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

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

I.T.A.No.1055/Del/2016
I.T.A.Nos.3417 to 3419/Del/2017
Asstt. Years: 2011-12, 2007-08 to 2009-10

ACIT, Circle 22(2),		**Swarovski India Pvt. Ltd.**
New Delhi.	**Vs**	**Building No.10, Tower-C,**
		1st Floor, DLF Cyber City,
		Phase-II, Gurgaon.
		PAN: AAGCS4052D

AND

I.T.A.No.964/Del/2016
I.T.A.Nos.2577 to 2579/Del/2017
Asstt. Years: 2011-12, 2007-08 to 2009-10

Swarovski India Pvt. Ltd.		**ACIT, Circle 22(2),**
Building No.10, Tower-C,	**vs**	**New Delhi.**
Building No.10, Tower-C,		
1st Floor, DLF Cyber City,		
Phase-II, Gurgaon.		
PAN: AAGCS4052D		

(Appellant) (Respondent)

Assessee by: S/Sh Kamal Sawhney &
Nikhil Goyal, Advocate
Sh Chetna Thapar, Ms Vanita Mehta,
S/Sh Nitish Gupta, Divyanshsingh, CAs
Shri Prashant Meharchandani, Advocate
Department by: Shri Rakesh Kumar, Sr. DR

Date of hearing:22/7/2019
Date of order :25/7/2019

ORDER

PER BENCH:

In these appeals, both the assessee ("M/s Swarovski India Private Limited") and the Revenue are challenging the common order dated 28.01.2011 passed by the learned Commissioner of Income Tax (Appeals)-38, New Delhi ("Ld. CIT(A)") for the Assessment Year 2007-08 to 2009-10 and also the order dated 30.12.2015 under section 144C read with section 143(3) of the Income-tax Act, 1961 ("the Act") pursuant to the directions dated 24.11. 2015 issued by the Ld. Dispute Resolution Panel (DRP)-2, New Delhi ("Ld. DRP") for the Assessment Year 2011-12.

2. Since the assessee, facts and issues involved in all these appeals are similar, we deem it just and convenient to dispose of all these appeals by way of this common order.

3. Briefly stated facts are that the assessee is a company incorporated in the year 1996 under the provisions of the Companies Act, 1956 and was originally registered as an export oriented unit to undertake manufacturing activities such as coating of raw beads, polishing, stinking, knotting etc on the beads provided by its associated enterprise, but from the year 2000 onwards the assessee also started undertaking importandresale of Crystal and Crystal related products in India to third parties.

4. For the years 2007-08 to 2009-10 and 2011-12 they have filed their return of income, and in view of the international transaction

undertaken by the assessee, reference under section 92CA(1) of the Act was made for determination of the arm's-length price of the international transaction to the Ld. Transfer Pricing Officer ("Ld. TPO").

5. In respect of Assessment Years 2007-08 to 2009-10, the assessee applied the CUP method as the most appropriate method (MAM). Ld. TPO rejected the TP documentation of the assessee and also the CUP method stating that such method was not conclusive and it does not capture the international transaction of AMP expenses incurred for creating marketing intangibles; that the CUP used by the assessee was the price paid by other distributors of the Associated Enterprise of the assessee in other geographical locations, which according to the Ld. TPO is not an uncontrolled comparable price in the strictsense of the definition of the CUP. Ld. TPO applied TNMM as the most appropriate method and determined the average arithmetic mean net profit margin of comparables at 4.41%, 2.20% and a 2.31% for the assessment years 2007-08 to 2009-10 respectively. In respect of the assessment year 2009-10, Ld. TPO made an adjustment to the international transaction of AMP expenses incurred by the assessee under the trading unit and it disallowed expenses in excess of "bright line" along with a Mark up of 15.46%. Ld. TPO computed the AMP adjustment of Rs.9,57,56,877/-, Rs. 8,86,16,878/-and Rs. 6,64,09,883/-respectively for the Assessment Years 2007-08 to 2009-10. In respect of the Assessment Year 2011-12, Ld. TPO had applied TNMM for distribution activity and analysed the AMP expenses separately based on BLT.

6. On the assessee filing objections in respect of Assessment Year 2011-12, Ld. DRP rejected the aggregation of transaction in distribution activity on the ground that the right comparables were not available, and segregated approach has to be adopted by separating the routine selling and distribution expenses from the advertising and promotional expenses as per the details furnished by the assessee.

7. In respect of the Assessment Years 2007-08 to 2009-10, assessee did not file any objections before the Ld. DRP but had chosen the line of appeal before the Ld. CIT(A). In respect of the issue relating to the most appropriate method, Ld. CIT(A) agreed with the assessee and held that RPM is the most appropriate method for benchmarking the trading activity of international transaction of import of Crystal and Crystal components. Ld. CIT(A), however, followed the directions of the Ld. DRP in respect of Assessment Year 2011-12, for analysing the AMP expenses wherein straightaway bright line was followed, without referring to the directions of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications (India) Private Ltd vs. CIT [(2015) 374 **ITR** 118].

8. In respect of Assessment Years2007-08 to 2009-10 and 2011-12, assessee is challenging the order of the Ld. CIT(A) in applying the same parameters of the Bright Line Test (BLT) stating that it has not a statutory mandate under the Act, whereas the Revenue is challenging the action of the Ld. CIT(A) in directing the use of RPM as the most appropriate method for benchmarking the transaction related to purchase/import of Crystal and Crystal components even when RPM does not capture the marketing intangibles created in the hands of the

assessee. Revenue further contends that in respect of the Assessment Year 2011-12, Ld. DRP should have appreciated the fact that the Bright Line Test (BLT) is a mere step of the most appropriate method for benchmarking the AMP services, carried out to estimate and bifurcate expenditure pertaining to the assessee for its own routine distribution function and the expenditure incurred on AMP services provided to the AE in a situation where the assessee has not reported the international transaction pertaining to marketing functions.

9. Insofar as the most appropriate method is concerned, Ld. AR submitted that for the Assessment Years 2004-05 and 2005-06, a coordinate Bench of this Tribunal in assessee's own case held that the assessee purchased Crystal goods and Crystal components from its AEs, no value addition was made to such imports and the goods were sold as such, and therefore, RPM is the most appropriate method for determining the ALP of the international transaction of "import of Crystal goods and Crystal components". He further submitted that independent of this finding given by the Tribunal for the assessment years 2004-05 and 2005-06, Ld. CIT(A) again for Assessment Years 2007-08 to 2009-10 applied the RPM for distribution activities of the assessee. He submitted that in distribution activities, the assessee does not make any value addition to such imports and were sold as such and, therefore, RPM method has to be applied as the most appropriate method for distribution activities in respect of Assessment Year 2011-12 also.

10. In the case of assessee for the Assessment Years 2004-05 in ITA No. 5621/Del/2014, by order dated 10/02/2017, a coordinate Bench of this Tribunal observed that,-

> **"**6.4*.... It is clear from the command of sub-clause (i) itself that the RPM is applied when the property purchased by the assessee is resold as such. Sub-clause (ii) further provides for choosing comparable cases in which similar property is purchased and resold.* Thus it is apparent that this method, by its very language, is applicable where a property purchased from an AE is resold as such. Where, however, some value addition is made to the goods before resale, the RPM ceases to be an unfailing method.
> 6.5. Adverting to the facts of the instant case, we find that the assessee purchased Crystal goodsand Crystal components from its AE. No value addition was made to such imports. The goodswere sold as such. *In the given circumstances, the* RPM is the most appropriate method fordetermining the ALP of the international transaction of Import of Crystal goods and Crystal*components* **'. "**

11. It is not the case of the Revenue that during the years under consideration, the assessee made any value addition to the goods imported before selling the same or that there is any change of circumstances or facts rendering the observations of the Tribunal in the earlier years not applicable to the Assessment Year 2011-12. We, therefore, following the rule of consistency hold that the RPM is the most appropriate method for determining the ALP of the international transaction for the Assessment Year 2011-12 also.As already stated above, in respect of the Assessment Years 2007-08 to 2009-10, Ld. CIT(A) held that RPM is the most appropriate method for benchmarking the activities of the assessee in the import of Crystal and Crystal components.

12. Next argument of the Ld. AR is that for all the years Bright Line Test (BLT) is sought to be applied and the same is rejected by the Hon'ble jurisdictional High Court in the case of Sony Ericsson (supra), whereas the intensity test is also rejected by Chandigarh Bench of Tribunal in the case of Widex India Private Limited vs ACIT, ITA No. 269/CHD/2017 by order dated 23.5.2019 holding that it was only a meagre remains of Bright Line Test (BLT) approach which has been rejected by the Hon'ble High Court in the case of Sony Ericsson (supra).

13. Ld. AR submitted that Ld. CIT(A), for the Assessment Years 2007-08 to 2009-10 held that RPM is the most appropriate method for benchmarking the international transaction of import of Crystal and Crystal components and once RPM is applied for distribution activity, the AMP has to be analysed in line with the directions given by the Hon'ble jurisdictional High Court in the case of Sony Ericsson (supra). While referring to the directions given by the Hon'ble jurisdictional High Court in the case of Sony Ericsson (supra) in the light of the facts involved in this case, Ld. AR submitted that, the comparables selected by the ld.TPO/Ld. CIT(A) are external comparables;that the comparables selected by the Ld.TPO/Ld. CIT(A) perform AMP functions; that none of the comparable selected by the Ld. TPO/Ld. CIT(A) is a brand owner; that theComparables selected by the Ld. TPO in its effect order to Ld. ClT(A)'s order incurs AMP expenses; and that, therefore, in tune with the directions of the Hon'ble High Court in the case of Sony Ericson case (supra),an economic adjustment, if required, can be made. He further submits thatif for any reason, they do not follow such

directions,they have to furnish the reasons for not following the same which are conspicuously absent. He, therefore, prayed that the matter may be remitted back to the file of the Ld. TPO for compliance with the directions of the Hon'ble High Court in the case of Sony Ericson case (supra). He further submitted that theGPM of comparables are available and the GPM including AMP expenses is higher than the comparables.

14. In Sony Ericsson (supra) the Hon'ble jurisdictional High Court, vide paragraph nos. 163 to 165 observed that,-

> *"163. Thus, in such cases, external comparables where said parties are performing similar functions including AMP expenses would give more accurate and precise results.*
>
> *164. However, it would be wrong to assert and accept that gross profit margins would not inevitably include cost of AMP expenses. The gross profit margins could remunerate an AE performing marketing and selling function. This has to be tested and examined without any assumption against the assessed. A finding on the said aspect would require detailed verification and ascertainment.*
>
> *165. An external comparable should perform similar AMP functions. Similarly the comparable should not be the legal owner of the brand name, trade mark etc. In case a comparable does not perform AMP functions in the marketing operations, a function which is performed by the tested party, the comparable may have to be discarded. Comparable analysis of the tested party and the comparable would include reference to AMP expenses. In case of a mismatch, adjustment could be made when the result would be reliable and accurate. Otherwise, RP Method should not be adopted. If on comparable analysis, including AMP expenses, gross profit margins match or are within the specified range, no transfer pricing adjustment is required. In such cases, the gross profit margin would include the margin or compensation for the AMP expenses incurred. Routine or non-routine AMP expenses would not materially and substantially affect the gross*

profit margins when the tested party and the comparable undertake similar AMP functions."

15. Further, this aspect was considered by a coordinate Bench of this Tribunal in assessee's own case for the Assessment Year 2004-05 in ITA No. 5621/Del/2014, by order dated 10/02/2017 in the light of Sony Ericsson (supra) and remanded the matter to the learned Assessing Officer/Ld. TPO with the following directions:-

"7. In view of the foregoing discussion, we set aside the impugned order on this score and direct the AO/TPO to determine the ALP of the transaction of Import of Crystal goods and Crystal components, firstly, by applying the RPM. It is hereby clarified that the manner of application of RPM is open at large before the TPO who will decide it in the way he thinks expedient. Contention of the ld. AR that the comparables should be restricted to the ten companies which it cited before the ld. CIT(A) or twenty companies which the ld. CIT(A) suomotu chose for making TP adjustment on account of AMP expenses, cannot be accepted. We do not intend to eclipse the power of the TPO by restricting the exercise, which he has yet to undertake for the first time. It is further clarified that if due to one reason or the other as discussed above, such a method cannot be applied, then, resort should be made to the TNMM in the way enshrined in rule 10B(1)(e) of IT Rules, 1962, taking care of the infirmities discussed above in the earlier calculation made by the TPO."

16. The above direction was followed by the Tribunal in assessee's case for the Assessment Year 2005-06 in ITA No. 5622/Del/2014 by order dated 10/02/2017.In view of the similarity of the facts involved in all these years, we are of the considered opinion that the situation does not warrant taking a different view from the above view taken by a coordinate Bench of this Tribunal and, accordingly, we set aside the impugned orders insofar as the Transfer Pricing adjustment is concerned to comply with the directions indicated above in assessee's

own case for the Assessment Year 2004-05.

17. Now turning to the non-Transfer Pricing addition, namely, addition made on account of Software and Electronic Data Processing ("EDP") charges, for all the years under consideration, the assessee incurred expenses towards IT support services which were categorised under Software and Electronic Data Processing ("EDP") charges.

18. Ld. AO followed the order of his predecessors and held that Software and EDP charges are in the nature of capital expenditure incurred for the acquisition of capital assets being 'computer and software'.

19. Ld. CIT(A) and the Ld. DRP, following the orders for earlier year, respectively observed that the payments were being made as a fixed amount towards strengthening and building up of the computer system of the assessee, and therefore, the contention advanced on behalf of the assessee that these expenses were Revenue in nature was not justified. On this score they rejected the contention of the assessee and confirmed the addition.

20. It is the argument before us by Ld. AR thatthe nature of services provided through software and EDP charges were for providing operational IT-services and for Individual Business Application Development Services; that these services were provided under an agreement named as "Inter Company IT-Services Agreement" entered into between the appellant and D. Swarovski & Co. Ld. AR of the assessee submitted that from a perusal of the nature of services as

mentioned above, it can be inferred that the said services/support from D. Swarovski & Co. is required to perform the basic business operations through a well organized and maintained IT-support system as they essentially pertain to providing access to appellant company of certain IT platforms meant for all group companies of Swarovski, providing support to ensure the continuance of security and other functions meant for basic health-check of company's IT systems; and carrying out the auxiliary functions such as documentation and others towards the above works. He also referred various invoices raised in consideration to the provision of the said services, received from D. Swarovski & Co., by the assessee in accordance with the agreement.

21. Ld. AR brought it to our notice that in assessee's own case for the Assessment Years 2006-07 and 2010-11, a coordinate Bench of this Tribunal considered the nature of this expenditure and held that the same are business expenditure and cannot be treated as capital expenditure. Relevant observations of the Bench are that,-

> "12. As relates to Ground No. 3, regarding disallowance of expenditure incurred on Software EDP Charges amounting to Rs.10,46,963/- paid to Swarovski Hong Kong Ltd on the ground that the same is a capital nature. The said charges are business expenditure and cannot be treated as capital expenditure. The assessee has field all the invoiced to that effect. There were no assets acquired by the assessee and it is a period cost but from the order of the Assessing Officer it can be seen that the said details as contemplated by the assessee was not before the Assessing Officer. Therefore, this aspect has to be verified at the level of. Therefore, this issue is remanded back to the file of the Assessing Officer to see these expenses according to the evidence produced by the assessee. Needless to say, the assessee be given opportunity of hearing as per principals of natural justice. Ground No. 3 is partly allowed for statistical purpose.

22. Ld. AR further submitted that since the requisite details were not available before the learned Assessing Officer, this aspect was remanded to the file of the learned Assessing Officer for verification. Ld. AR, however submitted that for those particular assessment years the details were not available before the Assessing Officer but in respect of the assessment years under consideration in view of the fact that all the details are available before the Tribunal, the assessee, while placing reliance on the decision of the Hon'ble Delhi High Court in the case of Bacardi India Private Limited vs DCIT in ITA No. 417/2017and Alcatel Lucent India Ltd vs DCIT in ITA No. 165/2017, prayed the Tribunal to examine the matter and adjudicate thereon.

23. On a perusal of the material available before us in the shape of paper book, we find that the expenditure being incurred in nature year after year, and cannot be placed in the category of capital expenditure. Apart from that the assessee produced voluminous record including the agreements, which go to show that the following services were rendered under the agreements:-

- Internet browsing services including surf-control- configuration and maintenance;
- Providing VPN access including security authentication;
- Remote AS400 (application software which provides remoteaccess to laptop etc. including support and maintenance for system hardware and software;
- Support for on-going operations;
- Document Management / Collaboration;
- Monitoring of central resources;
- Data management including back-up;
- Antivirus management; and

- Security checks.

24. A reading of the above services clearly shows that the services are basic business operations of the company through the organised and maintained IT support systems. Further the sample copies of the invoices show that these services are charged on the basis of uses at a predefined hourly usage rates and these expenses are incurred for the services in the nature of operational IT services such as browsing charges, usage of Swarovski distribution system software for facilitating the activities such as customer invoicing, inventory management etc services of laptops and PCs etc which are helpful to the assessee to perform the basic business operations.

25. Further, it is not the case of the Revenue that these expenses were made for purchase of any software for the purpose of making enhancement to any profit-making operations of the company constituting the capital asset. It could further be found from the record that no fixed amount expenses are incurred.

26. We, therefore, while respectfully following the decision of the Hon'ble Delhi High Court in the case of CIT vs. Asahi India Safety Glass Ltd (2011) 246 ITR 329 (Delhi) and the guidelines laid down in the case of CIT vs. JK synthetics 309 ITR 371 hold that the Software and Electronic Data Processing ("EDP") charges incurred by the assessee are Revenue in nature and the assessee is entitled to claim the same as allowable deduction. We, therefore, delete the addition made on this account.

27. In respect of Assessment Year 2011-12, the assessee claims to have incurred expenditure to the tune of Rs.4,58,00,387/-towards media advertisements, PR agency fees, communication material and others. Learned Assessing Officer, while following the orders of his predecessor held that the advertisement and publicity expenses are in the nature of capital expenditure incurred for creation of intangible assets in the form of brand and, therefore, they are to be disallowed. Learned Assessing Officer, however, allowed the assessee to claim depreciation at 25% on such amount and thereby at the end disallowed a sum of Rs.3,43,50,390/-.

28. Ld. DRP confirmed the order of the learned Assessing Officer on this aspect holding that since the factual matrix is similar to earlier period, there would follow the view taken by the Ld. DRP for the Assessment Year 2010-11 and added the expense as capital in nature.

29. At the outset, Ld. AR submitted that this issue is no longer res Integra and has fully been covered by the decision of this Tribunal in assessee's own case for the Assessment Years 2006-07 and 2010-11 by order dated 10.02.2017 for the Assessment Years 2004-05 and 2005-06 wherein the Tribunal held thatadvertisement and publicity expenses incurred by the assessee are purely Revenue in nature. Apart from this, Ld. CIT(A) by order dated 28.01.2017 for Assessment Years2007-08 to 2009-10 and 2012-13 held that the advertisement and the publicity expenses incurred by the assessee are purely Revenue in nature. Ld. AR submits that the Revenue had accepted the system and without

preferring any appeal on this issue to any higher appellate forum and, therefore, the issue had attained the finality.

30. We have gone through the record in the light of the above submissions, and found that in ITA No.5621 and 5494/Del/2014 for the Assessment Year 2004-05 while following the decision of the Hon'ble Delhi High Court in the case of CIT vs Citi Financial Consumer Fin Ltd (2011) 335 ITR 29 (Delhi), it was held that the entire expenditure on publicity and advertisement is allowable fully in the year in which it is incurred and a similar view is adopted for the Assessment Year 2002-03, 2004-05 in ITA No. 5622 and 5497/Del/2014. The same view is taken by the Tribunal in ITA 4080/Del/2013 and 1287/Del/2015 for the Assessment Years 2006-07 and 2010-11. We have also gone through the order of Ld. CIT(A) for the Assessment Years 2208-08 to 2009-10 wherein the Ld. CIT(A) held that the assessee had rightly claimed deduction of advertisement and publicity expenditure as Revenue expenditure.

31. In view of this consistent stand taken by the first appellate authority as well as the Tribunal in assessee's own case for the earlier years, we are of the considered opinion that in the absence of any compelling reasons to take a different view, it is not possible to deviate from the same. We, therefore, hold the issue in favour of the assessee.

32. In the result, all the appeals of the assessee and the Revenue are allowed for statistical purpose.

Order pronounced in open court on 25th July, 2019.

Sd/-	sd/-
(PRAMOD KUMAR)	(K. NARASIMHA CHARY)
VICE PRESIDENT	JUDICIAL MEMBER

Dated: 25th July, 2019
'VJ'

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

ASSISTANT
REGISTRAR
ITAT NEW DELHI

Draft dictated	23.07.2019
Draft placed before author	25.07.2019
Approved Draft comes to the Sr.PS/PS	
Order signed and pronounced on	
File sent to the Bench Clerk	
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	
Date of uploading on the website	