IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "I-2" : DELHI

BEFORE SHRI BHAVNESH SAINI, J.M. AND SHRI L.P. SAHU, A.M.

ITA.No.1536/Del./2016
Assessment Year 2011-2012

Wrigley India Pvt. Ltd., 206, Okhla Industrial Estate, Phase-III, New Delhi.PAN AAACW1789P	vs.	The DCIT, Circle-27(2), C.R. Building, New Delhi.
(Appellant)		(Respondent)

ITA.No.1596/Del./2016
Assessment Year 2011-2012

The ACIT, Circle-27(2), Room No.408, 4th Floor, D-Block, Civic Centre, New Delhi.	vs.	Wrigley India Pvt. Ltd., 206, Okhla Industrial Estate, Phase-III, New Delhi. PAN AAACW1789P
(Appellant)		(Respondent)

For Assessee :	Shri C.S. Agarwal, Sr. Advocate
For Revenue :	Shri H.K. Choudhary, CIT-DR Ms. Nimita Pandey, SR. D.R.

Date of Hearing :	08.01.2019
Date of Pronouncement :	10.01.2019

ORDER

PER BHAVNESH SAINI, J.M.

ITA.No.1536/Del./2016 by the assessee has been filed against the Order of the DCIT, Circle-27(2), New Delhi,

Dated 28.01.2016, for the A.Y. 2011-2012 under section 143(3) r.w.s. 144C(4) of the I.T. Act, 1961, on the following grounds :

1. *That on the facts and in the circumstances of the case and in law, the order passed by the Learned*

   Assessing Officer ('Ld. AO') under section 143(3) read with section 144C of the Act is bad in law.

2. *On the in law, and in the circumstances of the case, the Ld. AO/Transfer Pricing Officer ('Ld. TPO') and the Dispute Resolution Panel ('Ld. Panel') erred in making an addition of INR 18,02,86,000/- by allegedly assuming the expenditure on account of Advertisement, Marketing and Promotional ("AMP") incurred by the Appellant results in international transaction and consequently benchmarked the same separately in the present case.*

3. *On the facts, in law and in the circumstances of the case, the Ld. AO/ Ld. TPO and Ld. Panel erred in alleging that the Appellant is rendering a service to its Associated Enterprise ('AE') for creation of marketing intangibles in India and proceeded to make an adjustment completely disregarding the binding decisions of the Jurisdictional High Court in*

the case of Maruti Suzuki India Ltd. v. CIT [(2016) 237 Taxmann 256 (Delhi), thereby not following the judicial discipline as mandated by law.

4. *On the facts, in law and in the circumstances of the case, the Ld. AO/ Ld. TPO and Ld. Panel erred in not appreciating the characterisation of Wrigley India and in not appreciating that;*

4.1. *key decisions making functions with respect to Marketing function are performed by the Appellant;*

4.2. *by testing each of the "international transactions" (including import of raw materials and sale of finished goods) separately, it has been clearly demonstrated that the residual/entrepreneurial profits, inter-alia relating to AMP functions, are lying in the hands of Appellant in India and thus, the AE should not reimburse the AMP expenses incurred by the appellant;*

4.3. *all expenses with respect to the aforesaid activities and the related risks and reward consistent with the Appellant's characterisation, are to be borne by the Appellant;*

5. *On the facts, in law, and in the circumstances of the case, the Ld. AO/Ld. TPO and the Ld. Panel erred in not appreciating the AMP expenses could not be regarded as a 'international transaction',*

under section 92B read with Section 92F(v) of the Income Tax Act, 1961 ("the Act"), in the absence of any understanding / arrangement / agreement between the Appellant and its associated enterprises ('AEs').

6. *The Ld. AO/Ld. TPO and the Ld. Panel erred in not appreciating that the AMP expenses incurred by the Appellant represents transactions undertaken with third parties, which under the amended law (Finance Act 2012) were also outside the purview of section 92BA of the Act and hence no adjustment could be made in respect of the same.*
7. *On the facts and in the circumstances of the case, the Ld. AO/Ld. TPO and the Ld. Panel, has erred in failing to appreciate that it was commercially expedient for the Appellant to incur the expenditure on advertisement & sales promotion in order to measure its revenue and market share.*
8. *That the Ld. AO/Ld. TPO and the Ld. Panel erred in inappropriate application of the concept of economic ownership vs legal ownership ignoring the fact that economic ownership of the brand lies in India only, therefore no cost can be attributed for the brand building for the benefit of foreign company.*

9. *On the facts and in the circumstances of the case, the Ld. AO/Ld. TPO and the Ld. Panel, has erred in considering the expenditure incurred in the nature of normal business function as a service and erroneously bifurcating the expenditure into routine and non-routine expenditure.*

10. *On the facts and in the circumstances of the case, the Ld. AO/Ld. TPO and the Ld. Panel erred in misunderstanding the facts that the Appellant company was "promoting" Wrigley brand and creating marketing intangibles for the parent company instead of appreciating that the Appellant company was only carrying out its business by using the well-established brand name. In doing so the Ld. AO/Ld. TPO and the Ld. Panel has misunderstood the use of brand in the form of trademark i.e. brand exploitation as brand development.*

11. *On the facts and in the circumstances of the case, the Ld. AO/Ld. TPO and the Ld. Panel erred in considering that the primary benefit of incurring AMP expense is to Wrigley India's account and not appreciating that incidental benefit, if any does not warrant a reimbursement.*

12. *The Ld. AO/Ld. TPO and Ld. Panel erred in not appreciating the fact that the AMP expenses cannot be considered as a controlled transaction undertaken by the Appellant. However the same*

should be constituted as a function performed by the Appellant and not a transaction undertaken by the Appellant.

13. *On the facts, in law, and in the circumstances of the case, the Ld. AO/Ld. TPO and the Ld. Panel erred in applying AMP/Gross Profit ratio, a modified form of Bright Line Test ("BLT"), for establishing the existence of international transaction and computing the value of adjustment on account AMP expenditure without appreciating that in absence of specific provision under the Transfer Pricing Regulations in India such an adjustment could not be made.*

14. *On the facts, in law and in the circumstances of the case, the Ld. AO/Ld. TPO and Ld. Panel grossly erred on facts and in law in concluding that the overseas AE, being the legal owner of the brands, should have compensated the Appellant for alleged excess AMP expense as the AE derives benefit from such expenses through the creation of marketing intangible. While holding so, the Ld. AO/ Ld. TPO;*

14.1 *grossly failed to appreciate that the Appellant had incurred the AMP expense as a licensed marketer for the purpose of its own business and incidental benefit arising to AE, if any, was unintentional and incidental;*

14.2. grossly erred in law in departing from the settled principle of law that an incidental benefit to AE would not warrant any adjustment to the income of the Appellant;

14.3. grossly erred on facts in concluding that benefit arose to the AE from the AMP spend of the Appellant without actually demonstrating/ quantifying the same;

15. That without prejudice to the contentions above, the Ld. AO/ Ld. TPO and the Ld. Panel on the facts, in law and in the circumstances of the case, has erred in;

15.1 incorrectly computing the AMP intensity (AMP / Gross Profit ratio) of the Appellant by including trade advertising expenses, consumer promotion expenses, point of sale material, display stands, print costs etc. which are incurred in connection with the sale as against the advertisement activities;

15.2 not appreciating that the gross margin earned by the Appellant is higher than that of the comparable companies and accordingly is sufficient to cover the AMP expenses;

15.3 performing the analysis based on incorrect factual understanding of the functional profile of the Appellant and incorrectly characterizing the Appellant as a distributor of finished goods;

15.4 using inappropriate comparables by not adhering to principles of comparability to determine arm's length AMP/ Gross Profit Ratio;

15.5. in rejecting certain comparables and decreased the purported threshold limit by giving incorrect arguments.

15.6. holding that, Appellant has rendered brand building service to the AEs by incurring the AMP expense and by holding that an arbitrary/ abnormal mark-up of Gross Profit/Cost of goods sold ("GP/COGS") of the comparables of 69.05 percent, has to be earned by the Appellant in respect of the "alleged excessive" AMP expenses, which is completely untenable and based on mere surmises and conjectures; and

15.7 computing the adjustment on account of AMP wrongly.

16. That the Ld. AO erred on facts and in law in levying interest under sections 234A, 234B, 234C and 234D of the Act.

17. That on facts and in laws, the Ld.AO/Ld. Panel erred in holding that the Appellant has furnished inaccurate particulars of income in respect of each item of disallowance/ additions and in initiating penalty proceedings under section 271 (1) (c) of the Act.

That the above grounds of appeal are independent and without prejudice to each other."

2. ITA.No.1596/Del./2016 by the Revenue has been directed against the Order of the DRP-2, New Delhi, Dated 10.12.2015, for the A.Y. 2011-2012 under section 144C(5) of the I.T. Act on the following grounds :

1. *"On the facts and in the circumstances of the case, the DRP-2 erred in directing AO to complete the assessment as per observations made by DRP in the order which resulting in reducing the addition to Rs. 18,02,86,000/- in place of original recommended ALP of Rs.20,94,17,158/- for the International transactions undertaken the assessee company with its associate/ parent enterprise.*
2. *Whether the DRP was justified in not appreciating the fact that bright line is a mere step [of the most appropriate method for benchmarking the AMP services] carried out to estimate and bifurcate expenditure pertaining to the taxpayer for its own routine distribution function and the expenditure incurred on AMP service provided to the AE in a situation where the assessee has not reported the international transaction pertaining to marketing function.*

3. *Whether under the facts and circumstances of the case and in law the Hon'ble DRP was correct in holding that PLR cannot be the basis for computing markup on AMP expenses without appreciating the Revenue's case wherein the PLR of banks has been used as an uncontrolled comparable to benchmark the opportunity cost of money involved and locked up in AMP expense?*
4. *Whether in the facts and circumstance of the case and in law the Hon'ble DRP was justified in stating that routine selling and distribution expenses would not form part of AMP expenses) disregarding that fact that these expenses contribute to creation of marketing intangible) even while the same is a factor for comparability analysis as different entities account for such expenditure under different heads ?*

3. Briefly the facts of the case are that original return of income was filed on 28.11.2011 declaring loss of Rs.10.77 crores which was processed under section 143(1) of the I.T. Act. Further, revised return of income was filed on 30.03.2013 declaring loss of Rs.10.67 crores. The case was selected for scrutiny. During the year under consideration the assessee was engaged inter alia in the manufacture and sale of confectionary products i.e., chewing gums, bubble gums, lolly pops, toffees etc.

3.1. From the records it was found that assessee has entered into international transaction with Associated Enterprises during the year. During the course of assessment proceedings, a reference under section 92CE made to the TPO for determining the Arms Length Price ("ALP") of international transactions entered by the assessee with its associate concerns. The TPO deliberated upon the value of international transactions as shown by the assessee in respect of creation of marketing intangibles. After due deliberation, the TPO found the transfer pricing report furnished by the assessee to be erroneous. The TPO after discussion vide Order dated 29.01.2015 determined the ALP of the international transaction relating to marketing intangibles at Rs.23,26,06,386/-. The TPO has directed that the A.O. shall enhance the assessee's income by the aforesaid amount on account of creation of marketing intangibles. The opinion of the TPO is based on a scientific and lawful interpretation of the relevant valuation provisions of ALP. The assessee filed an application under section 154 before TPO. In its application, assessee has

referred to computation of upward T.P. adjustment amounting to Rs.23,26,06,386/-. In the said computation "total sales made by you" figure has been taken as Rs.297.35 crores instead of Rs.318.87 crores as reported in the audited financial statements of the assessee. After considering the above facts, it was noted that there was indeed an advertant mistake apparent from record in taking an incorrect figure for total sales. Accordingly, adjustment of Rs.23,26,06,386 made in the original order was reduced to Rs.20,94,17,158. The assessee filed objections to the draft assessment order before DRP. The DRP vide Order dated 10.12.2015 directed the TPO to exclude certain comparables i.e., routine selling and distribution expenses and to consider GP/AMP ratios of the comparables as per the Hon'ble Delhi High Court Order in the case of M/s. Sony Ericson Mobile Communications India Pvt. Ltd. Accordingly, the ALP of the international transaction was re-calculated as per the directions of DRP by the TPO and communicated to the A.O. to arrive at the adjustment of Rs.18,02,86,000 instead of Rs.20,94,17,158 proposed in the order.

Consequently, an adjustment of Rs.18,02,86,000/- as per TPO's Order under section 92CA(3) of the Act was made to the returned income and income was computed at Rs.7,35,30,410/- vide impugned assessment order dated 28.01.2016.

3.2. The assessee is in appeal on the above grounds claiming therein that AMP expenses could not be regarded as an "international transaction" under section 92B r.w.s. 92F(v) of the I.T. Act, 1961.

3.3. The Revenue is in appeal challenging the Order of DRP in reducing the addition to Rs.18.02 crores instead of original recommended ALP at Rs.20.94 crores.

4. We have heard the Learned Representatives of both the parties.

5. Learned Counsel for the Assessee submitted that in earlier years in the case of assessee the Tribunal has held that AMP expenses incurred by assessee cannot be categorized as international transaction under section 92B of the I.T. Act. Therefore, the issue is covered in favour of

the assessee. He has referred to Order of the Tribunal dated 31.01.2017 in the case of assessee in A.Ys. 2007-2008, 2008-2009 and 2009-2010 in ITA.No.4346/Del./2011, 6475/Del./2012 and ITA.No.826/Del./2014 in which the Tribunal held that AMP expenses incurred by assessee cannot be treated and categorized as an international transaction under section 92B of the I.T. Act. He has submitted that this order has been followed by the Tribunal in subsequent A.Y. 2010-2011 in the case of assessee in ITA.No.656/Del./2016 dated 25.09.2018, appeal of assessee have been allowed. Learned Counsel for the Assessee, therefore, submitted that since the Tribunal in its orders for the preceding four years above have already held that no adjustment is permissible to be made in respect of such expenditure incurred, in view of the circumstances of the case, therefore, departmental appeal has become infructuous.

6. On the other hand, Ld. D.R. relied upon the Orders of the A.O./DRP.

7. After considering the submissions of the parties, we are of the view that the issue is covered in favour of the assessee by Order of ITAT, Delhi Bench in the case of assessee in four years above vide Order dated 31.01.2017 and 25.09.2018 whereby the Tribunal has held that AMP expenses incurred by assessee cannot be treated and categorized as an international transaction under section 92B of the I.T. Act. The Tribunal in its Order dated 25.09.2018 has followed the Order of the Tribunal dated 31.01.2017. This Order dated 25.09.2018 in paras 9 to 15 is reproduced as under :

> 9. *"With respect to the grounds No. 2 to 111 of appeal, it was stated by the learned authorized representative that addition on the same ground was made by the Learned Assessing Officer for the A Y 2007–08, 2008 – 09 and 2009–10 and the coordinate bench vide order dated 31 January 2017 , has allowed the appeal of the assessee deleting the above additions holding that AMP expenditure incurred by the assessee cannot be treated and categorised as an international transactions under section 92B of The Income Tax Act. It was stated that the principal ground in the appeal filed by the*

assessee for the assessment year 2010 – 11 is therefore covered in favour of the assessee by the order of the coordinate bench for the above three years.

10. On the merits of the adjustment, The learned authorized representative submitted as under:-

"1. The appellant, a private limited company, is engaged in the manufacture and sale of confectionary products i.e. chewing gums, bubble gums, lollipops and toffees. The aforesaid company came into existence in October, 1993.

2. It is a wholly owned subsidiary of M/s Wm Wrigley Jr. Co., Chicago USA which had been established in April, 1891.

3. For the AY 2010-11, on 24.09.2010, the appellant filed a return disclosing aggregate loss of Rs. 42,93,17,566/-.

4. Since the appellant had undertaken eleven international transactions with its associated enterprise ("AE"), the learned AO made a reference u/s 92CA(1) of the Act to the learned TPO.

5. The Report from the Accountant in Form 3CEB did not report the expenditure on AMP as an

International Transaction since the expenditure incurred represented business expenditure allowable u/s 37(1) of the I.T. Act and not an international transaction under section 92B of the I.T. Act.

6. On 16.01.2014, the learned TPO however made an order u/s 92CA(3) of the Act proposing to make an adjustment of Rs. 73,23,49.876/- in respect of the advertising and marketing expenditure incurred of Rs. 65,09,77,688/- by the appellant by applying BLT. The aforesaid adjustment was made on the basis that total sales of the appellant was Rs. 274,94,32,230/- and as per BLT, expenditure incurred @ 4.66% of sales would be arm's length price ("ALP") i.e. Rs. 12,81,23,541/- and since the appellant has incurred an expenses of Rs. 77,91,01,209/- , a sum of Rs. 65,09,77,668/- was held to have been incurred for 'creation marketing intangibles' and hence appellant ought to have been compensated by its AE in respect of the same and for that purpose a markup of 12.50% was applied and ALP of the aforesaid transaction was computed at Rs. 73,23,49,876/-.

7. Special provision relating to ALP came into force from April, 2002. For assessment years upto the assessment year 2006-07 the Assessing Officer accepted

the expenditure incurred on AMP as business expenditure u/s 37(1) of the Act, and not as expenditure incurred for the purposes of 'Brand building' of the AE. It is further submitted that for the AY 2005-06 and 2006- 07, in orders made u/s 92CA(3) the learned TPO made adjustment by using Cost Plus Method, against the Transactional Net Margin Method chosen by the appellant, in respect of international transaction of export of finished goods. It is thus evident that the expenditure incurred in the AY 2006-07 on AMP which was of Rs. 30,94,79,033/- was accepted as an expenditure incurred u/s 37(1) of the Act and that it does not represent an international transaction.

8. It is further clarified that for the AY 2006-07 the expenditure incurred on AMP was of Rs. 30,94,79,033/- which has not been disputed by the learned TPO when he accepted that the said expenditure incurred does not represent an international transaction. In other words, the contention of the assessee as is reflected in its TP report was accepted when it had not been disputed that the said expenditure incurred did not warrant any interference so to be regarded as an international transaction. It is submitted that the assessee is

incurring the expenditure for its own business for making advertisement, publicity and marketing its products.

9. However, for the AYs 2007-08, 2008-09 and 2009-10 the learned TPO had held expenditure on AMP to be an international transaction. In doing so the learned TPO, did not have the benefit of the judgment of Delhi High Court in the case of Maruti Suzuki India Ltd. vs. CIT which had been rendered on 11.12.2015 . The perusal of the judgment of the High Court of Delhi at page 143 in para 57 specifically examined the issue as to whether AMP expenditure incurred bv the licensed manufacturer could be regarded as an international transaction. It held in para 87 that "the issue of arm's length price per se does not arise when deduction under section 37(1) is claimed". It is submitted that the situation is identical i.e. the expenditure incurred on AMP has been claimed as business expenditure allowable u/s 37(1) of the Act and there is no basis for the TPO to regard the same as an international transaction. It is undisputed fact that the assessee is a manufacturer and not a distributor as has been observed by the learned TPO in his order which it is submitted is manifestly erroneous. It appears that the learned TPO in order to justify the adjustment, has

held the assessee to be a distributor and that too, without any basis.

10. It is submitted that the expenditure incurred on AMP is not an international transaction and represents business expenditure. The learned TPO has thus without any justification treated the same to be an international transaction and to regard the same by applying BLT method, which was in applicable in the case of the appellant.

11. The appellant has been incurring expenditure on AMP purely and wholly to promote the products manufactured by it. The issue stands covered in favour of the appellant by the order of the Hon'ble Tribunal for immediately preceding three years and there has been no change in the facts and circumstances of the case, it is submitted the adjustment made by the learned TPO and sustained by the Dispute Resolution Panel is entirely unsustainable.

12. Without prejudice to the aforesaid it is submitted that even the comparable cases selected have no application and the bright line test, approach adopted is also untenable. In the cases cited in paragraph 18 it has been held by the Courts of India that BLT is inapplicable.

13. The Ld. TPO has stated that though the appellant is a manufacturer, yet it is a distributor also. The TPO has erred in ignoring that every manufacturer has to sell the goods it produces and this does not make it a distributor.

14. Without prejudice, it is stated that the Ld. TPO has held that the AMP expenditure incurred by the appellant is highly excessive and should have been in line with the expenditure being incurred by comparable companies (i.e 4.66% of sales). However, the comparable cases selected by the Ld. TPO are incomparable. A statement showing the goods manufactured by the companies cited by the TPO as comparable cases is Annexed.

15. The contention of the appellant is that by incurring expenses on AMP, it has not provided any services to its AE or incurred any expenses for the benefit of the AE.

16. The learned TPO in his order however on the basis of ratio of LG Electronics India Pvt. Ltd. (special bench) has held that the AMP expenditure incurred represents international transaction. On the aforesaid basis he held that the bright line test identifies the expenditure attributable to the requirement of

domestic sale and those expenditure which are over and above the requirement. Reliance by the TPO on clause (f) in rule 1 OB (1) of the Income-tax Rules does not advance the contention of the Income-tax Authorities. The said clause (f) provides another method for determining the arm's length price, namely, "any other method as provided in rule 10AB". The method for determination of arm's length price in 10AB is "any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts". The TPO has ignored the fact that the aforesaid clause (f) of rule 10B(1) and rule 10AB were inserted by the Income-tax (Sixth amendment) Rules, 2012 with effect from 1 April, 2012. Therefore, these rules have no application for the assessment year 2010-11. Even if these rules were in force, they would have no application to the case of the appellant because the expenditure of AMP cannot be regarded as an international transaction.

17. However the fundamental question involved here is that the appellant is a manufacturer and AMP

expenses have been incurred for the promotion of its sales, the benefit of which expenses accrues solely to it.

18. The issue stands covered in favour of the appellant by the following:

a. *Maruti Suzuki Ltd. Reported in 381 ITR 117 at page 153 has specifically held in para 29 that AMP expenditure incurred by licensed manufacturer is not an international transaction;*

b. *Order passed by the Hon'ble Tribunal in the appellant's own case for the Assessment Year 2007-08, AY 2008-09 and AY 2009-10; and*

c. *Order passed by the Commissioner of Income Tax (Appeals) in the appellant's own case for AY 2012-13.*

d. *The appellant seeks to rely on the following judgments where it has been held that Bright Line Test has no application:*

i. Sony Ericsson Mobile Communications India (P.) Ltd. vs. CLI [2015] 374 ITR 118 (Delhi)

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 using bright line test; bright line test has no statutory mandate and in all cases costs or compensation paid for AMP expenses cannot be 'NIL'.

ii. Honda Siel Power Products Ltd. vs DCIT [2016] 237 Taxman 304 (Delhi)

Bright Line Test (BLT) is not a valid method for either determining existence of international transaction or for determination of ALP of such transaction.

iii. CIT vs. Whirlpool of India Ltd. [2016] 381 ITR 154 (Delhi)

Where revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between Indian subsidiary and foreign parent, revenue cannot proceed to determine ALP of AMP expenses by inferring existence of an international transaction based on bright line test.

iv. Valvoline Cummins (P.) Ltd. vs DCIT [2017] 298 CTR 349 (Delhi)

17. Once the BLT has been declared by this Court in Sony Ericsson Mobile Communications India (P.) Ltd.{supra) to no longer be a valid basis for determining the existence of or the ALP of an international transaction involving AMP expenses, the order of the TPO was unsustainable in law. The mere fact that the Assessee was permitted to use the brand name 'Valvoline' will not automatically lead to an inference that any expense that the Assessee incurred towards AMP was only to enhance the brand 'Valvoline'. The onus was on the Revenue to show the existence of any arrangement or agreement on the basis of which it

could be inferred that the AMP expense incurred by the Assessee was not for its own benefit but for the benefit of its AE. That factual foundation has been unable to be laid by the Revenue in the present case. On the basis of the existing record, the TPO has found no basis other than by applying the BLT, to discern the existence of international transaction. Therefore, no purpose will be served if the matter is remanded to the TPO, or even the ITAT, for this purpose.

18. This Court has in similar circumstances in a series of decisions including Maruti Suzuki Ltd. (supra); Bausch & Lomb Eyecare (India) (P.) Ltd. v. Addl. CIT [20161 381 ITR 227/237 Taxman 24/65 taxmann.com 141 (Delhi)and Honda Siel Power Products Ltd. v. Dy. CIT [20161 237 Taxman 304/[20151 64 taxmann.com 328 (Delhikmphasized the importance of the Revenue having to first discharge the initial burden upon it with regard to showing the existence of an international transaction between the Assessee and the AE.

v. LE Passage To India Tour & Travels (P.) Ltd. vs. DCIT [2017] 391 ITR 207 (Delhi)

4. This Court is of the view that whilst L.G. Electronics India (P.) Ltd. {supra) indicated that AMPs were or did constitute the basis for an inquiry into the international transaction and indicated a "bright line" test for it, Sony Ericsson Mobile Communications India (P.) Ltd. {supra) overruled that decision. This per se does not mean that every endeavour will be to conclude that all transactions reporting AMPs are to be treated as

international transactions, the facts of each case would have to be examined for some deliberations. Whilst the TPO and the DRP undoubtedly held that the international transactions existed - that understanding apparently was passed upon the pre- existing regime, propounded in Z.G. Electronics India (P.) Ltd. {supra) with greater clarity on account of this Court's decision in Sony Ericsson Mobile Communications India (P.) Ltd. {supra). The I.T.A.T. in our opinion, should have first decided whether in the circumstances of this case, the nature of the AMP reported, could lead to the conclusion that there was an international transaction. When doing so, it should have remitted the matter back for examination to the A.O. in this case. Accordingly, following the decision of Sony Ericsson Mobile Communications India (P.) Ltd. {supra) and a subsequent decision in Daikin Air conditioning India (P.) Ltd. v. Asstt. CIT in ITA 269/2016, decided on 27.07.2016, this Court hereby remits the matter for a comprehensive decision by the I.T.A.T. In other words, the I.T.A.T. will decide whether the reporting of the AMP in regard to the outbound business constitutes an international transaction for which ALP determination was necessary and if so, the effect thereof. The parties are directed to appear before the I.T.A.T. on 01.02.2017. The appeal is partly allowed in the above terms.

vi. Bausch & Lomb Eyecare (India) (P.) Ltd. vs. Additional Commisssioner of Income-tax [2016] 381 ITR 227 (Delhi)

vii. Denso India Ltd. vs. Commissioner of Income-tax [2016] 388 ITR 324 (Delhi)

viii. Expenditure had been incurred on account of commercial expediency:

Knorr-Bremse India (P.) Ltd. vs. Asst. CIT 2016] 380 ITR 307 (Punjab & "

11. He further referred to the various documents submitted in the paper book to support his claim, such as the annual accounts of the assessee and the methodology adopted by the assessee for determination of ALP of the international transactions contained therein. He further referred to the various submissions made by the assessee before the learned transfer pricing officer. In the end, his submission was that the addition made by the learned transfer pricing officer of adjustment towards the arms length price of the international transactions stated to be on account of advertisement, marketing and promotion expenditure incurred by the assessee is not sustainable.

12. The learned departmental representative vehemently supported the order of the learned transfer-pricing officer and the learned dispute resolution panel – 2, New Delhi. He further stated that that the order of the coordinate bench in the case of the assessee for earlier years has not dealt with

the whole gamut of the issues involved in the above appeals and therefore same may not be followed.

13. *We have carefully considered the rival contention and perused the orders of the lower authorities. We have also perused the order of the coordinate bench in ITA number 4346, 6475 and 826 for assessment year 2007 – 08, 2008 – 09 and 2009 – 10 in order dated 31/1/2017, wherein the coordinate bench, while dealing the ground number 5 to 15 has dealt with the issue of advertisement, marketing and promotion expenses expenditure incurred by the assessee and considered by the learned transfer pricing officer and the learned dispute resolution panel as international transaction. The above issue has been discussed by the coordinate bench in para number 7 onwards of its order and relying on the decision of the Hon'ble Delhi High Court in case of Maruti Suzuki India Ltd, held that AMP expenditure incurred by the appellant cannot be treated and categorized as an international transactions u/s 92B of the act. The coordinate bench therefore held that the learned transfer pricing officer was not justified in making any transfer pricing adjustment in respect of such transactions under chapter X of the act.*

14. The coordinate bench in case of the assessee for AY 2007-08 to 2009-10 has dealt with this issue as under :-

"7. In ground Nos. 5 to 15 has been raised the issue of advertising, marketing and promotion expenses (in short, AMP) The Assessing Officer was of the view that the associated enterprise (AE) being the legal owner of the brand should have compensated the assessee for AMP expenses as AE derives benefit from such expenses incurred by the assessee and the creation of resulting marketing intangible. The assessee is a wholly owned subsidiary of Wm. Wrigley Jr.

Co., USA (WWJC). It is engaged in the manufacturing and sale of confectionary products like chewing gum, bubble gums, toffees, etc. In the year under reference it had international transactions with its associated enterprise (AE) amounting to Rs 48.26 crores which were in the form of import of raw materials, sale of finished goods, purchase of fixed" assets and SAP Software,payment of royalty, receipt of

services, interest on ECB loan and cost recharge. The TPO accepted the aforementioned international transactions at arm's length. However, she examined the taxpayer's advertising, marketing and promotion (AMP) expenses mainly for the purposes of examining

as to whether the taxpayer was creating marketing intangible for the brand name "Wingley" which was owned by its AE. The TPO found that the taxpayer had incurred these expenses which were much above the average expenses incurred by the comparable companies. According to her while the taxpayer's AMP expenses were 16.93% of its sales similar expenses of the comparables were only 4.32%. Applying the "bright line" test, the TPO held that AMP expenses in excess of 4.32% of the taxpayer's sales amounted to international transaction and the same should have been reimbursed by the AE, Such excess expenditure was computed by her at Rs.28.60 crores. The TPO applied a mark up of 13.04% on the aforesaid excess expenditure on the ground that in arm's length condition an independent enterprise would not be satisfied merely with the reimbursement of the cost but will also expect mark-up thereon She thus selected six comparables engaged in provision of advertisement, publicity and allied services and determined a mark-up of 13.04% on the aforesaid excess AMP expenditure. The same was computed at Rs.3.73 crores. Thus, total adjustment of Rs. 32.33 crores was proposed to the income of the taxpayer. The ld AR submitted that the issue raised is fully covered in favour of the assessee by the decision

of the Hon'ble Jurisdictional High Court of Delhi in the case of Maruti Suzuki India Ltd Vs. CIT Vide judgment dated 11.12.2015 in ITA. 110/2014 & another. He submitted that the assessee being a licensed manufacturer for its domestic segment for which AMP expenses were incurred, the benefit from these expenses accrued solely to it and any benefit arising to the AE was purely indirect and incidental.

8. The Id. CIT [DE|, on the other hand, placed reliance on the orders of the authorities below.

9. Having gone through the cited decision of Hon'ble jurisdictional High Court of Delhi in the case of Maruti Suzuki India Ltd. (supra) we find that an identical issue was raised before the Hon'ble High Court. The Hon'ble High Court after discussing the issue in detail has come to the conclusion that AMP expenses incurred by the appellant therein, cannot be treated and categorized as an international transaction under section 92B of the Act. Thus, the issue has been decided in favour of the assessee. The Hon'ble Court in view of the above decision held further that the question of TPO making any transfer pricing adjustment in respect of such transaction under Chapter X does not arise. The Hon'ble High Court has

followed its earlier decision in the case of Sony Ericcsion Mobile Communication India P. Ltd. Vs. CIT (2015) 374 ITR 118 (Del). Respectfully following the ratio laid down in the cited decision of Hon'ble High Court in the case of Maruti Suzuki India Ltd. (supra) we hold that AMP expenses incurred by the assessee cannot be treated and categorized as an international transaction under section 92B of the Act and in view of this finding, the TPO was not justified in making any transfer pricing adjustment in respect of such transaction under Chapter X of the Act. The ground Nos. 5 to 14 are thus allowed in favour of the assessee. The ground No. 15 is alternative ground with this contention that the Id. Assessing Officer/TPO has erred by not adhering to the principles of comparability and in using inappropriate comparables io determine the bright line limit. In view of the finding on the issue raised in ground Nos. 5 to 14, the alternative issue raised in ground No. 15 does not stand. This ground is accordingly disposed off. "

15. *The ld DR urged to not to follow the decision of coordinate bench but could not show us any reasons that why above order should not be followed while deciding this appeal. The judicial discipline also demands that, in case there is no change in the facts*

and circumstances of the case, the issue decided by the coordinate bench in assessee's own case for earlier years on identical facts and circumstances, should be followed by the coordinate bench while deciding the similar issue for later years. Therefore, respectfully following the decision of the coordinate bench in assessee's own case, we also hold that the transfer pricing adjustment made by the ld TPO of Rs.73,23,49,876/- on account of arm's length price of alleged international transaction of AMP expenditure is unsustainable. Accordingly, ground No. 2 to ground No. 11 of the appeal of the assessee are allowed accordingly."

7.1. Since the issue have already been decided in favour of the assessee by the above Orders of the Tribunal, therefore, following the same reasoning, we hold that AMP expenses incurred by assessee cannot be treated as an international transaction under section 92B of the I.T. Act. We, accordingly, set aside the Orders of the authorities below and delete the entire addition. The Departmental Appeal has thus become infructuous and the same is accordingly dismissed.

8. In the result, appeal of Assessee is allowed and appeal of Department is dismissed.

Order pronounced in the open Court.

Sd/-	Sd/-
(L.P. SAHU)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Delhi, Dated 10th January, 2019

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'I-2' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.