**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH 'I-2, NEW DELHI**

**BEFORE SHRI. N. S. SAINI, ACCOUNTANT MEMBER**
**AND SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No. 1611 /Del/2016**
**Assessment Year: 2011-12**

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| DCIT, Circle 25(1), New Delhi | vs | M/s Toshiba India Pvt. Ltd.,<br>3rd Floor, Building No. 10,<br>Tower B, DLF, Cyber City Phase-II,<br>Gurgaon, Haryna – 122002<br>PAN No AABCT4829N |
| **( Appellant)** | | **(Respondent)** |

**ITA No. 7340 /Del/2018**
**Assessment Year: 2011-12**

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| M/s Toshiba India Pvt. Ltd.,<br>3rd Floor, Building No. 10,<br>Tower B, DLF, Cyber City<br>Phase-II, Gurgaon, Haryna –<br>122002<br>PAN No AABCT4829N | vs | DCIT, Circle 25(1), New Delhi |
| **( Appellant)** | | **(Respondent)** |

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| Appellant by: | Shri Nageshwar Rao, Advocate |
| Respondent by: | Shri H.K.Choudhary, CIT DR |
| Date of hearing: | 11.06.2019 |
| Date of pronouncement: | 11.06.2019 |

**O R D E R**

**PER K NARASIMHA CHARY, JM**

Aggrieved by the final order dated 28/1/2016 passed by the AO pursuant to the directions dated 15/12/2015 given by the Ld. Dispute Resolution Panel (DRP), the Revenue preferred the ITA No. 1611/del/2016 whereas aggrieved by the assessment order dated

19/9/2018 pursuant to the order of remand dated 8/4/2016 by the Tribunal, M/S Toshiba India private limited (the assessee) preferred ITA No. 7340 /Del/ 2018.

2. Briefly stated relevant facts are that the Assessee is a company engaged in the business of trading of consumer durable etc and also has been providing representative and marketing support services to Toshiba workgroup companies worldwide. For the assessment year 2011-12, they have filed their return of income on 30-11-2011declaring a total income of Rs. 12,90,03,431/-.

3. Ld. TPO by order dated 30/1/2015 passed under section 90 2CA (3) of the Income Tax Act, 1961 (for short ñthe Actò), suggested an adjustment of Rs. 71,23,76,838/-to the returned income of the assessee on account of AMP adjustment. Apart from this, learned Assessing Officer found that the deductions claimed by the assessee on account of alleged deposit of employeesô contribution to PF/ESIC and Special Additional Duty (SAD) written off were to be disallowed. Learned Assessing Officer, accordingly, passed the draft assessment order on 12/3/2015.

4. Against the draft assessment order, the assessee filed objections before the Ld. Dispute Resolution Panel (DRP). DRP vide order dated 15/12/2015 directed the Ld. TPO to exclude routine AMP expenses. They have also deleted the disallowance on account of alleged deposit of employeesô contribution to PF/ESIC and a SAD written off. Ld. TPO gave effect to the directions of the directions of the Ld. DRP and worked out the AMP adjustment at Rs. 21,73,99,859/-as against Rs.71,23,76,838/- initially proposed by him by order dated 30/1/2015. In

conformity with the findings of the Ld. TPO, learned Assessing Officer passed the final assessment order dated 28/1/2016. Aggrieved by such final assessment order, both the assessee and the revenue preferred appeals.

5. Assessee also challenged the assessment order in ITA No. 944/Del/2016 in respect of the adjustment on account of AMP; whereas Revenue preferred ITA 1611/del/2016 challenging the direction given by the Ld. DRP to the Ld. TPO to exclude the routine AMP expenses and also the disallowance on account of alleged deposit of employeesô contribution to PF/ESIC and SAD written off. Appeal of the assessee in ITA No. 944/del/2016 was disposed of by order dated 8/4/2016 by the Tribunal by setting aside the issue relating to the adjustment on account of AMP and remanding the matter to the file of the Ld. TPO/AO for deciding it afresh.

6. Pursuant to the remand order dated 8/4/2016 passed by the Tribunal, Ld. TPO passed the order dated 27/10/2017 making the adjustment of NIL on substantive basis and an adjustment of Rs. 98,53,39,049/-on protective basis following the Bright Line Test (BLT) method. Assessee filed objections before the Ld. DRP and the Ld. DRP by order dated 24/8/2018 confirmed the adjustment on protective basis. Ld. DRP, however, the computed the adjustment at Rs. 91,46,45,639/- as against the adjustment of Rs. 98, 53, 39, 049/- suggested by the Ld. TPO. In consonance with the directions of the Ld. DRP, learned Assessing Officer passed the final assessment order on 19/9/2018. Aggrieved by such an order, assessee preferred ITA 7340 /Del/ 2018. Since both the appeals had anorigin initially in the order dated 12.03.2015 passed by the

learned Assessing Officer, we deem it just and proper to dispose of these 2 appeals by way of this common order.

7. Insofar as the adjustment on protective basis following the BLT is concerned, at the outset, Ld. AR brought to our notice that the Hon'ble jurisdictional High Court in the case of Sony Ericsson Mobile Communications Private Limited vs. CIT 374 ITR 118 invalidated the application of BLT for making any adjustment in respect of AMP. He further submitted that in assessee's own case for the assessment year 2009-10 and assessment year 2014-15, a coordinate Bench of this Tribunal in ITA No. 1438/del/2018 and ITA No. 7547/del/2018 respectively by orders dated 18/6/2018 and 10/1/2019 respectively deleted the protective adjustment following the BLT. He submits that though the very existence of international transaction is challenged by the assessee while grounds No. 5 to 10, if the contentions of the assessee in respect of the validity of the protective adjustment is allowed, the adjustment made on account of AMP would be totally deleted and the issue relating to the nonexistence of international transaction would be academic in this proceedings, and the assessee would seek the leave of the Tribunal to rise such an issue at any appropriate stage.

8. Ld. DR submitted that for the assessment year 2012-13 a coordinate Bench of this Tribunal held that the issue of AMP involves an international transaction and therefore, it is necessary to benchmark such a transaction. Ld. AR submitted that the issue of benchmarking the transaction in this case does not arise because under identical circumstances the protective addition on account of AMP following the BLT was deleted for the earlier and subsequent years by the coordinate

Bench of this Tribunal, and such an issued arise only when the revenue makes a substantive addition.

9. There is no denial from the Revenue as to the decision of the Hon'ble jurisdictional High Court in the case of Sony Ericsson (supra) or the Tribunal deleting the protective adjustment following the BLT in ITA ITA No. 1438/del/2018 and ITA No. 7547/del/2018 respectively by orders dated 18/6/2018 and 10/1/2019 respectively for the assessment years 2009-10 and 2014-15 respectively.

10. We have gone through the order dated18/6/2018 and 10/1/2019 in ITA No. 1438/del/2018 and ITA No. 7547/del/2018 respectively in respect of the assessment year 2009-10 and 2014-15 to be found at page numbers 871 and 860 respectively in the paper book. Inthe order dated 10/1/2019 in ITA No. 7547/del/2018, the Tribunal held that,-

> *8. In ITA No.6531/Del/2017, a coordinate bench of this Tribunal vide para 6.3 followed the decision of the another coordinate bench of this Tribunal in the case Nikon India P. Ltd., ITA No.4574/Del/2017 dated 20.9.2017 and held that in the light of the decision of the Hon'ble jurisdictional High Court in the case of Sony Ericson Mobile Communications (India (P) Ltd.(supra), no adjustment by application of BLT method could be sustained on protective basis having no statutory mandate. This finding of the Tribunal in ITA No.6531/Del/2017 for the Asstt. year 2013-14 was followed in assessee's own case for the Asstt. year 2009-10 in ITA No.1438/Del/2018 and deleted the addition made on protective basis by following the method of BLT.*
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> *9. Since the facts are similar, that too in assessee's own case and the decisions of the coordinate benches are rendered by following the decision of the Hon'ble jurisdictional High Court in the case of Sony Ericsson (supra), this Bench cannot hold the issue in some other way by taking a different view. Rule of consistency as laid down by the Hon'ble Apex court in the case of Radhasoami Satsang, 1992 AIR 377, does not permit such a course. We, therefore, while respectfully*

*following the same, hold that the addition on protective basis by following the BLT method cannot be sustained.*

11. Further, the Hon'ble High Court dismissed the appeal in ITA No. 1451/2018 by order dated 15/5/2019 preferred against the order dated 18 60,018 in ITA No. 1438/del/2018 for the assessment year 2009-10. In the circumstances, since facts fundamental for all these years remain the same, while respectfully following the decision of the Hon'ble jurisdictional High Court and also the view taken by a coordinate Bench of this Tribunal in assessee's own case for the assessment years 2009-10 and 2014-15, we conclude that the addition made on protective basis following the BLT cannot be sustained. We do not find it necessary to go into the question of benchmarking the transaction since no addition is made on substantive basis, and such a question could be gone into when the need arises and the revenue chooses to make any addition on substantive basis. We accordingly direct the assessing officer to delete the same.

12. Now coming to the grievance of the revenue in respect of the deletion of the disallowance on account of SAD written off, it is brought to our notice that in assessee's own case for the assessment year 2010-11, in ITA No. 1101 /Del/ 2015 by order dated 25/5/2015 a coordinate Bench of this Tribunal held that the amount of the SAD paid in relation to the goods which are still appearing as closing stock in the books of accounts of the assessee, cannot be claimed as deduction; that the payment of SAD in such circumstances is nothing, but a part of the purchase price; and that the the same cannot be separated from the purchase price of the goods to be written off separately in the year under question, when the corresponding goods are still treated as stock in trade.

13. Ld. DR submitted that so long as the corresponding goods are still treated as stock in trade and appearing in the books of the accounts of the assessee as closing stock, the advance amount paid cannot be claimed as deduction. No circumstances are brought to our notice to disturb such a finding of the Tribunal under similar circumstances. We, therefore, do not find any merit in the contention of the assessee and this ground of appeal of Revenue has to be allowed.

14. Lastly, in respect of the issue of disallowance on account of late deposit of employees contribution to PF/ESIC, the impugned order speaks that the Ld. DRP granted relief to the assessee on this aspect by following the binding precedent of the Hon'ble jurisdictional High Court in the case of CIT vs.AIMIL Ltd (2009) 321 ITR 508. It is not brought to our notice by the Revenue as to how this decision of the Hon'ble jurisdictional High Court is not applicable to the facts of the case and why the same shall not be followed. Since the Ld. DRP followed the binding precedent of the jurisdictional High Court, we find it difficult to hold that there is anything illegality or irregularity in the Ld. DRP deleting the same. We therefore uphold the finding of the Ld. DRP on this issue.

15. In the result, appeal of the revenue is allowed in part and the appeal of the assessee is allowed.

**Order pronounced in the open Court on 11th June, 2019.**

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| Sd/- | Sd/- |
| (N. S. SAINI) | (K. NARASIMHA CHARY) |
| ACCOUNTANT MEMBER | JUDICIAL MEMBER |

DATED: 11th June, 2019.