IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'I-2', NEW DELHI

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

ITA Nos. 8272/Del/2018
AY: 2013-14
&
ITA Nos. 8273/Del/2018
AY: 2014-15

Whirlpool of India Ltd. Plot No.40, Sector 44 Gurgaon 122 002 Haryana PAN: AAACW1336L	**vs**.	ACIT, LTU, Circle 1 NBCC Plaza Pushp Vihar Saket New Delhi 110 017
(Appellant)		**(Respondent)**

Assessee by : Sh. Neeraj Jain, Adv.
Sh. Ramit Katyal, C.A.
Department by: Sh. H.K.Choudhary, CIT, DR
Date of Hearing : 18/02/2019
Date of Pronouncement: 25 .02.2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeals have been filed by assessee against order dated 30/11/2018 passed by DCIT LTU-1, New Delhi under section 143(3) read with 144C of the Income Tax Act, 1961(the Act). At the outset Ld. Counsel submitted that, grounds raised by assessee in ITA No. 8273/Del/18 for AY 2014-15 are same and identical. This fact has not been disputed by Ld.CIT DR and therefore, we have taken these appeals to be disposed of, by way

of common order. For sake of convenience, grounds for assessment year 2013-14 are reproduced hereunder:

1. That the impugned order of assessment framed by the officer in pursuance of the directions of the Dispute Resolution Panel (hereinafter referred to as 'DRP') under Section 143(3) read with Section 144C of the Income-tax Act, 1961 ('Act'), is bad in law, violative of principles of natural justice and void ab-initio.

2. That on the facts and circumstances of the case and in law the impugned order passed by the assessing officer is barred by limitation and therefore, is liable to be quashed.

3. That the assessing officer erred on facts and in law in determining income of the appellant at Rs. 1,78,31,84,906/- against returned total income of Rs. 130,81,76,250/- under normal provision of the Act.

3.1. That the assessing officer/DRP erred on facts and in law in making addition of Rs.42,59,009/- on account of alleged difference in the arm's length price of international transactions resulting from the advertisement, marketing and sales promotion expenses (hereinafter referred to as 'the AMP expenses') incurred by the appellant.

3.2. That the assessing officer/DRP erred on facts and in law in not appreciating that the AMP expenses, etc., unilaterally incurred by the appellant in India could not be characterised as an international transaction as per section 92B, in the absence of any proved understanding/arrangement between the appellant and the associated enterprise, so as to invoke the provisions of section 92CA(3) of the Act.

3.3. That the DRP/TPO erred on facts and in law in holding that there exists an international transaction in connection with incurring of AMP expenses without placing on record any tangible material or evidence to substantiate the existence of such transaction.

3.4. That the DRP/TPO erred on facts and in law in not

appreciating that the only Transfer Pricing adjustment permitted by Chapter X of the Act was in respect of the difference between the arm's length price (ALP) and the contract or declared price, but said provision could not be invoked to determine the 'quantum'/extent of business expenditure.

3.5. That the TPO erred on facts and in law in not following the decision of the Hon'ble Delhi High Court in the appellant's own case for A.Y. 2008-09 reported as 381 ITR 154 wherein the Hon'ble High Court held that AMP expenses unilaterally incurred by the appellant do not constitute an international transaction.

3.6. That the DRP/TPO erred on facts and in law in not appreciating that since the appellant was performing the key people/critical decision making functions with regard to advertisement and marketing activity, the risk related to such activity ought to have been borne by the applicant.

3.7. That the TPO erred on facts and in law in holding that performance of Development, Enhancement, Maintenance, Protection and Enhancement ('DEMPE') functions by the appellant has led to international transaction between the appellant and the associated enterprise not appreciating that such functions are performed by the appellant independently, unilaterally and without any influence of the associated enterprise.

3.8. That the TPO erred on facts and in law in not appreciating that even otherwise since DEMPE functions relating to AMP expenses are performed by the appellant and consequently the returns attributed to such functions are also enjoyed by the appellant in the form of higher sales and profitability, such AMP expenses does not result in a service to the associated enterprise warranting compensation.

3.9. That the TPO erred on facts and in law in not appreciating that by virtue of long term right to use the 'Whirlpool' brand in India, the appellant has gained economic ownership of the said brand.

3.10. That the DRP/TPO erred on facts and in law in arbitrarily

holding that the associated enterprise controls the development and growth of its intangible not appreciating that in terms of the global marketing policy of the Whirlpool group, the critical decisions relating to incurring of AMP expenses are taken by the board and management of the appellant independently.

3.11. That the DRP/TPO erred on facts and in law in arbitrarily holding that with regard to export of goods the appellant is operating as a contract manufacturer not appreciating that (i) the appellant is operating as a full risk entrepreneur even with regard to export of goods and is responsible for performing critical decision making functions and (ii) the AMP expenses are incurred by the appellant in India for promoting sale of products in the Indian market.

3.12. That the DRP/TPO erred on facts and in law in not appreciating that adjustment on account of allegedly excess AMP expenses is not warranted in the case of the appellant, a full risk bearing entrepreneur.

3.13. That the DRP/TPO erred on facts and in law in holding that benefit derived by the associated enterprise as a result of AMP expenses incurred by the appellant is reflected in the improvement in overall global brand ranking not appreciating that such improvement in ranking was a result of the strategic marketing efforts and expenses incurred by the associated enterprises.

3.14. That the DRP/TPO erred on facts and in law in holding that the associated enterprise is benefitting from the AMP expenses incurred by the appellant on account of royalty, sale of goods etc. Not appreciating that such transactions have been separately benchmarked and accepted to be at arm's length.

3.15. That the DRP/TPO erred on facts and in law in holding that the AE is benefitting from the AMP expenses on account of development of brand without appreciating that the associated enterprise is not selling any goods directly in the Indian market.

3.16. That the TPO erred on facts and in law in relying on the

decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile communications 374 ITR 118 to hold that there exists an international transaction between the appellant and the associated enterprise in relation with incurring of AMP expenses not appreciating that the said decision was rendered on the facts of limited risk distributors and the existence of such transaction was not in dispute therein.

3.17. That the TPO erred on facts and in law in making protective adjustment of Rs.28,71,12,011 applying Bright Line Test (BLT) not appreciating that use of BLT to infer the existence of an international transaction is not mandated under the Act without appreciating that in absence of specific provision in the Transfer pricing statutory provisions in India, adjustment on account of the arm's length price of the advertisement and brand promotion expenses could not be made.

3.18. That the TPO erred on facts and in law in not appreciating that the use of BLT has been negated by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile communications 374 ITR 118.

3.19. Without prejudice that the DRP/TPO erred on facts and in law in not appreciating that the AMP expenses incurred by the appellant was appropriately established to be at arm's length applying TNMM.

3.20. Without prejudice that the DRP/TPO erred on facts and in law in not considering inappropriate comparable companies, being contact manufacturers, for the purpose of applying the bright line test not appreciating that such companies are not required to incur any significant AMP expenses.

3.21. Without prejudice that the DRP/TPO erred on facts and in law in considering inappropriate comparable companies for the purpose of computing the mark up charged on AMP expenses.

4. That the Assessing Officer/DRP erred on facts and in law in making disallowance of Rs.28,71,12,011/- u/s 37(1) of the Act on account of advertisement and marketing expenses incurred by the

appellant holding that the expenditure was incurred by the appellant for developing the brand in favour of the parent company, being the legal owner of the brand.

4.1. That the assessing officer erred on facts and in law in not appreciating that the advertisement and marketing expenses were incurred by the appellant wholly and exclusively for the purpose of its business and were deductible as business expenditure.

4.2.That the assessing officer erred on facts and in law in not appreciating that the appellant has a long term right to exploit the trademark 'Whirlpool' and benefits arising from the advertisement and marketing expenditure incurs solely to appellant.

4.3. That the assessing officer erred on facts and in law in not appreciating that the right allowed by the associated enterprise to the appellant to use the trademark 'Whirlpool' is a privilege and not a service rendered to the associated enterprise so as to warrant compensation.

4.4. That the assessing officer erred on facts and in law in not appreciating that benefit arising to the parent company, if any, is merely incidental, not warranting disallowance of advertisement and marketing expenses incurred by the appellant.

5. That the Assessing Officer erred on facts and in law in making an addition of Rs. 37,72,806 allegedly being undisclosed income on the basis of difference in the TDS claimed by the appellant and amount of TDS reported in the individual transaction statement/AIR information.

6. That the assessing officer erred on facts and in law in allowing the assessee the claim of double taxation relief u/s 90/91 of the Act.

The appellant craves leave to add, amend, alter or vary, any of the aforesaid grounds of appeal before or at the time of hearing of the appeal."

1.1. Ld.Counsel submitted that all issues are covered by order

of this Tribunal in assessee's own case for A.Ys 2010-11 to 2012-13 vide order dated 18/01/2019.

A.Y. 2013-14

2. Brief facts of the case are as under:

Assessee Company was engaged in the business of manufacturing and sale of home appliances like Refrigerators, Washing Machines, Air Conditioners and Microwave Ovens. Assessee filed its return of income electronically declaring total income of Rs.1,30,81,76,250/- under normal provisions of the Act, and income of Rs.1,74,97,67,000/- under section 115JB of the Act, on 29/11/2013 . The same was processed under section 143(1) of the Act, and subsequently was selected for scrutiny. Accordingly, notice under section 143(2) of the Act was issued followed by notices under section 142(1) and questionnaire.

2.1. Ld.AO, during assessment proceedings, observed that assessee had entered into international transaction with its AE and since value of such transactions exceeded more than Rs. 15 crores, case was referred to Transfer Pricing Officer (TPO). Ld.TPO on receipt of reference, issued notice to assessee and called upon to file documentations prescribed under Rule 10 D of Rules, 1962 and other details as called for.

2.2. Ld.TPO observed that assessee is a subsidiary of Whirlpool USA, and is engaged in production, sale and distribution of Whirlpool appliances and that assessee entered into international transactions and made adjustments. It was observed that during the year under consideration as in the earlier year, assessee was engaged in the business of manufacturing and sale of home appliances like Refrigeraters,

Washing Machines, Air Conditioners and Microwave Ovens. Ld.TPO in his order dated 31.10.2017 observed as under:

" the assessing officer, will accordingly, enhance the income of the tax payer by Rs.45,57,651/- on substantive basis. The protective adjustment of Rs.28,71,12,011 has been put on hold awaiting judgment of the Hon'ble Supreme Court over the concerned issue. This shall be treated as adjustment u/s 92CA."

Thereafter, upon receipt of such intimation from Ld.TPO, Ld.AO passed final assessment order by determining the ALP of AMP expenditure at Rs.42,59,009/-. Ld.AO after considering other disallowances computed income at Rs.178,31,84,910/-.

3. Aggrieved by order of Ld. AO, assessee is in appeal before us now.

4. Ground No.1 is general in nature.
Ground No.2 not pressed by Ld.Counsel.

5. Ground No. 3 to 3.21 have been raised against adjustment made by Ld.AO on account of alleged excessive AMP expenses amounting to Rs.42,59,009/-. It has been submitted by Ld. Counsel that said issue now stands squarely covered in assessee's own case by *order of this Tribunal in ITA Nos. 1972/Del/2015* for Assessment Year *2010-11, ITA No.1787/Del/2016 for A.Y. 2011-12 and ITA No.7085/Del/2017 for A.Y. 2012-13* vide order dated *19/01/2019.*

6. We have considered rival contentions of both sides in light of records and orders passed on this issue by Coordinate Benches of this Tribunal.

6.1. From records placed before us, it is observed that, undisputedly Ld.TPO proposed adjustment on account of AMP

expenses by applying bright line test. It is observed that Ld.TPO as well as DRP treated AMP expenses as international transaction by applying ratio laid down by *Special Bench* decision of this *Tribunal* in case of *LG Electronics India Pvt. Ltd., vs. ACIT* reported in *(2013) 29 Taxmann.com 300,* which stands over ruled by decision of *Hon'ble Delhi High Court* in case of *Sony Ericson India Pvt.Ltd vs. CIT* reported in *(2015) 55 Taxmann.com 240. Hon'ble Court* while deciding *Sony Ericson India Pvt.Ltd (supra)* categorically held that bright line test is not an appropriate yardstick for determining existence of an international transaction for calculating arm's length price.

6.2. *Hon'ble Delhi High Court* while deciding question of law raised for Assessment Year 2008-09 held as under:

> *"Conclusion*
> *47. For the aforementioned reasons, the Court is of the view that as far as the present appeals are concerned, the Revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between WOIL and Whirlpool USA. In the absence of that first step, the question of determining the ALP of such a transaction does not arise. In any event, in the absence of a machinery provision it would be hazardous for any TPO to proceed to determine the ALP of such a transaction since BLT has been negatived by this Court as a valid method of determining the existence of an international transaction and thereafter its ALP.*
> *48. Question (i) in the Assessee's appeal viz., "Was there an international transaction between WOIL and its AE involving the AMP expenses within the meaning of Section 92B of the Act read with Section 92F(v) of the Act?" is answered in the negative, i.e., in favour of the Assessee and against the Revenue. Consequently Question (ii) in the Assessee's appeal is not required to be answered. Further, the only question framed in the Revenue's Appeal viz., "Whether the ITAT erred in deleting the addition of Rs.*

180,73,10,769 made by the AO/TPO on account of AMP expenses under Section 37 of the Act?" is answered in the negative, i.e. in favour of the Assessee and against the Revenue.
*49. The impugned order of the ITAT and the corresponding orders of the DRP and the TPO, on the above issues are hereby set aside. The appeal of the Assessee, ITA No. 228 of 2015 is allowed and the appeal of the Revenue, ITA No. 610 of 2014 is di*smissed in the above terms, but in the circumstances with no orders as to costs."

6.3. On perusal of orders passed by Ld.TPO/AO/DRP for year under consideration, it is observed that AMP expenditure has been considered to be international transaction by applying bright line test, whereby Ld.TPO proposed an adjustment of Rs. 42,59,009/-.

6.4. Ld.Sr.DR preferred adjournment application on the ground that issue involved in present appeal is in respect of AMP adjustment. He submitted that consistent stand has been taken by revenue before this Tribunal to request for adjournment in all appeals, where AMP adjustment has been disputed by either parties on ground that *Hon'ble Supreme Court* is ceased with the matter.

6.5. During the course of argument Ld.Sr.DR sought permission from the Bench to file written submission regarding issues raised by assessee which was granted. Accordingly, on 10/01/2019 a detailed written submission has been filed by revenue in respect of issues raised by assessee for all years under consideration which is taken on record.

6.6. Plea taken by revenue in written submission to justify AMP adjustment proposed by Ld.TPO that assessee has been working for benefit of foreign AE and deserves suitable remuneration.

Heavy reliance has been placed by Ld.Sr.DR on BEPS Guidelines, provided for Transfer Pricing of intangibles, under Action Plan 8-10 of GE 20/OECD BEPS project in support of adjustment.

6.7. It has further been alleged by Ld.Sr.DR that, there is mutual agreement/arrangement between assessee and its AE, for discharge of function of marketing and market development in addition to agreement/arrangement for sale and distribution of goods purchased from its AE, for which cost has been borne by AE. Ld.TPO has also rejected claim that assessee is a full risk bearing manufacturer/distributor, as there is no supporting ground for the same.

7. In our considered opinion, since basis on which adjustment has been made being bright line test itself has been rejected by *Hon'ble Delhi High Court* in assessee's own case for Assessment Year 2008-09, no further interference can be called for at this stage. Further reliance placed by Ld.Sr.DR on BEPS guidelines and action plan 8-10 cannot be applied as the same is yet to be implemented.

7.1. Further it has been submitted by both sides that facts and circumstances in present appeal are IN no manner different from that of Assessment Year 2008-09, 2010-11, 2011-12 to 2012-13 that was for consideration before this Tribunal and thereafter before *Hon'ble High Court*. In our considered opinion under such circumstances, no purpose will be served by keeping present appeal pending, as issues raised by revenue in assessee's own case along with other cases, have not yet been listed before *Hon'ble Supreme Court*. We are therefore inclined to follow view taken by this *Tribunal* in assessee's own case which has been

upheld by *Hon'ble High Court* for Assessment Year 2008-09. We therefore, reject prayer advanced by Ld.Sr.DR for adjournment. It is observed that similar view has been taken by this *Tribunal in assessee's own case for assessment year 2009-10* in *ITA No.1254/del/2014 vide order dated 26/11/18*, and for A.Y. 2010-11, 2011-12, 2012-13 ITA 1972/Del/15, ITA No.1787/Del/16 & ITA No.7085/Del/17 respectively vide order dated 18.01.2019.

