

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1114/Del/2016
(Assessment Year: 2011-12)

DCIT, Circle-23(1), New Delhi	Vs.	M/s. Sharp Business Systems (India) Pvt. Ltd, 214-221, Ansal Tower, 38, Nehru Place, New Delhi
(Appellant)		(Respondent)

Revenue by :	Shri Sarabjeet Singh, Sr. DR
Assessee by:	None
Date of Hearing	16/10/2020
Date of pronouncement	10/12/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by The Deputy Commissioner Of Income Tax, Circle (23 (1), New Delhi (the learned AO) against the direction of the learned Dispute Resolution Panel – 2, New Delhi for assessment year 2011 – 12 issued u/s 144C (5) of The Income Tax Act, 1961 [The Act] on 24th of November 2015
2. The the learned AO has raised the following grounds of appeal:-
 - “1. *“Whether the DRP was justified in not appreciating the fact the bright line is a mere step [of the most appropriate method for benchmarking the AMP services] carried out to estimate and bifurcate expenditure pertaining to the taxpayer for its own routine distribution function and the expenditure incurred on AMP service provided to the AE in a situation where the assessee has not reported the international transaction pertaining to the marketing function?”*
 2. *“Whether under the facts and circumstance of the case and in law the Hon’ble DRP was correct in holding that PLR cannot be the basis for computing markup on AMP expenses without appreciating the Revenue’s case wherein the PLR of banks has been used as an uncontrolled comparable to benchmark the opportunity cost of money involved and locked up in AMP expense?”*
 3. *“Whether in the facts and circumstances of the case and in law the DRP was justified in stating that routine selling and distribution expenses would not form part of AMP expenses (disregarding the fact that these*

expenses contribute to creation of marketing intangible) even while the same is a factor for comparability analysis as different entities account for such expenditure heads?”

3. Despite notice none appeared on behalf of the assessee. Therefore, the appeal of the learned assessing officer is decided in absence of the representation from the side of the assessee.
4. The learned departmental representative relied upon the order of the learned Transfer Pricing Officer.
5. The brief facts of the case show that assessee is a distributor company, who filed its return of income on 28/11/2011 declaring total income of Rs 6,47,97,832/-. Case was selected for the scrutiny and draft assessment order was passed on 17/2/2015 by making an addition of ₹ 200,573,352/- as per the adjustment suggested by the learned Transfer Pricing Officer as per his order u/s 92CA (3) of the act dated 29 January 2015.
6. The assessee was incorporated in February 2000 as a private Ltd company pursuant to receiving an approval from the Indian government to undertake specified activities in India. It is a wholly-owned subsidiary of Sharp Corporation Japan. Assessee imports business machine such as multifunction devices/printers/PS, fax machines, LCD display panels, electronic cash register, scientific calculator and assessee is also buying LCD DLP projectors from its associated enterprise for sale in India through varied distribution channel. The assessee has also imported solar modules from its associated enterprise for sale.
7. Assessee has entered into international transactions with respect to distribution functions, cost allocations , reimbursement received and reimbursement paid. In its transfer pricing study report, assessee for distribution function adopted Resale Price Method for benchmarking of international transactions amounting to ₹ 1,514,151,896. It aggregated the cost allocation with its distribution function. With respect to the reimbursement received it was submitted that it is cost to cost reimbursement received and with respect to reimbursement paid it was also stated to be a cost to cost transaction. Therefore, for the purpose of benchmarking reimbursement no particular method was selected for benchmarking. For the distribution function, assessee selected 11 comparables whose gross profit margin was 11.61% and compared with the

gross profit margin of the assessee at 32.68%. Similarly for the consumer products assessee selected seven comparables , whose gross profit margin of the comparable company was 13.42% compared gross profit margin of the tested party (assessee) was 9.57% and therefore it was found in the range of 5%. With respect to the solar modules trading, assessee selected two comparables whose gross profit margin was 8.18 percentage and the gross profit margin of the assessee was 7.84 percentage and therefore it was also found to be in the range of 5%.

8. The learned Transfer Pricing Officer noted that assessee's functions/assets and risk analysis shows that it is characterized as a full risk distributor and it assumes risk like market risk, price risk , contract risk, credit risk and inventory risk. It also uses the brand 'sharp' owned by Sharp Japan to market its products in India. Therefore the learned transfer pricing Officer was of the view that assessee was actively involved in the marketing activities for Sharp products. Therefore the learned transfer pricing officer proposed an adjustment on account of AMP expenditure. He considered the explanation of the assessee and thereafter selected seven comparable companies whose average margin of AMP expenditure to sales was 2.01%. The total sales of the assessee was considered at ₹ 2,154,511,000 and arm's-length AMP expenditure were determined at ₹ 43,305,671 against which the assessee actually spent AMP expenditure of ₹ 221,974,255 and therefore applying the bright line test the assessee was found to have spent in excess on creation of marketing intangible of ₹ 178,668,584/- . The learned TPO further applied the markup at the rate of 12.26% of amounting to ₹ 21,904,678 and proposed the total adjustment on account of AMP expenditure of ₹ 200,573,352.
9. Consequently draft assessment order was passed by the learned assessing officer making an adjustment of ₹ 200,573,352 to the returned income of ₹ 64,797,832 and thereby determining the total income at ₹ 265,371,184.
10. Against this assessee preferred objections for direction before the learned dispute resolution panel on account of AMP adjustment. The learned dispute resolution panel after considering the whole of the argument concluded as Under:-
 - a. AMP expenses constitute international transaction

- b. Routine selling and distribution expenses are to be excluded while computing the AMP expenses for this purpose
 - c. Comparable chosen by the learned transfer pricing officer are good and shall be retained
 - d. only similar bouquet of AMP expenses as ordained as per High Court ruling shall be considered while matching assessee's expenses with those of the comparables
 - e. TPO shall use cost plus method for this purpose
 - f. Markup on the excess AMP expenses shall be as per subrule (ii) to rule 10 B (1) (c).
11. Accordingly the assessee's objections were disposed of. Assessee is not aggrieved with any of the directions of the learned Dispute Resolution Panel.
12. On careful consideration of the finding of the learned dispute resolution panel we note that it has issued direction following the decision of the honourable Delhi High Court in Sony Ericsson mobile Co private limited (ITA 16/2014 (2015) 55 taxmann.com 240 (Delhi). Ld DR could not point out any infirmity in the direction of Ld DRP where in it has rejected Bright line test approach in bench marking AMP functions of the assessee. In view of this, we do not find any infirmity in the direction of the learned dispute resolution panel. Accordingly ground numbers 1 – 3 of the appeal of the learned assessing officer are dismissed.
13. Accordingly appeal of the learned assessing officer is dismissed.
Order pronounced in the open court on 10/12/2020.

-Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 10/12/2020
A K Keot

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

ASSISTANT REGISTRAR
ITAT, New Delhi