

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL,
CHANDIGARH BENCH 'A', CHANDIGARH

श्री संजय गर्ग, न्यायकि सदस्य एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य
BEFORE: SHRI SANJAY GARG, JM & SMT. ANNAPURNA GUPTA, AM

आयकर अपील सं./ ITA No.265/Chd/2016

निर्धारण वर्ष / Assessment Year : 2007-08

M/s GlaxoSmithKline Consumer Healthcare Ltd., 24-25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon. स्थायी लेखा सं./PAN NO: AACCS0144E अपीलार्थी/Appellant	बनाम	The A.C.I.T., Circle 4(1), Chandigarh. प्रत्यर्थी/Respondent
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निर्धारिती की ओर से/Assessee by : S/Shri Ajay Vohra, Adv.
& Shri Neeraj Jain, Adv.
राजस्व की ओर से/ Revenue by : Shri J.S. Kehlon, Addl.
CIT(DR)

सुनवाई की तारीख/Date of Hearing : 15.10.2018

उद्घोषणा की तारीख/Date of Pronouncement: 26.11.2018

आदेश/Order

PER ANNAPURNA GUPTA, AM:

The present appeal has been filed by the assessee against the order of the Assistant Commissioner of Income Tax, Circle-4(1), Chandigarh dated 28.1.2016 passed u/s 143(3) r.w.s. 144C(5) of the Income Tax Act, 1961 (in short referred to as 'Act').

2. At the outset it was pointed out that this was the second round of appeal before the I.T.A.T. Drawing our attention to the facts of the case the Ld. counsel for assessee pointed out that the assessee was a Public Limited Company incorporated under the Companies Act, 1956 and

was engaged in the business of manufacturing & selling of malted food products and drinks under the brand names, Horlicks, Maltova, Viva and Boost and that the assessee was a part of GlaxoSmithKline Plc, UK (GSK Plc) and that 43% of the equity shareholding of the assessee was held by Horlicks Ltd., UK, a subsidiary company of GSK Plc, UK and the balance shares are held by Public and Financial Institutions. It was pointed out thereafter that in the Transfer Pricing order for the relevant assessment year dated 29.10.2010, the TPO had undertaken benchmarking analysis on advertisement, marketing and promotional expenses (in short referred to as 'AMP' expense) incurred by the assessee, applying bright line test and holding thereafter that any expenditure in excess of bright line was for the promotion of the brand/trade name which was owned by the associated enterprises and which needed to be suitably compensated by the AE. For the purpose of undertaking the benchmarking of AMP expenses applying the bright line test the TPO had considered the following AMP expenses incurred by the assessee:

S.No.	Name of	Amount (Rs.Lacs)
1.	Advertisement expenses	8679.75
2.	Selling & Distribution	826.17
3.	Market Research	664.24
4.	Sales Promotion	3939.90
5.	Service charges paid to selling	10.03
6.	Discount - sales	60.52

Further the TPO compared the percentage of AMP expenditure to the total turnover incurred by the assessee,

of 11.21%, with the average AMP expenditure of the following comparable companies of 0.95%:

S.No.	Name of the comparable companies	Industrial sales (Rs Cr)	AMP Expense (Rs)	AMP Expense as % age of sale
1.	National Cereals Products Ltd.	3.93	0.00	0.00
2.	Puja Food Products	18.74	0.39	2.08
3.	Shah Foods Ltd.	1.84	0.014	0.76
	Average			0.95%

3. Accordingly, the TPO held that since the AMP expense incurred by the assessee was more than the comparable companies, the assessee had incurred expenses on brand promotion and development of marketing intangible for the AE which needed to be suitably compensated. Accordingly an adjustment of Rs.102, 83,55. 523/- was proposed on account of the brand building activity undertaken by the assessee. The said proposed adjustment was challenged by the assessee before the Dispute Resolution Panel (in short "DRP") who sustained the order of the TPO. The AO therefore made the adjustment to the AMP expense incurred by the assessee resulting in addition to the income of the assessee to the said extent.

4. Aggrieved by the said order passed by the AO, u/s 143(3) read with section 144C of the Act, the assessee filed an appeal before the Tribunal challenging the aforesaid addition. The Tribunal, vide its order dated 02.04.2013 in ITA No.1148/Chd/2011, set aside the issue of determination of ALP of AMP expenses to the file of the TPO to redetermine the same in accordance with the directions given by the

Special Bench of the ITAT in the case of LG Electronics India Pvt. Ltd. Vs. ACIT in ITA No.5410/Del/2011. In pursuance to the aforesaid directions the arms' length price was recomputed by the TPO at Rs.57,38,90,169/- in his order dated 30-01-15, which was objected to by the assessee before the DRP who in turn rejected the Bright Line Test method adopted by the TPO, following the decision of the Hon'ble High Court of Delhi in the case of Soni Ericsson Mobile Communications India Pvt. Ltd. Vs. CIT, 374 ITR 118 and directed the TPO to recompute the adjustment on the AMP expenses. Accordingly, the TPO after giving effect to the directions of the DRP recomputed the adjustment at Rs.75,04,28,786/- as under:

Particulars	Amount in INR
AMP expense incurred by the appellant	65,77,74,000
Less: expenditure incurred on selling	2,49,28,000
Advertisement expenditure incurred on creation of marketing intangibles	63,28,46,000
Mark up at 18.58%	11,75,82,786
Revised Adjustment	75,04,28,786

5. Aggrieved by the same, the assessee has come up in the present appeal before us.

6. At the outset, the Ld. counsel for assessee stated that both the TPO and the DRP had not followed the directions of the I.T.A.T while computing the arms' length price of the AMP spent. Drawing our attention to the order passed by the I.T.A.T. in the first round, the Ld. counsel for assessee pointed out that the entire issue before the I.T.A.T. on the determination of the arms' length price of the AMP spend was decided following the decision of the Special Bench of

the I.T.A.T. in the case of L.G. Electronics India Pvt. Ltd.. Referring to paras 21 and 22 of the order the Ld. counsel for assessee pointed out that the I.T.A.T., following the decision of the Special Bench, held the transaction in question to be an international transaction liable to be considered under the provisions of section 92B of the Act and upheld the action of the A.O. in treating the transaction of brand building as an international transaction. Thereafter our attention was drawn to para 23 of the order where the I.T.A.T. held that despite no reference being made to the TPO for determination of ALP of AMP spend, the said determination by the TPO was correct. Thereafter our attention was drawn to para 24 of the order wherein the determination of the arms' length price of the international transaction was directed to be computed in accordance with the directions given by the Special Bench in this regard in the case of L.G. Electronics India Pvt. Ltd. (supra). The Ld. counsel for assessee thereafter drew our attention to paras 26 to 29 of the order where the issue of exclusion of expenses incurred on sale promotion was dealt with by the I.T.A.T. and following the decision in the case of Special Bench, the claim of the assessee for exclusion of sale promotion expenses totaling Rs.5500.86 lacs and marketing research expenses of Rs.567.49 lacs, was allowed. Our attention thereafter was drawn to para 30 of the order wherein the issue of consideration of comparable companies for benchmarking of the AMP expenses was dealt with. It was pointed out that the assessee had raised a plea in this

ground that its percentage of spend on sales of foreign brand was lower than what was incurred on domestic products and, therefore, no transfer pricing adjustment was to be made. It was pointed out that the I.T.A.T. had directed this aspect to be considered while determining the value of arms' length price of AMP spent of the assessee in the set aside proceedings. Summing up the briefly the order passed by the ITAT in the first round following the decision of the Special Bench of the ITAT in the case of LG Electronics (supra). Ld.Counsel for the assessee pointed out that the transaction of brand building was held to be an international transaction and the determination of the ALP of the same by the TPO without any reference made by the AO was also upheld. The exclusion of selling expenses from the AMP spend was also directed by the ITAT. But the issue of determination of the ALP was set aside to the TPO to be computed in accordance with the direction given in this regard in the case of L.G Electronics (supra) and the TPO was also directed to take into consideration the fact that the AMP spend on domestic brands by the assessee exceeded that on the foreign brands, while determining the ALP of the AMP spend incurred by the assessee.

7. The Ld. counsel for assessee thereafter drew our attention to the order passed by the TPO in the set aside proceedings. The Ld. counsel for assessee pointed out that the assessee had raised objections to the method adopted by the TPO for determining the ALP of the AMP expenses as not

being in consonance with the directions of the I.T.A.T., which were brushed aside by the TPO and who in turn proceeded to determine the same not in accordance with the directions given by the Special Bench in the case of L.G. Electronics India Pvt. Ltd. (supra) as directed by the I.T.A.T. in the case of the assessee. Our attention was drawn to para 5 of the order of the TPO wherein the objections of the assessee to consider the selling and distribution and sale promotion expenses in the AMP spent was dealt with and brushed aside by the TPO by stating that the same included expenses in the nature of brand promotion and, therefore, were included for the purpose of ALP of AMP. Thereafter our attention was drawn to para 6 of the order wherein the assessee had objected to the use of the same three comparable companies which had been used in the original TP order as opposed to the directions of the Special Bench in the case of L.G. Electronics India Pvt. Ltd. (supra) to select comparables which were in the business of sales promotion only. It was pointed out that the same was also rejected by the TPO stating that the decision in the case of L.G. Electronics India Pvt. Ltd. (supra) was not acceptable since the Department had gone in appeal against the said case before the Hon'ble High Court. The Ld. counsel for assessee, therefore, contended that it was clear that the TPO had determined the arms' length price of the AMP spend against the directions given by the I.T.A.T. in the first round by not following the ratio and principle laid down by the Special Bench in the case of L.G. Electronics India Pvt. Ltd. (supra).

Further the Ld. counsel for assessee drew our attention to the order of the DRP who in turn had completely rejected the bright line test method which had been approved by the Special Bench in the case of L .G Electronics (supra). It was thus contended that both the TPO and DRP had not followed the directions of the I.T.A.T. in the first round and, therefore, the matter needed to be restored back for determining the arms' length price in accordance with the directions given in the first round.

8. The Ld. DR fairly conceded that both the TPO and DRP had not followed the directions of the I.T.A.T. and agreed that the issue needed to be restored back to the TPO.

9. In view of the above, we restore back the issue of determination of arms' length price of the AMP spend incurred by the assessee to the TPO, to be determined strictly in accordance with directions given by the I.T.A.T. in the first round.

10. In the result, the appeal of the assessee is, therefore, allowed for statistical purposes.

Order pronounced in the Open Court.

Sd/-
संजय गर्ग
(SANJAY GARG)
न्यायकि सदस्य/ Judicial Member
दिनांक /Dated: 26th November, 2018
रती

Sd/-
अन्नपूर्णा गुप्ता
(ANNAPURNA GUPTA)
लेखा सदस्य/ Accountant Member

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar