

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES: Bench 'I-1', NEW DELHI**

**BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER  
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER**

**ITA No. 8060/Del/2018**  
**AY: 2014-15**

|   |            |                                   |
|---|------------|-----------------------------------|
| Casio India Company Pvt. Ltd.<br>New Delhi<br>PAN: AAACC3448H | <b>vs.</b> | DCIT<br>Circle- 5(2)<br>New Delhi |
|---|------------|-----------------------------------|

**(Appellant)**

**(Respondent)**

**Appellant by** : Sh. Nageswar Rao, Parth &  
Sandeep S. Karhail, Adv.

**Respondent by** : Sh. Sanjay I Bara, CIT(D.R.)

**Date of Hearing** : 17/01/2019

**Date of Pronouncement** : 24/01/2019

**ORDER**

**PER BEENA A PILLAI, JUDICIAL MEMBER**

Present appeal has been filed by assessee against the final assessment order dated 30/10/18 passed by Ld. DCIT, circle 5 (2), New Delhi on following grounds of appeal:

**GROUND OF APPEAL**

*Based on the facts and circumstances of the case, Casio India Company Private Limited (hereinafter referred to as 'the Appellant') respectfully craves leave to prefer an appeal under section 253(1)(d) of the Income-tax Act, 1961 (hereinafter referred to as 'Act'), against the order dated 31 October 2018 (received by Appellant on 15 November 2018) by the Deputy*

Commissioner of Income Tax, Income Tax Circle 5(2) (hereinafter referred to as the learned 'AO') under section 143(3) read with section 144C of the Act in pursuance of the directions dated 17 September 2018 issued by the Hon'ble Dispute Resolution Panel (hereinafter referred to as 'DRP'), on the following grounds, which are independent of and without prejudice to each other.

**General Grounds:**

1. That on facts and circumstances of the case, Learned Assessing Officer ("Ld. AO")/ Learned Transfer Pricing Officer ('Ld. TPO')/ Hon'ble Dispute Resolution Panel ('Hon'ble DRP') erred in making transfer pricing adjustment of I NR 8,25,69,766 (on protective basis) to the total income of the Appellant under section 92CA(3) of the Act in respect of the "advertising and marketing expenses" ('AMP expenses') incurred by the Appellant

**Grounds related to validity of proceedings**

2. That on the facts and circumstances of the case and in law, the impugned order passed by Ld. AO/ Ld. TPO computing the total income at INR 23,44,52,284 is blatantly erroneous since adjustment based on a protective assessment has been added by the Ld. AO in computing the total income of the Appellant. While doing so, the Ld. AO has not followed the directions of Hon'ble DRP mentioning that no demand to be computed on protective adjustment.

3. That on the facts and circumstances of the case and in law, the final assessment order passed under section 143(3) read with section 144C of the Income Tax Act, 1961 ("the Act") by the Ld. AO is bad in law as the same is not in accordance with the provisions of the Act.

**Grounds in relation to treatment of AMP as an international transaction:**

4. That on the facts and circumstances of the case, Ld. TPO/Ld. AO/Hon'ble DRP have erred in holding the AMP expenditure incurred by the Appellant, as an 'international transaction' u/s 92B of the Act, disregarding the findings of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd., Whirlpool of India Ltd., Bausch & Lomb Eye Care India Pvt. Ltd and Honda Siel Power Products Ltd., etc.

5. That, on facts and in law, the Hon'ble DRP/ Ld. TPO/ Ld. AO erred in treating/ upholding the AMP expenses as an 'international transaction', misinterpreting the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd; without appreciating the business model and functional profile of the appellant.

5.1 That the Hon'ble DRP/ Ld. TPO/ Ld. AO resorted to the provisions of

Section 92F (v) of the Act and failed to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between the appellant and its AEs with regard to AMP spend by Jbe, appellant in India.

5.2 That, on facts and in law, the Hon'ble DRP/ Ld. TPO/ Ld. AO has failed to appreciate the fact that any benefit to AE from AMP expenditure in India is purely incidental in nature and does not constitute an international transaction, disregarding the findings of the Hon'ble Delhi High Court in the case of Whirlpool of India Ltd.

5.3 That, on facts and in law, the Hon'ble DRP/ Ld. TPO/ Ld. AO has erred in concluding that the appellant has incurred non-routine AMP expenditure and performed 'DEMPE' ("Development, Enhancement, Maintenance, Protection and Exploitation") related function leading to creation of marketing intangibles for the AE without providing any evidence in support of this contention.

5.4 That, on facts and in law, the Hon'ble DRP/ Ld. TPO/ Ld. AO have erred in attributing additional revenues to the assessee from the "Exploitation" of the intangibles (without prejudice to appellant's contention that expenditure on AMP does not create any non-routine intangibles), without appreciating the fact that all the revenues from exploitation of the intangibles (sales in India) are earned by the assessee only, and that there is no further revenue from the intangibles, which could be attributed to the assessee.

6. That the Hon'ble DRP/ Ld. TPO/ Ld. AO have erred in re-characterization of AMP expenditure incurred by Appellant as rendition of advertisement and brand promotion services to its overseas associated enterprises and without satisfying the criteria of re-characterization as laid out in various judicial precedents.

7. That the Hon'ble DRP/ Ld. TPO/ Ld. AO disregarding the findings of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd and Sony Ericsson Mobile Communications India Pvt. Ltd., failed to appreciate that once the appellant has satisfied arm's length basis using Transactional Net Margin Method ("TNMM") i.e. operating margin of the appellant is more than the operating margin of comparable companies, no further separate adjustment for AMP expenditure is warranted.

Grounds in relation to Protective adjustment using Bright Line approach

8. The Hon'ble DRP/ Ld. TPO/ Ld. AO have grossly erred in applying Bright Line Test ('BLT') for computing adjustment on protective basis on account of AMP, disregarding the principles laid by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd and subsequently followed in case of Maruti Suzuki India Ltd., which

*rejected the application of BLT.*

9. *The Hon'ble DRP/ Ld. TPO/ Ld. AO have erred by not providing set-off against appellant's distribution margins while using the de-bundled approach to benchmark AMP expenditure, as directed by the Hon'ble High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd.*

10. *The Hon'ble DRP/ Ld. TPO/ Ld. AO have erred in quantifying AMP expenses by considering certain selling and distribution expenses while performing arm's length analysis without giving cogent reasons for the purpose of benchmarking alleged AMP expenditure, disregarding the principles and findings laid down by the Hon'ble High Court in the case of Appellant.*

11. *The Hon'ble DRP/ Ld. TPO/ Ld. AO have erred in levying a further mark-up of service providers on AMP expenses for determination of the arm's length price of the alleged brand-promotion services rendered by the Appellant to its AEs and Hon'ble DRP erroneously upheld the approach of the Ld. TPO/Ld. AO.*

12. *The Hon'ble DRP/ Ld. TPO/ Ld. AO have erred in making inappropriate selection of comparable companies for the mark-up on alleged AMP expenditure while computing adjustment in protective assessment and Hon'ble DRP erroneously upheld the approach of the Ld. TPO/AO.*

Other Grounds

13. *That the Ld. TPO has arbitrarily rejected Allied Photographics India Limited for the purpose of intensity disregarding the fact that the company during the year had entire revenue from trading activities.*

14. *That on the facts and circumstances of the case, the Ld. AO erred in law and in fact, by initiating penalty proceedings under section 271(1)(c) of the Act.*

**2.** At the outset, Ld.Counsel submitted that intensity adjustment on substantive basis has already been made in respect of comparables, by providing working capital adjustment as per directions of DRP vide order dated 22/10/18 passed by Ld.DCIT. Ld.Counsel further submitted that from order giving effect to directions of DRP passed by Ld.DCIT, substantive adjustment has been computed at 'Nil'. He further submitted that Ld.DCIT made protective adjustment by applying bright line test,

which has been discarded by *Hon'ble Delhi High Court* in case of *CIT vs Sony Ericson Mobile Communication India Pvt.Ltd.*, reported in [2015] 55 taxmann.com 240

**3.** on the contrary Ld.CIT DR submitted that enforcement of protective adjustment would depend on final outcome of decision of *Hon'ble Supreme Court* in case of *CIT vs Sony Ericson Mobile Communication India Pvt.Ltd.*, (supra).

**4.** We have perused submissions advanced by both sides in the light of the records placed before us.

In present facts of the case, substantive as well as protective assessment both has been made in the hands of same assessee for same year under consideration on AMP expenditure by learnt TPO. On objection being raised by assessee before DRP against the adjustment proposed, a direction was issued to Ld.AO/TPO to make adjustment to in respect of AMP expenditure by following intensity method, being the plausible method.

**8.** In our considered opinion, DRP has followed view of *Hon'ble Delhi High Court* in case of *CIT vs. Sony Ericson Mobile Communication India Pvt.Ltd.*, (supra), to reject BLT method for proposing adjustment for AMP expenditure. Thus respectfully following *Hon'ble Delhi High Court*, we hold that adjustment made on protective basis by following bright line test is not sustainable.

**9. Accordingly we allow Grounds 8-12 raised by assessee.**

It is observed that **Grounds 1-7** has not been argued by Ld.Counsel and accordingly stands dismissed.

**10. Ground No. 13** becomes purely academic in nature insofar as it relates to **Ground No. 8-12** which has already been decided hereinabove.

**11. Ground No. 14** is consequential in nature and therefore do not require any adjudication.

**12. In the result appeal filed by assessee stands partly allowed.**

Order pronounced in the open court on 24/01/2019

Sd/-  
**(R.K.PANDA)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(BEENA A PILLAI)**  
**JUDICIAL MEMBER**

Dt. 24/01/2019  
Bidhan

Copy forwarded to: -

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

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By Order,

**ASSISTANT REGISTRAR**  
ITAT Delhi Benches

| S.No. | Details  | Date     |
|-------|--|----------|
| 1     | Draft dictated on Dragon                         | 18/01/19 |
| 2     | Draft placed before author                       | 24/01/19 |
| 3     | Draft proposed & placed before the Second Member |          |
| 4     | Draft discussed/approved by Second Member        |          |
| 5     | Approved Draft comes to the Sr. PS/PS            | 24/01/19 |
| 6     | Kept for pronouncement                           | 24/01/19 |
| 7.    | Order uploaded on                                | 24/01/19 |
| 8     | File sent to Bench Clerk                         | 24/01/19 |
| 9     | Date on which the file goes to Head Clerk        |          |
| 10    | Date on which file goes                          |          |

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|----|---------------------------|--|
|    | to A.R.                   |  |
| 11 | Date of Dispatch of order |  |
|    |                           |  |