7.2. However, we appreciate the concern raised by Ld.Sr.DR that decision of *Hon'ble Supreme Court* will be binding upon assessee as well as revenue. We are therefore, inclined to set aside this issue to Ld.AO/TPO to pass fresh order considering decision of *Hon'ble Supreme Court*. Needless to say that proper opportunity shall be granted to assessee of being heard.

7.3. Accordingly Grounds 3 to 3.21 stand allowed for statistical purposes.

8. Ground No.4 to 4.3

Ground No. 4 to 4.3 have been raised by assessee regarding disallowance of expenses under section 37 of the Act, incurred by assessee on account of alleged advertisement and marketing expenses.

8.1. Ld.Counsel submitted that this issue has been considered by *Hon'ble High Court* assessee's own case which has been referred to herein above. He submitted that issue relates to AMP expenses which have been disallowed by Ld.AO under section 37 of the Act. Ld.Counsel submitted that *Hon'ble High Court* has

answered the question in negative that is in favour of assessee and against revenue.

8.2. Ld.Sr.DR placed reliance upon order of authorities below and submitted that this issue is interconnected with main issue of treatment of AMP expenses as international transaction, which is pending before Hon'ble Supreme Court and the result is awaited.

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

8.4. As the issue relating to nature of AMP expenses being international transaction or not, has been set aside to Ld.AO in preceding paragraphs, allowability of such expenses claimed by assessee under section 37 of the Act also deserves to be set-aside. The outcome of this ground raised depends upon decision of *Hon'ble Supreme Court* in assessee's own case.

9. Accordingly ground nos. 4 to 4.3 raised by assessee stand allowed for statistical purposes.

10. Ground no.5 has been raised due to mismatch in 26 A-S. He submitted that at the time of assessment, all details regarding claim raised in these grounds were not available with assessee due to which reconciliation could not be drawn. However Ld.Counsel submitted that now assessee has all relevant information to file reconciliation statement in respect of same. He submitted that these grounds may be set-aside to Ld.AO for due verification on basis of submissions advanced by assessee.

10.1. Ld.Sr.DR does not object to plea advanced by Ld. Counsel.

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

10.3. Perusal of record it appears that differential amount reflected in form 26 A-S were not properly reconciled. As now assessee has all relevant information for the same, in the interest of natural Justice, we direct Ld. AO to tally database of revenue in light of details filed by assessee.

10.4. We are therefore inclined to set aside ground no.5 to Ld.AO for reconciliation and to allow the claim as per law.

10.5. Accordingly Ground No. 5 is allowed for statistical purposes.

11. Ground no.6 relates to claim of double taxation relief sought u/s 90-91 of the Act.

11.1. Ld.Counsel submitted that Assessing Officer required the assessee to furnish the certificate in respect of tax withheld by foreign group entities. However, since the assessee was in the process of obtaining the certificates from the associated enterprises, the same could not be furnished before the Assessing Officer during the course of assessment proceedings. The A.O. in the absence of such certificates disallowed the claim of assessee towards foreign tax credit.

It has been submitted that assessee is now in possession of all Certificates and can reconcile the payment. Both parties agreed for issues to be set aside for verification.

11.2. We are therefore inclined to set aside ground no.6 to Ld.AO for reconciliation and to allow the claim as per law.

11.3. Accordingly Ground No.6 is allowed for statistical purposes.

12. A.Y. 2014-15

Ld.Counsel submitted that all grounds are identical and similar to that of A.Y. 2013-14.

12.1. Ld.D.R. did not object to the fact submitted by Ld.Counsel.

12.2. Accordingly, we decide grounds raised in A.Y. 2014-15 in similar manner as A.Y. 2013-14 herein above.

13. In the result appeal filed by assessee for Assessment Year 2013-14 and 2014-15 stand allowed for statistical purposes.

Order pronounced in Open Court on ..... February, 2019.

(R.K.PANDA)	**(BEENA A PILLAI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dt. .... February, 2019

- Gmv

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	21.02.2019 22.02.2019
2	Draft placed before author	22.02.19 25.02.19
3	Draft proposed & placed before the Second Member	
4	Draft discussed/approved by Second Member	
5	Approved Draft comes to the Sr. PS/PS	
6	Kept for pronouncement Order uploaded on :	
7	File sent to Bench Clerk	
8	Date on which the file goes to Head Clerk	
9	Date on which file goes to A.R.	
10	Date of Dispatch of order	