

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

**BEFORE SHRI N. S. SAINI, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 7808/DEL/2018 (A.Y 2014-15)

Bausch & Lomb India Pvt. Ltd. 4 th Floor, Tower-B, Unitech Business Park, South City-1, Gurgaon Haryana, PIN: 122001 AABCB3877E (APPELLANT)	Vs	DCIT Circle-4(1) Room No. G-15B, C. R. Building, New Delhi (RESPONDENT)
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S.A NO. 976/DEL/2018 (A.Y 2014-15)

Bausch & Lomb India Pvt. Ltd. 4 th Floor, Tower-B, Unitech Business Park, South City-1, Gurgaon Haryana, PIN: 122001 AABCB3877E (APPELLANT)	Vs	DCIT Circle-4(1) Room No. G-15B, C. R. Building, New Delhi (RESPONDENT)
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Appellant by	Sh. Nageshwar Rao & Sh. Sandeep S. Karhail, Advs
Respondent by	Sh. Sandeep Kr. Mishra, SR DR & Sh. Sanjay I. Bara, CIT DR

Date of Hearing	31.01.2019
Date of Pronouncement	25.02.2019

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the Assessment Order dated 26/10/2018 passed by the Assessing Officer u/s 143 (3) read with Section 144C of the Income Tax Act, 1961 for Assessment Year 2014-15.

2. The grounds of appeal are as under:-

“Appeal under Section 253(1) of the Income Tax Act, 1961 (“Act”) against the order dated January 26 October, 2018 (received on 5 November 2018) passed under Section 144C (13) read with Section 143(3) of the Act (“impugned order”), by the learned Deputy Commissioner of Income Tax, Circle-4(1), New Delhi (“AO”).

GROUND OF APPEAL

1. *That on the facts and in circumstances of the case and in law, impugned order incorrectly determined taxable income of Rs. 30,67,10,630/- as against returned income of Rs. - 6,00,66,615/- by making following additions:*

a) *purported substantive addition of Rs. 24,79,23,197/- made by Ld. Transfer Pricing Officer (“TPO”) basis self- contradictory and categorical finding that “no adverse inference is drawn in respect of other international transaction [meaning except advertising, marketing and promotion expenses (AMP)] and*

b) *Addition of Rs. 11,88,13,177/- made by ld. TPO in respect of services availed by the Appellant from its associated enterprises (AEs) based on mistaken notions and contradictory assumptions.*

Transfer pricing adjustment relating to AMP expenditure:

On the facts and in circumstances of present case and in law:

2. *That Ld. AO/TPO and DRP have erred in making adjustment purportedly in relation to AMP expenses incurred by Appellant, disregarding decision of Hon’ble Delhi High Court in the appellant’s own case for earlier years.*

3. *That impugned order erred in not applying principles laid down in decision by Hon’ble High Court even while noting there is no distinction between ‘distributor’ and ‘manufacturer’ & accepting absence of tools to measure impact under extant law.*

4. *That Ld. TPO/AO/ DRP have erred by not assessing international transaction as entered into with AE for arm’s length but re-writing the same on imaginary basis.*

5. That Ld. AO/ TPO/ DRP have erred in adopting 'intensity adjustment', unknown to law, as basis for adjusting net profit margin of comparable companies without appreciating same is nothing but mirror image of Bright Line Test ('BLT') which has already been held to be unlawful by Hon'ble Delhi High Court.

6. That impugned order equalising 'other expenses' across comparable companies on the pretext of making 'intensity adjustment', which method is not known to law/ is invalid as much as BLT, in the process of application of Transactional Net Margin Method (TNMM) is not as per provisions in Chapter X of the Act and rules there under.

7. That impugned order failed to appreciate that no lawful adjustment can be made for difference in intensity of functions, if any, solely by reference to quantum of spending, in absence of adequate and accurate data being available in public domain.

8. That on the facts and circumstances of the case and in law, the Ld. AO/ Ld. TPO/ Hon'ble DRP have erred in using intensity adjustment to adjust the net profit margin of comparable companies without appreciating that intensity adjustment leads to the assumption that Appellant has not earned any benefit in terms of sales/profit out of AMP expenses and in arm's length situation.

9. Without prejudice to all other grounds, Ld TPO/AO erred in performing so called 'intensity adjustment' on all indirect expenses while professing to consider quantum of marketing related function and further erred in making inappropriate selection of comparables providing marketing support services and Hon'ble DRP erroneously upheld the approach of Ld. TPO/AO.

10. Without prejudice to all other grounds, Ld. AO/TPO/ DRP erred in making inappropriate selection of companies as comparable and rejected comparable companies proposed by Appellant citing incorrect reasons.

11. Without prejudice to all other grounds, Ld. TPO/ AO/DRP have made certain errors while computing 'intensity based' adjustment.

12. Ld. AO/Ld. TPO / DRP have erred in retaining protective

assessment based on BLT even though the same has been held to be unlawful further, Ld. TPO travelled much beyond jurisdiction conferred in law in questioning the reasonableness, quantum, and commercial expediency of AMP expenditure incurred by the Appellant.

13. Impugned order erred in not appreciating that AMP expenses were incurred by Appellant in normal course of business, were wholly and exclusively for generating domestic sales for its business operations and further erred in presuming that such expenses resulted in creation of marketing intangibles for AEs.

14. Ld. AO/DRP/TPO have erred in not appreciating that benefit arising from incurrence of AMP expenses by Appellant has been received by the Appellant and benefit, if any, resulting to AEs is merely incidental.

15. While computing protective adjustment, Ld. AO/TPO and Hon'ble DRP have erred in holding that AMP expenditure incurred by the Appellant, is separate 'international transaction', disregarding findings of Hon'ble Delhi High Court in the Appellant's own case for earlier years.

16. Without prejudice to fact that Appellant was fully compensated for its efforts as is evident from arm's length margins earned as distributor, Ld. AO/ Ld. TPO/ Hon'ble DRP in not appreciating that AMP expenses incurred by Appellant did not view of an "international transaction" pertaining to rendition of service, as Section 92B of the Act, distinct from its functional profile and responsibility as a distributor..

17. Ld.CIT(A) TPO/DRP have erred in selecting Comparable Uncontrolled Price ("CUP") method for determination of the cost base in considering the 'bright line' concept as a id further erred in not applying CUP in the manner prescribed under Rule 10B of the Rules.

18. TPO/ AO has erred in levying a further mark-up on AMP expenses incurred over and above the so-called 'bright-line' limit by comparing with entities providing market support functions.

Transfer pricing adjustment in relation to payment towards intra-group services:

On the facts and in circumstances of present case and in law:

19. That impugned order erred in determining ALP of intra- group services i.e., regional support services availed by Appellant from its Associated Enterprises (“AEs”) at Nil as against actual payment of Rs. 11,88,13,177/-, by purportedly applying CUP, while completely ignoring material available on record, as also separate benchmarking of this international transaction already carried out by Appellant. Neither selection of CUP as Most Appropriate Method nor its application by Ld. TPO is as per provisions of Chapter X.

20. That on facts and in law, Ld. TPO erred in making the aforesaid addition without discharging his statutory onus of establishing that the conditions specified in clause (a) to (d) of Section 92C (3) of the Act are satisfied before disregarding the arm’s length price determined by the Appellant and proceeding to determine the arm’s length price himself.

21. Ld. TPO/AO/DRP have erred in alleging that Appellant failed to establish actual rendition or services without appreciating the detailed documentation and evidences submitted.

22. That in making the aforesaid addition, the Ld. TPO/AO/DRP proceeded in irrelevant and baseless presumptions that that the services rendered by AEs could have been availed locally by Appellant or that there was no necessity or benefit arising from such services or that such services are steward ship / shareholder activities even while alleging that nature of services is not clear.

Common Grounds

23. That on the facts and circumstances of the case and in law, the learned AO has erred in initiating penalty proceedings under Section 271 (1) (c) read with Section 274 of the Act.

24. That on the facts and circumstances of the case and in law, the learned AO has erred, in charging interest under Sections 234B and 234D of

the Act.

The above grounds are independent and without prejudice to each other.

3. The assessee company, Bausch & Lomb Eyecare (India) Pvt. Ltd. is wholly owned subsidiary of Bausch & Lomb South Asia Inc. USA and engaged in the business of manufacturing Sense care solutions and trading of contact lenses and protein removal enzyme tablets. The company is also engaged in the trading of ophthalmic intra ocular lenses and surgical equipments. The return of income declaring loss of (-) Rs. 6,00,66,615/- under normal provisions of the I.T Act, 1961 and Book Profit (Loss) of (-) Rs. 9,24,25,408/- was filed on 30/11/2014. The case was selected for scrutiny and first notice u/s 143(2) of the Act dated 31/8/2015 was issued and served on assessee. Subsequently, notice u/s 142(1) of the Income Tax Act, 1961 was called for. In response thereto, CA & ARs of the assessee company attended the proceedings from time to time and filed necessary details as called for which were examined and placed on record. During the previous year under consideration, the assessee entered into International Transactions with 'Associated Enterprises' within the meaning of Section 92B of the Act. The details of said transactions were mentioned in Form No, 3CEB filed by the assessee. The case was referred to the Transfer Pricing Officer as per provisions of section 92CA(1) of the I T. Act after taking statutory approval from the Commissioner of Income Tax, Delhi-I, New Delhi for computation of arm's length price in relation to the international transactions. Subsequently, an order u/s 92CA(3) of the Act was passed by the ACIT, Transfer Pricing Officer-I(l)(l). New Delhi on 27/10/2017 wherein an adjustment of Rs. 42,10,32,235/- and Protective Addition of Rs. 15,23,97,596/- attributable to difference in Arm's Length Price of the International transactions entered by the assessee with associated enterprises has been made. In view of the detailed reason in the TPO's order, the addition of Rs.42,10,32,235/- and protective addition of Rs. 15,23,97,596/- was proposed on account of Arms Length Price determined by the TPO and the

same was added to the income of the assessee company vide Draft Assessment Order dated 28/12/2017. Further, the assessee company had raised objection vide objection no. 76/2017-18 on 24/01/2018 before Hon'ble DRP against the draft assessment order dated 28/12/2017 on the issue of Arm's Length Price of international Transactions. Accordingly, the DRP passed an order u/s 144C(5) dated 18/09/2018 and the DRP directed the AO/TPO to incorporate the reasons given by the DRP in respect of various objections at the appropriate places in the body of the final order which was received in this office on 24/09/2018 to be implemented by the Assessing Officer as per the directions given by the DRP. In view of the direction of the DRP, the TPO has passed appeal order on 18/10/2018 giving effect to the DRP's direction which was received in this office on 22/10/2018. While giving effect to the directions of the Hon'ble DRP, the final list of comparables and the calculation of ALP is as under:

S.No.	Name of the Company	Adjusted OP/OC (as per direction of Hon'ble DRP)
1	Crystal Hues Ltd.	5.23%
2	ICRA Management Consulting Services Ltd.	4.01%
3	Kestone Integrated Marketing Services Pvt. Ltd.	10.11%
4	Marketing Consultant & Agencies	9.41%
	Average	7.19

Therefore, the taxpayer company should have been compensated by the AE at Rs.12,73,69,491/- plus mark up @ 7.19% for undertaking advertisement, marketing and publicity activities purely for AE and most importantly creating a marketing intangible for the AE. The net adjustment,

therefore, works out to Rs. 13.65.27,352/-on protective basis. As regards to intra group services, the DRP made the following observation towards the adjustment of Intra Group Services:

“Having considered the submission of the assessee, we find that (he DRP in AY 2011-12 & 2012-15 have upheld the TPO’s action, in view of the SLP under process of being filed. In view of the fact that Hon’ble Delhi High Court has decided the issue in favour of the assessee in respect of IGS payments, we direct the TPO/AO to verify and ascertain as to whether the SLP filed in assessee’s case against the High Court’s order dated 23.12.2015 and 17.04.2017 contains the grounds relating to IGS. If the grounds of IGS have been preferred in SLP, then only the TP adjustment should be retained, otherwise not ”

The issue has been taken as a ground for filing the SLP in the assessee’s own case for the A.Y. 2011-12 and the said SLP is still pending before the Hon’ble Apex Court and yet not decided. In view of this and as per the above direction of the DRP, the adjustment made by the TPO in respect of IGS will remain same. After giving effect to the directions of the DRP on all the above issues, the cumulative adjustment made by the TPO are as under:-

S.No.	Nature of transaction	Adjustment after giving effect of Hon’ble DRP
1	AMP on Protective Basis	Rs.13,66,27,357/-
2	AMP on Substantive Basis	Rs.24,79,23,197/-
3	Intra Group Services	Rs.11,88,13,177/-
Total		Rs.36,67,36,374/-

The Assessing officer enhanced the income of the taxpayer by Rs, 36,67,36,374/- as a result of giving effect to the directions of the DRP. In view of the above, the proposed addition of Rs, 42,10,32,235/-(substantive) and Rs. 15.23,97,596/-(protective) made in the draft assessment order was reduced amounting to Rs.36,67,36,374/-(substantive) & Rs. 13,65,27,357/- (protective) with directions of the Hon’ble DRP as well as TPO’s adjustments. Therefore, the amount of Rs.36,67,36,374/- was added to the income of the assessee

company on account of Transfer Pricing Adjustment.

4. Being aggrieved by the assessment order, the assessee filed present appeal before us.

5. The Ld. AR submitted that the issue is squarely covered by the decision of the Hon'ble High Court in assessee's own case for Assessment Years 2006-07, 2007-08, 2008-09 & 2009-10 reported in (2016) 381 ITR 227 as well as in Assessment Year 2012-13 by the Tribunal.

6. The Ld. DR submitted that the Department is in appeal before this Hon'ble Apex Court in respect of Hon'ble High Court's decisions in assessee's own case for Assessment Years 2006-07, 2007-08, 2008-09 & 2009-10. The Ld. DR could not controvert that the factual aspects of the present Assessment Year are identical with the earlier Assessment Years which was decided by the Hon'ble High Court as well as Tribunal for Assessment Year 2012-13.

7. We have heard both the parties and perused the material available on record. The issues involved are AMP expenses and transfer pricing adjustment in Intra Group Services both the issues are squarely covered in assessee's favour by the Hon'ble High Court as well as Tribunal in Assessment Year 2012-13. The Hon'ble High Court held as under:

“66. On the issue of the intra-group services, the Assessee is justified in contending that the re-characterization of its transaction involving its AE for the two years which have been fully disclosed in the TP Study on the basis of it not being for commercial expediency of the Assessee is clearly beyond the powers of the TPO and contrary to the legal position explained in EKL Appliances Ltd.'s case (supra)

67. For the aforementioned reasons the Court is satisfied that the Revenue has not been able to show the existence of an international transaction involving AMP expenses between the Assessee and its AE, B&L,

USA. Question (ii) is accordingly answered in favour of the Assessee and against the Revenue.”

The facts of the present assessment year are identical with that of A.Ys. 2006-07 to 2009-10. Therefore, appeal of the assessee is allowed and stay application is dismissed.

8. In result, appeal of the assessee is allowed and stay application is disposed off accordingly.

Order pronounced in the Open Court on 25th FEBRUARY, 2019.

**Sd/-
(N. S. SAINI)
ACCOUNTANT MEMBER**

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 25/02/2019
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	1.02.2019
Date on which the typed draft is placed before the dictating Member	04.02.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	25.02.2019
Date on which the final order is uploaded on the website of ITAT	25.02.2019
Date on which the file goes to the Bench Clerk	25.02.2019
Date on which the file goes to the Head Clerk	