaction. After making this observation in paragraph 6, the Hon'ble High Court has noted the assessee's contention in paragraph 10 that the grant received by the assessee exceeded the net AMP expenses incurred by the assessee and therefore, there would not be any requirement of any TP adjustment. He submitted that since the facts are so clear, the appeal can be decided on the factual matrix i.e., the grant received by the assessee exceeded the net AMP expenses. In that case, so far as the year under consideration is concerned, there would be no requirement of deciding whether the incurring of AMP expenses is an international transaction.

5. Learned DR, on the other hand, stated that the issue whether the incurring of AMP expenses is an international transaction or not is pending for consideration before the Hon'ble Apex Court and therefore, if the question whether the incurring of AMP expenses is an international transaction or not is to be decided, then the matter should be kept pending till the decision of Hon'ble Apex Court. However, he has no objection in adjudicating the matter on facts. The learned counsel for the assessee also agreed with the submission of the learned DR and stated that the present appeal of the assessee can be adjudicated on facts.

6. We have carefully considered the arguments of both the sides and perused the material placed before us. The TPO in the order passed u/s 92CA(3) of the Act proposed an adjustment of ₹13,59,01,632/- on account of the alleged difference in advertisement and promotion expenditure incurred by the assessee and the arm's length price of subsidy received from the associated enterprises (AEs) as follows :-

Total revenue of the appellant	₹2,91,67,11,067
Arm's length price of AMP expenses	3.87%
Arm's length AMP expenses	₹11,28,76,718 (A)
AMP expenses incurred of appellant	₹46,78,74,750 (B)
Expenses incurred on creation of intangibles (B-A)	₹35,49,98,032
Mark up @ 15%	₹5,32,49,705
Arm's length value of capital grant	₹40,82,47,736
Actual grant received	₹27,23,46,104
Difference	₹13,59,01,632

7. The DRP, however, directed the TPO to reduce the mark up on the provision of services from 15% to 9%. Giving effect to the order of the DRP, the TPO, vide order dated 24th February, 2014, recomputed the transfer pricing adjustment on account of AMP at ₹11,46,01,751/-. The assessee has claimed that in the above working, the TPO has considered the rebate and discount of ₹22,64,61,618/- which is evident from paragraph 4 of the TPO's order. Hon'ble Jurisdictional High Court in the case of Sony Ericsson Mobile Communications (supra) held as under :-

"176. The aforesaid argument, when AMP expenses are segregated from the composite transaction including distribution and marketing function, is flawed and has to be rejected. The respondent-appellants are engaged in distribution and marketing of consumer goods. Distribution and marketing exercise in case of tangibles requires transfer/sale of goods to third parties, be it sub-distributors or retailers. The said transaction is in the nature of sale of goods for consideration. The marketing or selling expenses like trade discounts, volume discounts, etc. offered to sub-distributors or retailers are not in the nature and character of 'brand promotion'. They are not directly or immediately related to 'brand building' exercise, but have a live link and direct connect with marketing and increased volume of sales or turnover. The brand building connect is too remote and faint. To include and treat the

direct marketing expenses like trade or volume discount of incentive as 'brand building' exercise would be contrary to common sense and would be highly exaggerated. These reduce the net profit margin. It would lead to abnormal financial results defying accountancy practices and commercial and business sense. The expenses being in nature of selling expenses have an immediate connect with price/consideration payable for the goods sold. They are not incurred for publicity or advertisement. Direct marketing and sale related expenses or discounts/concessions would not form part of the AMP expenses."

8. No contrary decision is brought to our knowledge and therefore, respectfully following the above decision of Hon'ble Jurisdictional High Court, we hold that direct marketing and sales related expenses or discounts/concessions would not form part of AMP expenses. Admittedly, the TPO has considered the rebate and discount of ₹22.64 crores as part of AMP expenses which is to be excluded from AMP expenses as per the above decision of Hon'ble Jurisdictional High Court. After excluding the same, the net AMP expenses work out to ₹24.14 crores as under :-

Particulars	Amount (Rs.)
Total AMP expenses determined by the TPO	46,78,74,750
Less : Rebate & Discount	22,64,61,618
Net AMP expense incurred by the appellant	24,14,13,132

9. When, on the above figure, the mark up of 9% as upheld by the DRP is applied, then the arm's length price of AMP would be worked out to ₹26,31,40,313/-. The grant received by the assessee from its AE is ₹27,23,46,104/-, which is more than the arm's length price of AMP expenses. Since the grant received by the assessee exceeded the arm's length price of AMP, no TP adjustment in respect of AMP expenses is called for. Accordingly, we direct that the addition of

₹11,46,01,751/- in respect of AMP expenses made by the Assessing Officer be deleted.

10. In the result, the appeal of the assessee is allowed *pro tanto*.
Decision pronounced in the open Court on 03.12.2018.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(G.D. AGRAWAL)
VICE PRESIDENT

VK.

Copy forwarded to: -

1. Appellant : **M/s Haier Appliances India Limited,
B-1/A-14, Mohan Coop Indl. Estate,
Mathura Road, New Delhi – 110 044.**
2. Respondent : **Deputy Commissioner of Income Tax,
Circle-12(1), New Delhi.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar