

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

(THROUGH VIDEO CONFERENCE)

**SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
and
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.7142/Del./2017
(ASSESSMENT YEAR : 2013-14)**

M/s. Suzuki Motorcycles (I) Pvt. Ltd., vs. DCIT, Circle 24 (2),
2nd Floor, Plot No.1, Nelson Mandela Road, New Delhi.
Vasant Kunj,
New Delhi – 110 070.

(PAN : AAACI5832P)

(APPELLANT)

(RESPONDENT)

**ASSESSEE BY : Shri Ajay Vohra, Senior Advocate
Shri Neeraj Jain, Advocate
Shri Ramit Katiyal, Advocate**

REVENUE BY : Shri Anupam Kant Garg, CIT DR

Date of Hearing : 27.08.2020
Date of Order : 31.08.2020

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. Suzuki Motorcycles (I) Pvt. Ltd. (hereinafter referred to as the 'taxpayer') by filing the present appeal sought to set aside the impugned order dated 20.09.2017 passed by the AO in consonance with the orders passed by the Id. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961

(for short 'the Act') qua the assessment year 2013-14 on the grounds inter alia that :-

“1. That the assessing officer erred on facts and in law in completing the assessment under section 144C read with section 143(3) of the Income-tax Act, 1961 ('the Act') at a loss of Rs.20,56,26,035 as against the loss of Rs 37,85,45,196 returned by the appellant.

2. That the assessing officer erred on facts and in law in making transfer pricing adjustment of Rs.17,29,19,161 in relation to the advertisement, marketing and sales promotion expenses (hereinafter referred to as 'the AMP expenses') incurred by the appellant.

3. That the DRP/TPO erred on facts and in law in not appreciating that the AMP expenses, etc., unilaterally incurred by the appellant in India could not be characterized as an international transaction as per section 928, in the absence of any proved understanding / arrangement between the appellant and the associated enterprise, so as to invoke the provisions of section 92 of the Act.

4. 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.

5. That the DRP/TPO erred on facts and in law in holding that valuable marketing intangible has been created by the appellant in India in favor of the associated enterprises.

6. That the TPO/DRP erred on facts and in law in holding that there exists an international transaction of incurring AMP expenses allegedly holding that the appellant has reported reimbursement received from associated enterprises on account of AMP expenses as an international transaction in form 3CEB not appreciating that such expenses were reimbursed by the associated enterprise as gratis and not in pursuance of any international transaction.

7. That the DRP/TPO erred on facts and in law in holding that AMP expenses incurred by the appellant constitutes an international transaction on the basis that the associated enterprise has reimbursed a part of AMP expenses not appreciating that such expenses were reimbursed by the associated enterprise in order to support the operations of the

appellant and not in pursuance of any understanding, arrangement or action in concert to incur AMP expenses.

8. That the DRP/TPO erred on facts and in law in holding that the associated enterprise not only owns the intangibles but also controls further development and growth of its intangibles.

9. That the DRP/TPO erred on facts and in law in not appreciating that the appellant was performing the critical decision making functions with regard to advertisement and marketing activity and was therefore independently controlling the AMP expenditure incurred by it.

10. That the DRP/TPO erred on facts and in law in relying upon the memorandum entered into between the appellant and the associate enterprises which states that the "AE commissioned the assessee to put in effect the advertisement and publicity of assessee's products in India" to hold that the associated enterprise has a definite say in the decisions regarding incurring of advertisement in India without appreciating that such memorandum provides for advertisement and promotion of appellant's own products in India.

11. That the DRP/TPO erred on facts and in law in not appreciating that in terms of memorandum entered into between the appellant and the associate enterprises, the associated enterprise reimburses 100% of the expenses incurred for advertisement of 'Suzuki' brand and the remaining AMP expenses have been incurred solely for promotion of sale of products of the appellant in India.

12. 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 the said provision could not be invoked to determine the 'quantum' / extent of business expenditure.

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

14. 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.

15. That the TPO erred on facts and in law in holding that the associated enterprise is benefiting from the AMP expenses

incurred by the appellant on account of royalty, sale of goods etc. not appreciating that such transactions have been separately bench marked and accepted to be at arm's length.

16. That the TPO erred on facts and in law in holding that the associated enterprise is benefiting 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.

17. That assessing officer erred on facts and in law in not appreciating that the Transfer Pricing adjustment made by the TPO in the present case was a mere quantitative adjustment, on the footing that the appellant had incurred excessive amount of AMP expenditure and consequently that such Transfer Pricing adjustment was not at all permitted or authorized by Chapter X of the Act.

18. 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 purposes of its business and not on behalf of or for the benefit of the AE; any benefit to the AE being only incidental.

19. The assessing officer erred on facts and in law in applying Bright Line Test not appreciating that use of bright line test for the purpose of undertaking benchmarking analysis has been jettisoned by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications Pvt Ltd 374 ITR 118

20. Without prejudice that the assessing officer/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.

21. Without prejudice that the assessing officer erred on facts and in law in considering rebate amounting to Rs 27,43,804 and discount of Rs.4,37,65,020 for the purpose of calculating alleged AMP expenditure of the assessee.

22. Without prejudice, the assessing officer erred on facts and in law considering companies having different product profile than the appellant as comparable companies for the purpose of benchmarking the alleged international transaction of AMP expenditure incurred by the appellant.

23. Without prejudice, the assessing officer erred on facts and in law in applying a markup of 8.50% on the alleged excess AMP expenditure incurred by the appellant, while computing the value

of compensation to be received by the appellant on account of creation of marketing intangible of 'Suzuki' brand.”

2. Briefly stated the facts necessary for adjudication of the issue at hand are : Suzuki Motorcycles India Pvt. Ltd. (SMIPL), the taxpayer, an India based manufacturer and seller of two wheelers bearing brand/trademark of its Associated Enterprises (AE), Suzuki Motor Company, Japan, entered into international transactions with its AE for carrying out its manufacturing activities as under :-

S. No.	Nature of International Transaction	Amount in INR	Most Appropriate Method
1.	Import/Purchase of component/raw material		Transactional Net Margin Method ('TNMM')
1.1	Import of components/consumables	8425780	
1.2	Purchase of raw material and component	4625788711	
2.	Sale of motorcycle/scooters	9644921	
3.	Sale of components	14990823	
4.	Purchase of manufacturing machineries, tools and equipments	4591533	
5.	Royalty payment	97559309	
6.	Supervision fee paid	27380184	
7.	License fee paid	170776	
8.	Reimbursement of expenses to AEs	33383056	
9.	Recovery of expenses from AEs	386045879	
10.	Rent paid	18792582	
11.	Salary of deputed employee paid	14317532	
12.	Repair and Maintenance paid	76700	
13.	Director's remuneration paid	12102309	
14.	Purchase of traded motorcycle	100026522	

3. Ld. Transfer Pricing Officer (TPO) accepted the benchmarking analysis of international transactions made by the taxpayer to be at arm's length except disputing the Advertisement, Marketing and Promotion (AMP) expenses incurred by the taxpayer for the products having brand name of Suzuki and proceeded to carry out the benchmarking analysis of the same. During Transfer Pricing (TP) study, ld. TPO noticed that in the process of manufacturing and selling of goods by the taxpayer, significant AMP expenditure have been incurred which are as under:-

S.No.	Nature of Transactions	Reimbursement in INR
1.	Discounts	43765020
2.	Advertisement	835776644
3.	Rebate Traded Motorcycle	27143804
	Total	906685468

4. Ld. TPO noticed that in the process of manufacturing and selling of goods which bear the brand and trademark of AE, valuable marketing intangibles have been credited by way of well developed sales network and valuable supply chain in India in favour of the AE calling for suitable compensation from AE.

5. In order to benchmark the reimbursement of AMP expenditure by the AE, the taxpayer aggregated all international transactions and benchmarked them together by applying

Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) with Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) by using multiple year data selected three comparables and computed their PLI at (-) 1.72% after availing working capital adjustment as against the PLI of the taxpayer at (-) 3.19%. Consequently, the taxpayer found its transaction at arm's length it being within the range of +/- 3%.

6. Ld. TPO examined the effect of AMP expenditure incurred by the taxpayer on the margin earned by it. Ld. TPO in order to benchmark the AMP expenses used Bright Line Test (BLT) in order to work out the limit of routine AMP expenditure including trade discounts, commissions and rebates. Ld. TPO resorted to compare the AMP expenditure of the taxpayer with AMP expenditure of other comparable companies in similar business using AMP expenditure to sales ratio. By using the BLT limit, the TPO determined the average ratio of AMP expenditure to sales of comparables at 2.29% as against 6.23% of the taxpayer and held that the excess expenditure of Rs.58,43,99,881/-, which exceeds the BLT, required to be compensated by the AE. Consequently, ld. TPO proposed the TP adjustment at Rs.26,01,37,110/-.

7. The taxpayer carried the matter before the ld. Disputes Resolution Panel (DRP) by way of objections who has excluded

two comparable companies, namely, Atul Auto and Limited and Mahindra Two Wheelers Ltd. from the final set of comparables chosen by the TPO for the purpose of applying the BLT and also directed the TPO to verify the margin of the comparable companies for the purpose of computing adjustment. After DRP order, AO computed the adjustment at Rs.17,29,19,161/- on account of AMP expenses. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

8. We have heard the Id. 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.

9. Undisputedly, the taxpayer is a manufacturing entity and its AMP/sales ratio is 6.23% as against 2.29% of the comparables by applying the BLT. It is also not in dispute that the AE has compensated the taxpayer with an amount of Rs.32,42,62,780/- on account of expenditure made by it. Ld. TPO also applied the mark up of 15.43% of AMP expenses by using the BLT over and above the AMP expenses computed on the basis of comparable analysis. Ld. TPO consequently reached the conclusion that the taxpayer has incurred huge amount in excess of the Bright Line limit in order to

promote the brand and trademark of its AE which is required to be compensated.

10. Ld. TPO on the basis of its TP study computed the average ratio of AMP/sales expenditure at 2.29% of comparables vis-à-vis 6.23% of the comparables and proceeded to compute the AMP expenditure as under :-

Particulars		Value (Rs.)
Value of gross sales of assessee	A	14560170913
Arithmetic mean of AMP/SALES of comparables	B	2.75%
Amount that represents price for routine AMP activities	C=B*A	400404700.00
Total expenditure incurred by assessee on AMP	D	906685468.00
Arm's Length Price of the service/expenditure for creation of marketing intangible in India in favour of the AE	E=D-C	506280768.00
Mark-up @ 15.43%	R=15.43% OF E	78119113.00
The amount by which the assessee company should have been reimbursed by AE and for which the adjustment is proposed to be made	G=E+F	584399881.00
Price received from the AE for creation of marketing intangibles	H	324262780.00
Adjustment required to be made for creation of marketing intangibles	I=G-H	260137110.00

11. Ld. AR for the taxpayer contended that identical issue of similar adjustment on account of AMP expenses made by the TPO in *taxpayer's own case in ITA No.476/Del/2015 for AY 2010-11*

order dated 26.11.2018 has been decided in favour of the taxpayer by deleting addition.

12. Learned DR for the Revenue, although admitted the legal position enunciated in the preceding paragraphs, but contended that since all the aforesaid decisions are lying challenged before the Hon'ble Apex Court, the matter may be kept pending till the decision by Hon'ble Apex Court. However, we are of the considered view that since it is a stay granted matter and the proceedings before the second appellate authority have not been stayed by any higher forum, the same cannot be kept pending.

13. We have examined the order passed by the coordinate Bench of the Tribunal in *taxpayer's own case in AY 2010-11* (supra) which is exactly on the identical issue and adjustment on account of AMP expenditure made by the TPO has been found to be not sustainable on the ground that no international transactions held to be involved and that economic/legal ownership of the brand seeking compensation for AMP expenditure is inconsistent with the characterization and business model of the taxpayer and that adjustment on account of AMP expenses is not permissible within the scheme of "Chapter – X".

14. In view of the backdrop of the aforesaid facts and circumstances of the case, the sole question arises for determination in this case is :-

“as to whether Revenue has discharged its onus of proving the international transactions between the taxpayer and the AE and as to whether existence of international transactions can be inferred merely on the basis of BLT?”

15. Coordinate Bench of the Tribunal in *taxpayer’s own case for AY 2010-11* (supra) decided this issue by returning following findings :-

“10. Hon’ble Delhi High Court in Maruti Suzuki India Ltd. v. CIT (2016) 381 ITR 117 (Del.) has decided the identical issue of AMP expenses in case of manufacturing entity in favour of the assessee by distinguishing Sony Ericsson India Pvt. Ltd. vs. CIT – (2015) 374 ITR 118 (Del.) case wherein the assessee has not disputed the existence of international transaction qua its AMP expenses. So, in case of assessee, being a manufacturing entity, ratio of Sony Ericsson India Pvt. Ltd. (supra) cannot be applied. At the same time, in Sony Ericsson India Pvt. Ltd. (supra), Hon’ble High Court has held that BLT has no statutory mandate and considering the excess expenditure beyond the bright line as an international transaction was unwarranted.

11. Hon’ble Delhi High Court in series of decisions inter alia Maruti Suzuki India Ltd.; Bausch & Lomb Eyecare (India) Pvt. Ltd. v. Additional CIT (2016) 381 ITR 227 (Del) and Honda Siel Power Products Ltd. v. Dy.CIT (2016) 237 Taxman 304 held that the Revenue is to discharge first the onus of proving the existence of an international transaction between assessee and the AE and such transactions cannot be inferred merely on the basis of bright line test. Revenue has to discharge the initial onus by bringing on record some tangible material that the taxpayer and its AE have acted in concert and further that there was an agreement to enter into international transactions concerning AMP expenses.

12. In the instant case, there is not an iota of material on the file apart from applying the BLT and by taking the view that the taxpayer has incurred huge AMP/sales expenses to the extent of 10.26%, 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 transaction i.e. BLT is not a legally sustainable method.

13. *So, we are of the considered view that merely by applying the BLT, the existence of international transactions cannot be proved and as such the adjustment made by the TPO/DRP/AO on this account is not sustainable in the eyes of law. We are further of the considered view that ALP expenses incurred by the taxpayer were not for the benefit of AE but only to enhance sales of the taxpayer.*

14. *TPO on the basis of his TP analysis observed that incurring of huge AMP expenditure by the taxpayer have benefited its AE to promote “Suzuki” a trademark owned by its AE on its product range and to create market intangibles for the sale of product with brand name of the AE in India. However, these observations of the TPO have been negated by Hon’ble Delhi High Court in Valvoline Cummins Private Ltd. vs. DCIT in ITA 158/2016 order dated 31.07.2016 by holding that “the mere fact that the assessee was permitted to use the brand name will not automatically lead to the inference that any expenses that the assessee incurred towards AMP is only to enhance the brand/trademark Valvoline.” So, in the absence of any arrangement or agreement, it is difficult to infer that the AMP expenses incurred by assessee are not for its own benefit but for the benefit of its AE. So, when the factual foundation i.e. BLT method to determine the existence of or the ALP of international transactions involving AMP expenses is held to be not sustainable, the entire adjustment made by TPO/DRP/AO is not sustainable.*

15. *In view of what has been discussed above, we are of the considered view that following the series of decisions rendered by Hon’ble Delhi High Court discussed in preceding paras, when the taxpayer has disputed the existence of international transaction qua its AMP expenses the Revenue has failed to discharge its initial onus to prove on the basis of tangible material that there exists an international transaction qua incurring of AMP expenses between the taxpayer and its AE or that the taxpayer and its AE have acted in concert by way of any agreement as to incurring of international transactions qua AMP expenses.*

16. *So, when the BLT method adopted by the TPO incurring the AMP expenses by following the ratio of LG Electronics India Pvt. Ltd. (supra) decided by Special Bench of the Tribunal, has been held to be not legally sustainable by the Hon’ble Delhi High Court in series of judgments discussed in preceding paras, the entire exercise of determining AMP expenses as international*

transaction by the TPO is without any basis, hence not sustainable.

17. Learned DR for the Revenue, although admitted the legal position enunciated in the preceding paragraphs, but he contended that since all the aforesaid decisions are lying challenged before the Hon'ble Apex Court, the matter may be kept pending till the decision by Hon'ble Apex Court. However, we are of the considered view that since it is a stay granted matter and the proceedings before the second appellate authority have not been stayed by any higher forum, the same cannot be kept pending.”

16. Even otherwise, adjustment on account of AMP expenses is not permissible within the scheme of “Chapter - X” of the Act as has been held by the *Hon'ble Delhi High Court in case of Maruti Suzuki India Ltd. vs. CIT (2016) 381 ITR 117 (Del.)*.

17. In view of what has been discussed above, we are of the considered view that addition made by AO/DRP/TPO on account of AMP expenses is not sustainable and as such question framed is answered in the negative.

18. At the same time, we cannot ignore the submission of the learned DR that the matter is pending before Hon'ble Apex Court and the decision of Hon'ble Apex Court would be binding upon all the authorities.

19. In view of the above, we set aside the orders of authorities below and restore the matter to the file of the Assessing Officer. We hold that as per the facts of the case and the legal position as of now and discussed above in this order, the adjustment made by the

TPO/DRP/AO in respect of AMP expenses is not sustainable. However, if the above decisions of Hon'ble Jurisdictional High Court which is under consideration before the Hon'ble Apex Court is modified or reversed by the Hon'ble Apex Court, then the Assessing Officer would pass the order afresh considering the decision of Hon'ble Apex Court. In those circumstances, he will also allow opportunity of being heard to the assessee.

20. In view of what has been discussed above and following the order passed by the coordinate Bench of the Tribunal, we are of the considered view that the adjustment made by the TPO/DRP/AO by applying the BLT on account of AMP expenses in the absence of international transactions between the taxpayer and AE is not sustainable in the eyes of law, hence ordered to be deleted.

21. Resultantly, the appeal filed by the taxpayer is allowed.

Order pronounced in open court on this 31st day of August, 2020.

**Sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 31st day of August, 2020
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Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)
- 5.CIT(ITAT), New Delhi.

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