

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "I-2": NEW DELHI  
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
(THROUGH VIDEO CONFERENCING)

ITA No. 1886/Del/2017  
(Assessment Year: 2012-13)

Yakult Danone India Pvt. Ltd, 16, 1 <sup>st</sup> Floor, Community Center, Okhla Industrial Area, Phase-1, New Delhi PAN: AAACY2585R (Appellant)	Vs.	DCIT, Circle-27(2), New Delhi (Respondent)
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Assessee by :	Shri Himanshu Sinha, Adv Ms. Vvindhya, Adv Mr Bhuvan Dhooper Adv Shri Yash Varmani, Adv
Revenue by:	Shri H. K. Choudhary, CIT DR
Date of Hearing	07/08/2020
Date of pronouncement	06/10/2020

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by Yakult Danone India Private Limited [Assessee/Appellant] against the order of The Deputy Commissioner Of Income Tax, Circle 27 – 2, New Delhi (Ld AO ) dated 16.01.2017 for the Assessment Year 2012-13 passed u/s 143 (3) read with Section 144C (1) of The Income Tax Act, 1961 (The Act) determining total income of the assessee at a loss of ₹ 254,406,708 against the loss as per return filed 30/11/2012 of ₹ 333,665,022.
2. The only dispute in appeal is with respect to the addition of ₹ 79,258,314 made in pursuance of the order of the learned t Deputy Commissioner Of Income Tax, Transfer Pricing Officer – 3 (3) (2) New Delhi (the learned TPO) passed u/s 92CA (3) of the act on 30 January 2016 which was subject to the direction of the learned Dispute Resolution Panel dated 9 December 2016 relating to determination of ALP of AMP expenses.

3. The addition is pertaining to the adjustment on account of AMP expenditure amounting to ₹ 94,120,248 based on Bright line test selecting four comparables whose average AMP/sales ratio was 0.83% whereas the ratio in the case of the assessee is 57.44 %. The learned transfer pricing officer further determined arm's-length price using the Transactional Net Margin Method as an alternative approach and made an adjustment of ₹ 79,887,754/-. Consequently the lower of the addition was made resulting into an addition of ₹ 79,887,754/- by the order passed u/s 92 CA (3) of the income tax act on 30 January 2016. The assessee objected same before the learned Dispute Resolution Panel – 2, New Delhi who passed direction on 9 December 2016 directing the learned transfer pricing officer to reduce the adjustment to ₹ 79,258,314/-. Accordingly the assessment order u/s 143 (3) read with Section 144C (1) of the income tax act, 1961 was passed on 16<sup>th</sup> of January 2017 determining total loss of the assessee at ₹ 254,406,708 against the total loss declared by the assessee in the return of income of ₹ 333,665,022/-.
4. The assessee has raised the following grounds of appeal:-

*General Ground of Appeal*

- “1. That Ld. Assessing Officer (“AO”) /Hon’ble Dispute Resolution Panel (“DRP”)/ Ld. Transfer Pricing Officer (“TPO”) erred in assessing the loss of the Appellant at INR. 25,44,06,708/- as against returned loss of INR 33,36,65,022 under normal provisions of the Act.

**Transfer Pricing Ground of appeals**

2. The learned TPO/AO/Hon’ble DRP have erred in making an adjustment under section 92CA (3) of the Act
3. The learned TPO/AO/ Hon’ble DRP have erred in computing an adjustment of INR 7,92,58,314/- to the total income of the Appellant on account of adjustment in arm’s length price (“ALP”) of the alleged international transaction pertaining to Advertisement, Marketing and Promotional (“AMP”) expenditure entered into by the Appellant with its Associated Enterprise (“AE”)
4. The Ld. TPO/ AO/Hon’ble DRP have erred in holding AMP expenditure as a separate international transaction under section 92B of the Act and assuming jurisdiction to determine the ALP thereof, when such expenditure represents only domestic transactions with unrelated parties and does not satisfy the requisites of being an international transaction under section 92B read with section 92F(v) of the Act
5. On the facts and in circumstances of the case and in law, even if the word 'transaction' is given its widest connotation, the Ld. TPO/AO/DRP have failed to show the existence of an 'understanding' or an

*'arrangement' or 'action in concert' between the appellant and its AE as regards AMP spend for brand promotion;*

6. *That on the facts and circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO have erred in not appreciating the benefit arising from incurrance of AMP expenses by the Appellant has been received by the Appellant and benefit to the AEs, if any is purely incidental and such incidental benefit does not require any compensation under both Indian and international jurisprudence.*
7. *That on the facts and circumstances of the case and in law, the Ld. AO/Hon'ble DRP/Ld. TPO have erred in this case by carrying out an intensity adjustment*
8. *Without prejudice to the other grounds, the learned TPO/AO/DRP has grossly erred in facts and circumstances of the case and in law by adopting adjusted margin using TNMM as alternative approach on ad-hoc basis and considering the amount of AMP expenditure in the amount of international transactions during the year.*
9. *The learned TPO/AO/DRP erred in not allowing economic adjustments (working capital adjustment, import duty adjustment, capacity utilization adjustment and penetration policy) for differences on account of risks assumed by the Appellant vis-a-vis the comparable companies*
10. *That on the facts and circumstances of the case and in law, the Ld. AO/TPO/Hon'ble DRP have incorrectly applied the "Bright Line test" while computing the protective/primary adjustment.*
11. *That on the facts and circumstances of the case and in law, while computing the protective/primary adjustment, Ld. AO/TPO DRP were not justified in considering sales promotion expenses while calculating the AMP expenditure of the Appellant*
12. *Without prejudice to all other contentions of the Appellant, the learned TPO/AO/DRP has grossly erred in law by enhancing the income of the Appellant by INR 79,887,754 vis-a-vis adjustment of INR 17,644,396 as per the show cause notice dated 18 January 2016.*
13. *Without prejudice to all other contentions of the Appellant, the comparables used by the Ld. TPO for benchmarking the marketing function are inappropriate.*
14. *The learned TPO/AO/DRP has adopted a flawed approach by using single year data as against the multiple year data used by the Appellant, to compute the arm's length price of the international transaction of the Appellant using TNMM method.*
15. *The learned TPO/ AO/DRP have erred, on facts and circumstances of the case,*
  - i. *not considering that the Appellant is a full risk bearing licensed manufacturer*
  - ii. *Holding that advertising is done for brand promotion and not for product promotion and computing adjustment thereon, without appreciating that no expenditure attributable to brand promotion can be separately identified*

- iii. *Ignoring the fact that an internally generated brand name is not an*
- iv. *not giving due consideration to the fact that the company is into its startup phase of operations and have incurred heavy advertising and sales promotion*
- v. *questioning the commercial expediency of the Appellant*

**Corporate tax Ground of Appeals**

16. *That on facts and in laws, the Ld. AO erred in holding that the appellant has furnished inaccurate particulars of income in respect of each item of disallowance/ additions and in initiating penalty proceedings under section 274 read with section 271 (1) (c) of the Act.”*
5. The assessee deals in manufacturing and sale of probiotic milk in India. It is the sole manufacturer of ‘Yakult’ groups products in India and performs all business functions relating to sale of such products as identifying customers, negotiating purchase terms, arranging the necessary resources, undertaking sales promotion activities etc. it has entered into five different international transactions during the year of purchase of raw material and packing material, stores and spares. It is also paid royalty. These transactions were benchmarked adopting Transactional Net Margin Method as the Most Appropriate Method adopting Profit Level Indicator of Operating Profit By Operating Income. It selected 11 comparables, taking multiple year data and found that PLI of the assessee is higher than the average of the PLI of the comparables. Thus international transactions were stated to be at arm’s-length.
6. When the reference was made before the learned transfer pricing officer he noted that assessee has incurred advertisement and sales promotion expenditure of ₹ 95,571,222/- against the sales of ₹ 166,382,422/- which is resulting into ratio of AMP/sales of 57.44 percent. He noted that assessee is also paying royalty at the rate of 1 % of sales to associated enterprise for use of trademark. According to him AE is the legal owner of the brand and assessee is promoting it in India as per the decision of associated enterprise in relation to how the brand has to be used. Factually by itself it establish that the assessee has incurred huge non routine expenditure to promote the brand of the associated enterprise and to develop marketing and intangible is for the associated enterprise. According to him for encouraging this nonroutine AMP expenditure, assessee should have been reimbursed which

was not done. He thereafter referred to the brand building strategy of the brand owned by associated enterprise by looking at publicly available information. Based on this he noted that the brand strategy of the assessee is guided by the Japanese associated enterprise. The choice of creative marketing agencies which are themselves off-shoots of Japanese firms shows how the decision making is very clearly influenced by the Japanese AE decisions on how the brand has to be promoted. On the basis of these information he stated that the brand marketing strategy of the assessee is largely driven by the global brand strategy and it cannot be mere coincidence that the brand that is owned by the assessee's Japanese associated enterprise is following a completely independent strategy for brand building. Based on these information he issued a show cause notice to the assessee. He adopted primary approach of bright line test and alternative approach of Transactional Net Margin Method for benchmarking the AMP expenditure. Assessee objected that AMP expenses is not an international transaction and such expenditure are incurred solely for the product promotion as product offered by the assessee is a niche product. The learned TPO rejected all the explanations of the assessee and selected four comparables whose margin of AMP/sales is 0.83 percentage. He noted that assessee has advertisement and sales promotion expenses of Rs. 95,571,222 which is 57.44% of sales of the assessee, Whereas the bright line of all the four comparable selected is 0.83 percentage and the arm's-length price of AMP expenditure is only ₹ 1,380,974/- and therefore, the assessee has incurred excessive AMP expenditure of ₹ 94,190,248. He applied a markup of 12.06% on that of RS 105,549,592. Accordingly applying the bright line test he determined the AMP adjustment of ₹ 94,190,248. He also stated that determination of arm's-length price is also required to be determined by adopting adjusted margin using transactional net margin method as an alternative approach. According to that cost basis is enhanced of the comparables and a markup is added thereon. He noted that the markup is required to be taken at 12.06 percentage. According to that he noted that operating cost of the assessee is Rs 452,537,528 whereas the international transaction is shown of purchases of Rs 122,285,011/- and therefore operating revenue of the assessee is Rs. 16,63,82,422

resulting into arm's-length of operating profit/operating revenue of 5.70%. Arm's-length profit is determined at Rs 9,483,798 and the arm's-length cost is determined at ₹ 156,898,624. He further determine the arm's-length price of the cost at Rs 42,397,257 and determine the difference between the price shown in the international transaction and the ALP amounting to ₹ 79,887,754/- . Accordingly he proposed an adjustment of ₹ 79,887,754 u/s 92CA of the act. Draft order was passed accordingly . The learned dispute resolution panel held that addition of ₹ 94,190,248/- applying the bright line test shall be made on protective basis whereas the alternative approach of the assessee adopting the transactional net margin method should be upheld. Accordingly the adjustment after certain direction of the learned dispute resolution panel was made at ₹ 79,258,314/-. Thus the only dispute in this appeal is the adjustment on account of the arm's-length price of the AMP expenditure incurred by the assessee. Assessee has challenged the transfer pricing adjustment as per ground number 2 – 15. Ground number 1 is general in nature and ground number 16 is a corporate ground against initiation of penalty proceedings u/s 271 (1) ( c) of the act.

7. Adverting to ground number 2 – 15 learned authorised representative submitted that appeal for this year is for assessment year 2012 – 13 whereas the appellant's appeal for assessment year 2011 – 12 in ITA number 996/Del/2016 is already decided by the coordinate bench as per order dated 29<sup>th</sup> of March 2019 and issue involved in this appeal is identical with respect to the adjustment made on account of advertisement, marketing and promotional expenditure in that year. Therefore it was submitted that this issue is squarely covered in favour of the assessee. The learned authorised representative also referred to the paper book wherein at page number 291 – 344 the order in case of assessee for assessment year 2011 – 12 is placed. He also referred to the grounds of appeal in that appeal and also the facts involved. According to him the issue is squarely covered by that order.
8. The learned departmental representative vehemently supported the order of the learned transfer pricing officer and the learned dispute resolution panel.
9. We have carefully considered the rival contentions and perused the order of the coordinate bench in assessee's own case for assessment year 2011 – 12.

The issue involved in that appeal is also with respect to the determination of ALP of AMP functions. In para number 6.10 of that order the coordinate bench has rejected the Bright line test applied by the learned transfer pricing officer and further held that AMP expenditure cannot be considered as an international transaction in the facts and circumstances of the case of the assessee. The learned departmental representative could not show us any reason to deviate from such an order in assessee's own case for earlier year. Even in this particular order of the learned transfer pricing officer for the impugned assessment year, we do not find that the learned transfer pricing officer has first established that there is an international transaction entered into by the assessee by incurring a higher AMP expenditure. Unless first the international transaction is established by the learned transfer pricing officer, question of determination of its arm's-length price does not arise. Therefore respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2011 – 12, we also hold that the approach of the learned transfer pricing officer of determining ALP of international transaction of incurring of higher AMP expenditure cannot be benchmarked either on Bright line test bases or on transactional net margin method unless first it is established that there existed an international transaction. Accordingly all the grounds of the appeal of the assessee relating to the transfer pricing adjustment from ground number 2 – 15 are allowed.

10. Ground number 1 is general in nature and therefore same is dismissed.
11. Ground number 16 is related to the initiation of penalty proceedings u/s 271 (1) (C) of the act, it is premature, no arguments were advanced by the parties, therefore, same is dismissed.
12. In the result appeal of the assessee is partly allowed.
13. Order pronounced in the open court on 06/10/2020

-Sd/-  
(BHAVNESH SAINI)  
JUDICIAL MEMBER

-Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 06/10/2020  
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi