IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.85/Del/2015
(ASSESSMENT YEAR : 2010-11)

M/s. Moet Hennessy India Private Ltd., Unit No.1903, Tower 2, 19th Floor, Indiabulls Financial Centre, Senapati Bapat Marg, Elphinstone Road, Mumbai – 400 013.	vs.	ACIT, Circle 5(1), New Delhi.
(PAN : AACCM4079L)		
(APPLICANT)		(RESPONDENT)

ASSESSEE BY : Shri Sumit Mangal, Advocate
Shri Saksham Singhal, CA
REVENUE BY : Shri H.K. Choudhary, CIT DR
Ms. Nimita Pandey, Senior DR

Date of Hearing : 27.03.2019
Date of Order : 09.04.2019

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

The Appellant, M/s. Moet Hennessy India Private Ltd. (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 13.11.2014 passed by the AO in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C of the

Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2010-11 on the grounds inter alia that :-

> ***"1. On the facts and in the circumstances of the case and in law, the Assistant Commissioner of Income-tax - Circle 5(1) ('AO')/ Transfer Pricing Officer (TPO')/ Dispute Resolution Panel ('DRP') erred in confirming the adjustment of Rs.7,12,19,145 by holding that the Appellant ought to have received reimbursement for "alleged excessive" Advertising, Marketing and Promotion ('AMP') expenses from its Associated Enterprises. ('AEs').***
>
> ***2. On the facts and circumstances of the case and in law, the AO / TPO/ DRP erred in:***
>
> ***a) disregarding the fact that the premium profits earned by the Appellant compensated for the allegedly excessive AMP expenses, if any, incurred by it;***
>
> ***b) disregarding the transfer pricing policy of the Moet Group wherein Moet India is provided with an agreed contribution margin which clearly indicates that Moet Group funds the AMP expenses of Moet India;***
>
> ***c) misinterpreting or placing incorrect reliance on the international guidance in relation to the 'marketing intangibles' from Organisation for Economic Co-operation and Development ('OECD'), US TP Regulations and Australian Tax Office ('ATO') and relying on several erroneous/ factually incorrect and contradictory statements/ observations in the Transfer Pricing (TP') order, which are not relevant to the instant case, only in order to justify an otherwise inappropriate and unwarranted TP adjustment;***
>
> ***d) incorrectly holding the AMP expenses incurred by the Appellant to be "excessive" on the basis of a "bright line limit" arrived at by deriving a distorted and incorrect set of comparable companies;***
>
> ***e) by holding that a mark-up of 15% ought to be earned by the Appellant in respect of the "alleged excessive" AMP expenses, without any basis;***
>
> ***f) in following the decision of the Hon'ble Special Bench in the case of LG Electronics (152 TTJ 273) (Del) (5B) without appreciating the fact that the said decision was rendered in the context of licensed manufacturer and hence not applicable to the distributor.***

> ***The Appellant therefore prays that the aforesaid adjustment be deleted.***
>
> ***3. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the AO / TPO/ DRP erred in considering expenses such as discounts, rebates, commission, trade component cost, trade incentives, etc. for computing the AMP spend ratio of the Appellant."***

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Moet India, the taxpayer held 99% by Champagne Moet & Chandon, France ('CMC') and 1% by Jas Hannessy & Co., France ('JHC'). CMC is one of the leading producers of Champagne, which is a sparkling wine manufactured in the Champagne region of France. JHC is a leading producer of Cognac (spirits).

3. The taxpayer is into the business of importing and distributing different kinds of wines and spirits and executing (ex-bonded) warehouse sales in India. The taxpayer undertakes marketing and sales promotion of products in its trading portfolio and is assisted by its Associated Enterprises (AE) in carrying out this function. The taxpayer imports advertising and promotional material from its AE such as wine glasses, menu holders etc. to be given as complimentary products to its customers.

4. During the year under assessment, the taxpayer entered into international transactions with its AE as under :-

Sr. No.	*Nature of Transaction*	*Method used by assessee*		*Amount*	*MHIPL's Operating Margin/Sales*
		Method	*PLI*		
1.	*Purchase of finished goods*	*TNMM*	*OP/ Sales*	*189,956,058*	*7.72%*
2.	*Sale of finished goods*			*7,66,15,647*	
3.	*Reimbursement of expenses*	*CUP*		*8,353,558*	-
4.	*Recovery of expenses*	*CUP*		*604,740*	
	Total			*275,530,003*	

4. Ld. TPO has accepted all the aforesaid international transactions at arm's length, however disputed the Advertisement, Marking and Promotional (AMP) expenses by noticing that the taxpayer has incurred huge AMP expenditure and beneficiary of the efforts of the taxpayer is its AE because of the increase in the brand value significantly. TPO also taken the view that the taxpayer has created marketing intangibles in favour of the taxpayer.

5. Declining the contentions raised by the taxpayer that any benefit that AE may have drawn is incidental in nature as the brand taxpayer has received from its AE has no intrinsic value, TPO after using "Bright Line Method" selected 5 comparables with average of AMP/Sales at 4.678% as against average of taxpayer at 13.34% and has also added mark-up of 15% on AMP spent and calculated the AMP expenses as under :-

Arm's length margin for markup : 15%

Total revenue of the assessee	***499,154,634***
Arm's length price of AMP expenses (%)	***0.935%***
Arm's length AMP expenses (A)	***46,67,096***
AMP expenses incurred by the assessee (B)	***66,596,787***
Expenditure incurred on creation of intangibles (B) – (A)	***6,19,29,691***
Mark up @ 15%	***92,89,454***
Arm's length value of AMP expenses	***71,219,145***

6. The taxpayer carried the matter before the ld. DRP by way of filing objections, who has confirmed the arm's length value of AMP expenses at Rs.712,19,145/- proposed by the TPO. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

7. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

8. Undisputedly, assessee is a distributor exposed to routine risks associated with carrying out the business of distribution of wine and spirits. It is also not in dispute that the ld. TPO has recognised the taxpayer as a distributor. It is also not in dispute that the taxpayer is not the owner of the brand. It is also not in dispute that the TPO has followed ***LG Electronics India Pvt. Ltd. vs. ACIT (2013) 29 taxmann.com 300 (Delhi)(SB)*** and used the

"Bright Line Test" to determine the arm's length value of AMP expenses.

9. The ld. TPO noticed that the AMP expenditure of the taxpayer is 13.34% of sales as against 0.935% of sale for the comparable, thus incurred huge expenses of Rs.66,596,787/- on the sale of Rs.499,154,634/-. Following the ***LG Electronics India Pvt. Ltd.*** (supra), the ld. TPO applied 'cost plus method' for determining the ALP of international transaction of brand building for its AE.

10. We are of the considered view that firstly ***LG Electronics India Pvt. Ltd.*** (supra) decided by the Special Bench of the Tribunal applying the "Bright Line Test" in order to decide the issue if AMP expenditure by the taxpayer is international transaction leading to the brand building of its AE has since been overruled by the Hon'ble Delhi High Court in ***Sony Ericsson India Pvt. Ltd. v. CIT (2015) 374 ITR 118 (Del.)*** and subsequently in ***Maruti Suzuki India Ltd. v. CIT (2016) 328 ITR 210 (Del.)*** has categorically held that BLT is not a valid basis for determining the existence of international transaction or for that matter for computing the ALP of such international transaction involving AMP expenses, the order of TPO passed by making BLT as basis of the ALP adjustment is not sustainable in the eyes of law.

11. Ld. AR for the taxpayer brought to our notice that the issue in controversy in the present appeal is a covered one in ***taxpayer's own case for AY 2009-10 decided in ITA No.1906/Del/2014 decided by order dated 23.08.2018,*** which fact has not been controverted by the dl. DR for the Revenue.

12. Ld. TPO in order to arrive at the decision that AMP expenditure incurred by the taxpayer is an international transaction for which reimbursement should have been received by the taxpayer by making following observations :-

> ***"2. It is seen from audited financial of the assessee company that a sum of Rs.6,18,37,549/- has been incurred by it on advertisement and sales promotion (AMP) which amounts to 26.94% of the total sales of the assessee company. It is proposed that the AMP expenditure incurred by the assessee should be considered as an international transaction for which reimbursement should have been received by the assessee as it leads to creation of marketing intangible for the AEs and not for the business purposes of the assessee.***
>
> ***2.1 It has been mentioned Para 4.3.3 of the transfer pricing report that "MHIPL does not own any significant intangible and does not undertake any significant Research and Development on its account that leads to the development of nonroutine intangibles. MHIPL uses the trademark, know-how, technical data software, quality standard etc., developed/owned by CMC. All companies of the group leverage from these intangibles for continued growth in revenues and profits. Accordingly, MHIPL does not own any significant non-routine intangibles."***
>
> ***2.2 From the quantum of the advertisement and sales promotion expense incurred by the assessee it is apparent that the assessee is involved in the promotion of a Brand which is not owned by it. It is doing it for the benefit of the Brand Owner i.e. the foreign AE CMC, France, hence, it should have been paid for the services being provided by it. However, no agreement between the assessee and the AE for the promotion of the brand has been filed. The transfer pricing regulations require that it is***

not the 'form' but the overall arrangement/substance of the transactions that must be kept in mind.

> ***Section 92F(v) of the Income-tax Act states:***
>
> ***"transaction includes an arrangement, understanding or action in concert, whether or not such arrangement, understanding or action is formal or in writing;"***
>
> ***Similarly, Rule 10B(2)(c) states:***
>
> ***"the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;"***

2.3 Above provisions read with the well established doctrine of 'substance over form' (applied by the Courts in numerous judicial decisions) indicate that transfer pricing regulations are to be applied keeping in mind the overall scheme of the taxpayer's business arrangement.

2.4 In view of the discussions in the foregoing paragraphs I am of the considered view that the expenditure incurred on AMP by the assessee and thereby promoting the brand/trade name owned by CMC, France, the AE is an international transaction and the same has neither been reported in Form 3CEB nor has been benchmarked in transfer pricing study, I am of the considered view that the onus which was on the assessee to benchmark the international transaction relating to the expenditure incurred on AMP has not been discharged. I therefore propose to benchmark the transactions relating to "AMP".

2.5 It has already been stated in the foregoing paragraphs that the expenditure on AMP has been incurred to promote the brand/trade name owned by CMC, France, the AE and such expenditure has resulted into brand building and increased awareness of the products bearing such brands/trade names. I am of the considered view that the expenditure incurred by the assessee company is for the advantage of its AE, since the brand/trade name is owned by the AE. In such a situation the assessee company should have been suitably compensated by the AE. However the assessee has not received any payment in this regard from the AE. Therefore it is clear that the assessee has not been suitably compensated by the AE in respect of the expenditure incurred by it (the assessee) on Advertising and Sales Promotion expenses (AMP) to penetrate the market and to increase the sales by promoting the brand name."

13. From the aforesaid observations of the ld. TPO, we have gathered that the TPO has treated the AMP expenditure as international transactions merely on the ground that the taxpayer has incurred huge expenses on AMP spent and has made comparison with (i) IFB Agro Inds. Ltd.; (ii) Rajasthan State Ganganagar Sugar Mills Ltd.; (iii J.L. Morison (I) Ltd.; and (iv) Lotus Herbals Ltd. having AMP expenses/sales of 1.32%, 0.55%, 7.32% & 9.50% respectively as against taxpayer's AMP expenditure of 18.14% of the total sales. We are of the considered view that highest AMP expenses per se cannot be a ground to infer that there was an international transaction.

14. The taxpayer has given details of expenses in the nature of AMP expenses, available at page 205 of the paper book, which are as under :-

Sr.No.	***Nature of expenses***	***Amount***
1	***Advertising exp***	***130,125***
2	***Cost of DJ @ Ricks for Belvedere***	***24,000***
3	***Music Band Payment***	***1,097,845***
4	***Display charges at events***	***96,137***
5	***Employee Claim for A&P Expenses***	***66,267***
6	***Event Organiser***	***49,635***
7	***Event/Sponsorship Expenses***	***4,905,212***
8	***Incentive***	***2,680,690***
9	***Launch of BV Promotion evening @ F Bar***	***125,000***
10	***Merchanding***	***274,871***
11	***Rent Contract for visibility***	***919,440***
12	***Towards Printing of invites BV Beat Nights***	***49,588***
13	***Towards visit of Regional Brand Ambassador***	***77,796***
14	***Visibility***	***6,758,964***
	Total	***17,255,570***

15. The taxpayer also brought on record the fact that the AMP expenses considered by the TPO i.e. Rs.90.551.831/- include distribution expenses of Rs.23,955,044/- which are also required to be excluded by computing the AMP/sales ratio of the taxpayer. It is also the case of the taxpayer that it has incurred Rs.66,596,787/- towards AMP expenses merely for creating awareness of the product and not for its brand building.

16. From the order passed by the ld. TPO/DRP/AO, it is undisputedly proved on fact that the facts in the case at hand are identical to taxpayer's own case for AY 2009-10 decided by the coordinate Bench of the Tribunal and has not undergone any change in its business model. Coordinate Bench of the Tribunal in taxpayer's own case decided the issue in controversy in favour of the taxpayer by deleting the ALP adjustment on account of AMP expenses by returning following findings :-

> ***"9. On a careful consideration of all these factors, including the inconsistency in the approach of the AO/TPO with respect to the AMP expenditure being in the nature of an international transaction as expenditure incurred on behalf of the assessee, including the quantum and nature of expenditure and including lack of any material to suggest that there was "an arrangement, understanding or action in concert" with respect of the expenditure incurred by the assessee and including the fact that, in our considered view, the expenditure incurred by the assessee was in nature of bonafide business expenditure in furtherance of its legitimate business interests, we are of the considered view***

that there is no legally sustainable basis for the TPO coming to the conclusion that there was an international transaction, under section 92B, on the facts of this case. It was only on the basis of bright line test that the impugned ALP adjustment was made but that approach has already been negatived by Hon'ble Courts above. We see no reasons to remit the matter to the file of the TPO, as is prayed for by the learned Departmental Representative. A remand to the assessment stage cannot be a matter of routine; it has to be so done only when there is anything in the facts and circumstances to so warrant or justify. In any case, there are direct judicial precedents from Hon'ble jurisdictional High Court which clearly suggest that the matter regarding existence of international transaction under section 92B, as far as possible, should be decided at the level of Tribunal itself. In the case of Bacardi India (supra), Their Lordships, inter alia, have observed as follows:

> *5. Having heard learned counsel for the parties, the Court finds that the case before the ITAT was argued at length and the views of the TPO as well as the Dispute Resolution Panel ('DRP') were already available to the ITAT. Arguments were advanced on the strength of judgments of this Court in Sony Ericsson Mobile Communications India Pvt. Ltd. vs. Commissioner of Income Tax (2015) 374 ITR 118 (Del.) as well as a string of subsequent judgments beginning with Maruti Suzuki India Ltd v. CIT, (2016) 381 ITR 117.*
>
> *6. Nevertheless, the main reason that weighed with the ITAT to remand the matter to the TPO was that the TPO did not have the benefit of the above decisions of this Court when the order was initially passed by the TPO. That can hardly be a ground for remanding the entire matter to the TPO. In fact, this was anticipated by this Court in Sony Ericsson Mobile Communications India Pvt. Ltd.(supra). In para 193 of that judgment, it cautioned that the ITAT should not simply remand the matter to the TPO but examine it itself, particularly when the facts have already been analysed and considered and no new facts have emerged in the meanwhile.*
>
> *7. In the present case, all the facts necessary for the ITAT to form an opinion on the issues before it*

> ***concerning the AMP expenditure were already before it. In the circumstances, the remand to the TPO of the entire matter for a decision afresh appears to be unwarranted. The assessee thus succeeds in this appeal.***
>
> ***10. In the present case, no new facts have emerged and all the facts brought to record, during the course of the assessment proceedings, donot indicate legally sustainable basis for coming to the conclusion that there was an internal transaction in respect of AMP expenses incurred by the assessee. We are, therefore, of the considered view that the plea of the assessee, on the peculiar facts of this case, does indeed deserve to be upheld that there is no material on record to hold that there was an international transactions, in terms of the provisions of Section 92B, nor any material has been brought on record to even remotely suggest so and, therefore, that there is no good reason to remit the matter to the assessment stage for building a case afresh. Respectfully following the binding judicial precedents, we delete the impugned ALP adjustment which was made solely on the basis of bright line test. The plea of the learned counsel was indeed well taken and merits acceptance. The impugned ALP adjustment of Rs.6,64,70,841, accordingly, stands deleted."***

17. Following the decision rendered by the coordinate Bench of the Tribunal in taxpayer's own case for AY 2009-10 and in view of the decision rendered by the Hon'ble Delhi High Court in ***Sony Ericsson India Pvt. Ltd.*** and ***Maruti Suzuki India Ltd. v. CIT*** (supra), the Revenue has failed to discharge the onus to prove the international transactions between the taxpayer and its AE and only thereafter ALP of international transactions involving AMP expenses can be computed.

18. In the instant case, there is not an iota of material apart from applying the Bright Line Test and by taking the view that the taxpayer had incurred huge AMP/sales expenses to the tune of 18.14%, no cogent material is there to treat the incurring of AMP expenses as international transaction more particularly when basis for treating the AMP expenses as international transactions i.e. BLT is not sustainable method. So, following the binding judicial precedents, impugned ALP adjustment on account of AMP expenses is ordered to be deleted. Consequently, appeal filed by the taxpayer is allowed.

Order pronounced in open court on this 9th day of April, 2019.

Sd/-	**sd/-**
(PRASHANT MAHARISHI)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 9th day of April, 2019
TS

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT
5.CIT(ITAT), New Delhi.

AR, ITAT
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