

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I-1', NEW DELHI**

**Before Sh. Amit Shukla, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 126/Del/2018: Asstt. Year: 2013-14**

M/s Luxottica India Eyewear Pvt. Ltd. 7 <sup>th</sup> Floor, DLF Building No. 9, Tower- B, Phase-III, DLF Cyber City, Gurgaon	Vs	ACIT, Circle-15(2), New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AABCL3871C</b>		

**Assessee by : Sh. Nageshwar Rao, Adv.**

**Revenue by : Sh. Surendrapal, CIT DR**

**Date of Hearing: 23.03.2021**

**Date of Pronouncement: 26.04.2021**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the assessee against the order dated 17.10.2017 passed by the AO u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

**Re: General Grounds**

*"1. That on the facts and circumstances of the case and in law, the Id. AO erred in assessing the income of the Appellant at Rs.92,09,362/- as against the returned loss of Rs.12,47,639/-.*

**Re: Transfer Pricing Adjustment in respect of Advertisement, Marketing and Promotion Expenses ("AMP Expenses")**

2. That on the facts and circumstances of the case and in law, the Ld. AO/Ld. Transfer Pricing Officer ("Ld. TPO") erred in enhancing the income of the Appellant by Rs. 13,39,13,000/- by making a Transfer Pricing ("TP") adjustment on account of AMP expenses incurred by the Appellant in the regular course of its business on the ground that it was excessive and should be compensated by the Associated Enterprises ("AEs").

3. That on the facts and circumstances of the case and in law, the Hon'ble DRP erred in confirming the transfer pricing adjustment made by the Ld. TPO without giving due consideration to the objections raised by the Appellant against the said adjustment.

**Re: No Transaction much less than an International Transaction**

3.1 That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO erred in assuming that the AMP expenditure incurred by the Appellant is an "international transaction" within the meaning of the term as contained in section 92B of the Act (including the explanation to section 92B) without appreciating that the AMP expenses incurred by the Appellant is a function performed by the Appellant for the purpose of sales of goods in India.

3.2 That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO erred in holding that the AMP expenditure incurred by the Appellant is an international transaction by relying upon the decision of the Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT ([2015] 374 ITR 118) and without appreciating that unlike the facts of the case in Sony Ericsson Mobile Communications India Pvt. Ltd. (supra), the Appellant had -(a) neither received any subsidy / grant in connection with AMP expenses from its AE; and (b) nor the Appellant had admitted to the existence of an international transaction.

3.3 That on the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO has

*erred in not appreciating that the AE of the Appellant did not derive any benefit from the AMP expenditure incurred by the Appellant.*

*3.4 That on the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO erred in not appreciating that the AMP expenses were incurred by the Appellant as a part of its role and responsibility as a distributor and not for the purpose of providing any benefit to its AE and thus could not be considered to be a transaction under section 92F(v) of the Act, in the absence of any understanding or arrangement or action in concert for any provision of service.*

*3.5 That on the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO erred in not appreciating that there are no machinery provisions in the Act to make adjustment in relation to AMP expenses.*

**Re: No arrangement / Agreement / Understanding/Contract with AEs**

*3.6 That the Hon'ble DRP/Ld. AO/Ld. TPO grossly erred on facts and in law in not appreciating that AMP expenditure incurred by the Applicant at its own behest could not be regarded as a 'transaction , much less than an international transaction under section 92B of the Act, in the absence of any understanding/ arrangement/ agreement between the Appellant and its AEs (which own the trademarks) for incurrence of extraordinary AMP expenditure by the Appellant for developing marketing intangibles for the AE.*

**Re: Erroneous approach for determining the Arm's length price ("ALP") o f alleged AMP expenses**

*3.7 That the Hon'ble DRP/ Ld. TPO/Ld. AO erred in law and facts by not appreciating that since gross profit margin earned by the Appellant is higher that the gross profit margins of comparable companies, by application of Resale Price Margin ("RPM") method,*

*the AMP expenses incurred by the Appellant are not required to be compensated by the AEs.*

*3.8 That on the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO have erred in using modified Transactional Net Margin Method ("TNMM") to determine the arm's length nature of the alleged international transaction by comparing the net margin earned by the Appellant with adjusted net margins of comparable companies ("intensity adjustment"), without giving any reasons for rejecting the RPM method used by the Appellant which has been upheld as the most appropriate method for determination of arm's length price of import of finished goods by the order of Hon'ble High Court in Appellant's own case for AY 2009-10.*

*3.9 That on the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO have erred in not considering that even if intensity adjustment is to be performed to determine the ALP of the alleged AMP transaction, the same should be performed on the gross profit margins of comparable companies while applying the RPM selected by the Appellant.*

*3.10 That on the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO have erred in using intensity adjustment to adjust the net profit margin of comparable companies without appreciating that intensity adjustment in principle uses the same parameters which were being used for application of Bright Line Test ("BLT") which is in complete disregard to the decision of Jurisdictional Delhi High Court in the case of Sony Ericsson Mobile Communications (supra).*

*3.11 That on the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO grossly erred in not following the well accepted doctrine of stare decisis and res judicata by disregarding the binding judicial precedent in Appellant's own case, wherein the use of RPM for the purpose of intensity adjustment has been upheld by the Hon'ble IT AT, on the erroneous and false assumption that the*

*respondent was in the process of filing an appeal against the order of Hon'ble ITAT before higher forum.*

*3.12 That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO have erred in using "total operating revenue" instead of "total operating cost" as the base for computing the proportionate value of transfer pricing adjustment.*

*3.13 That the Hon'ble DRP/ Ld. AO/ Ld. TPO have erred in using an unjust approach of cherry picking a set of 11 companies for the purpose of determining the mark up of 15.43%, that should be earned by the Appellant on the alleged AMP expenses as a service provider without providing any source or search strategy and without appreciating that the said companies were functionally not comparable.*

**Re: Use of BLT approach for computing transfer pricing adjustment on a protective basis**

*3.14 That on the facts and circumstances of the case and in law, Hon'ble DRP/ Ld. AO/Ld. TPO have grossly erred in applying the "BLT" to propose transfer pricing adjustment of Rs.28,40,13,614 on a protective basis, in complete disregard of the findings of the Hon'ble Jurisdictional Delhi High Court in the case of Sony Ericsson Mobile Telecommunications India Private Limited. In this regard, the Hon'ble DRP/ Ld. AO/ Ld. TPO also erred in facts and law by disregarding the binding nature of a judicial precedent as it remains unaffected by whether or not it has been challenged before a higher forum, till the time it is not overturned.*

*4. That on the fact and circumstances of the case and in law, Hon'ble DRP/ Ld. AO/ Ld. TPO have grossly erred in using protective assessment for application of BLT approach as the very concept of protective assessment is only relevant where there is an ambiguity regarding the assessee in V.whose hands income is chargeable to tax.*

*4.1 That on the facts and circumstances of the case and in law, Ld. AO/ Ld. TPO have grossly erred in not*

*following the directions issued by Hon'ble DRP to eliminate routine selling expenses for L the purpose of computing the AMP expense incurred by the Appellant.*

*4.2 That the Hon'ble DRP/ Ld. AO/Ld. TPO grossly erred in facts and in law in by not appreciating that the AMP expense considered by the Ld. TPO for computing the adjustment using BLT approach are primarily in the nature of at "point of sale expenditure" and thus are in the nature of selling expenses.*

*4.3 That on the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO failed to appreciate that ambit of "selling expenses" is not only limited to trade discount/ volume discount, rather, any expense(s) which have been incurred for the purposes of enhancing sales will fall under the purview of "selling expenses".*

**Re: Errors in computation of the adjustment while applying the approach of "intensity adjustment"**

*4.4 That on the facts and in circumstances of the case and in law the Hon'ble DRP/ Ld. AO/ Ld. TPO have erred by failing to consider certain expenses as operating in nature while computing the operating profit margin of comparable company and in failing to rectify the arithmetical inaccuracy pointed out by the Appellant in the comparability adjustment sheet.*

*4.5 That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld.AO/ Ld. TPO have erred is undertaking intensity adjustment by considering an incorrect value of international transaction for the purpose of computing the TP adjustment.*

*4.6 That the Hon'ble DRP/ Ld. AO/ Ld. TPO erred in undertaking intensity adjustment by following an inconsistent approach of using operating cost (excluding employee cost) as a percentage of sales instead of using AMP expense (on non-licensed*

*brands) as a percentage of sales for the purpose of adjusting the net profit margin of comparable companies under intensity adjustment.*

**Re: Consequential Grounds**

*5. That on the facts and circumstances of the case, the Ld. AO erred in levying interest under section 234B and 234C of the Act.*

*6. That on the facts and circumstances of the case, Ld. AO erred in initiating penalty proceedings under section 271(1)(c) of the Act.”*

3. Luxottica India was incorporated in India in 15.11.2007 and commenced actual operations from February 2008. It has been established primarily for the purpose of carrying on the business of trading of sunglasses and spectacles frames in India. Luxottica India being a closely held company, 99.99 per cent of its equity shares are held by Luxottica Holland.

4. The primary issue relates to determination of Most Appropriate Method (MAM) for the transfer pricing adjustment of the transactions.

5. For benchmarking the international transactions with regard to the AMP expenses, the assessee has opted for Resale Price Method (RPM) whereas the revenue has resorted to Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM).

6. Having heard the arguments , we find that This issue has already been covered by the order of the ITAT in assessee's own case for the earlier assessment year 2013-14 wherein it was held that RPM was MAM for benchmarking. However, the Id. DRP

choose to confirm the order of the TPO/AO as the department has not accepted Tribunal decision and it is likely to be challenged in the higher forum. For the sake of ready reference, the relevant part of the order of the Id. DRP is reproduced as under:

*"h. TPO has concluded that the intensity of AMP spend expressed as an AMP/Sales ratio is much higher than that of the comparables. But, the Assessee is not suitably compensated for this additional function. This situation is also covered by example 10/BEPS report [G-20 (Action Plan 8-10)]. The example concludes that an entity, performing functions and incurring marketing expenditure substantially in excess of the level of function and expenditure of independent marketer /distributor/manufacture in comparable transactions, is required to be compensated and the appropriate tax administration must propose a transfer pricing adjustment based on such compensation for such AMP activity performed. Such adjustment may be consistent with what Independent enterprises would have earned in similar transactions.*

*i. In view of the discussions supra, it is held that the International Transaction on account of AMP does exist. The same calls for examination to determine ALP. Resale price method cannot be invoked in this case due to wide scope of the activities (including promotional activities directly benefitting the brand and creation of intangibles) undertaken by the assessee, which are beyond a simple distributor. TPO has rightly invoked TNMM in view of the facts of this case. The choice of comparables has been accepted by the assessee. The mark up for services is required and it has been upheld per BEPS guidance also.*

*The assessee has also mentioned that ITAT in assessee's own case for A.Y 2012-13 has held that RPM was MAM for benchmarking. Factual matrix of the current year is same as that of A.Y 2012-13. From TPO's report it is clear that the department has not accepted Tribunal's decision and is likely to challenge it in higher forum.*

*Basis above conclusions emanating from the discussion supra, the action of the TPO is upheld."*

7. The relevant portion of the order of the ITAT in the assessee's own case in ITA No. 344/Del/2017 for the assessment year 2012-13 **dated 26.05.2017**

*"19. The Id. AR next contended that the assessee applied Resale Price Method (RPM) as the most appropriate method in its Transfer pricing study report and the TPO used the Transactional Net Margin Method (TNMM) as the most appropriate method for making the transfer pricing adjustment. The Id. AR argued that the Tribunal in its order for the assessment year 2009-10 has approved the RPM as the most appropriate method and the Hon'ble High Court has not interfered with the Tribunal order on this issue. This was opposed by the Id. DR who submitted that the Hon'ble High Court has simply chosen not to interfere in the Tribunal order without giving any separate reasons and, hence, it cannot be said that the Tribunal order on this issue has been affirmed by the Hon'ble High Court.*

*20. We find that the TPO in the instant case, though noted in para 2 of its order, that the assessee applied RPM as the most appropriate method, but gave no reasons for rejecting the same and went on to compute transfer pricing adjustment under the TNMM. It is a matter of fact that the assessee for the assessment year 2009-10 adopted TNMM as the most appropriate method to demonstrate that its international transaction of purchase of material was at ALP. Such determination was sought to be corroborated by also*

*applying RPM. The TPO for that year initially called upon the assessee to show cause as to why the RPM be not applied as the most appropriate method. Later on, the TPO went with the TNMM as the most appropriate method. The Tribunal noticed that the main business of the assessee was to carry on trading of sunglasses and frames. The goods purchased were sold without making any value addition. It was, therefore, held that RPM was the most appropriate method in preference over the TNMM. The Hon'ble High Court did not interfere with the view taken by the Tribunal. It is, therefore, manifest that the application of the RPM as the most appropriate method has been finally approved for the A.Y. 2009-10. However, a significant factor which cannot be lost sight of for the A.Y. 2009-10 is that instead of making any AMP intensity adjustment in the profit rate of comparables, the TPO considered AMP expenditure as a separate international transaction and determined its ALP independent of the ALP of the international transaction of purchase of material from its AE. As such there was no need to subsume the AMP function in the determination of the ALP of the international transaction of purchase of material. But in so far as the facts for the extant year are concerned, it is patent that the AMP function has been embedded by the TPO in the international transaction of purchase of Material from the AE and the transfer pricing adjustment has been made for such an international transaction alone, though by factoring in the effect of higher intensity AMP functions carried out by the assessee. Respectfully following the decision taken for the A.Y. 2009-10, we hold that, firstly, the RPM should be applied as the most appropriate method for determining the ALP of the international transaction of purchase of material from the AE, but, by carrying out the AMP intensity adjustment in the profit rate of comparables. If, however, it turns out that such an adjustment cannot be done due to one reason or the other, then the RPM should be discarded and another suitable method be adopted, which encompasses the effect of AMP intensity adjustment. Our view is fortified by the judgment in the case of Sony Ericsson (supra), in which it has been held in para 165 that: '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.'*

*21. We, therefore, set aside the impugned order and remit the matter to the file of Assessing Officer/TPO for re-determining the ALP of the international transaction of 'Import of finished goods' in the manner delineated above. The assessee should be given an adequate opportunity of hearing in such fresh proceedings."*

8. Since, the matter stands covered in favour of the assessed for the earlier years and in the absence of any material change in the facts of the case brought to our notice, we hereby direct that the adjustment be determined considering as RPM as MAM.

9. The other issue raised during the arguments pertains to adjustment on protective basis following the BLT method. This issue has been squarely covered by the order of the Co-ordinate Bench of ITAT Delhi in ITA No. 6531/Del/2017 for the assessment year 2013-14 vide order dated 30.11.2017 in the case of M/s Toshiba India Pvt. Ltd., wherein one of the Members of this bench was the signatory. The relevant part of the said order is as under:

*"3.1 The Hon'ble Delhi High Court in the case of Sony Ericsson (supra) rejected the Bright Line Test (BLT) method for computing the arm's length price of the AMP transaction and directed that for the purpose of comparability, the comparable should be identified in such a way that they are carrying out marketing and distribution function and the comparables should have comparable intensities of expenses incurred for sales and marketing and in the case of the assessee. The Ld. TPO computed the adjustment under AMP according to the manner proposed by the Hon'ble Delhi High Court in the case of Sony Ericsson (supra) on substantive basis at Rs.19,80,30,988/- and also proposed addition on protective basis following the BLT method amounting to Rs.131,21,90,000/-.*

3.2 Against the adjusted proposed by the Id. TPO, the assessee before the Ld. DR, the assessee filed objections before the Ld. DRP. The Ld. DRP directed to verify the segmental account and other arithmetical errors/factual mistakes to allow certain expenses out of AMP. In view of the directions of the Ld. DRP, adjustment was revised. A table revising the adjustment both on substantive as well as protective basis by the Assessing Officer in the impugned final assessment order is reproduced as under:

<b>On Substantive Basis</b>			
S. No.	Nature of International Transaction	Adjustment as per the order of the Transfer Pricing Officer	Adjustment after the directions issued by the Hon'ble DRP
1.	AMP-Distribution	19,80,30,988	Nil

<b>On Protective Basis</b>			
S. No.	Nature of International Transaction	Adjustment as per the order of the Transfer Pricing Officer	Adjustment after the directions issued by the Hon'ble DRP
1	AMP-Distribution (Protective Addition)	1,31,21,90,000	51,09,87,000

3.3 Thus, we find that substantive addition on AMP adjustment on AMP stands already deleted by the Ld. DRP, and only the addition made on protective basis following the BLT method was sustained by the Id. DRP, against which, the assessee is in appeal before us.

4. The Ld. counsel submitted that ground No. 1 and 1.1 of the appeal are general in nature. Since the ground being general in nature we are not required to adjudicate upon specifically and accordingly dismissed as infructuous.

5. Further, during the hearing of the case, the Ld. counsel did not press the ground Nos.1.2 to 1.5 and 2.1 to 2.4 and ground No. 3, accordingly all these grounds are dismissed as infructuous.

6. The ground Nos. 2, 2.5 to 2.6 relates to protective addition made applying the BLT.

6.1 Before us, the learned counsel submitted that Tribunal in the case of Nickon India Private Limited (ITA No. 4574/Del/2017, dated 20.09.2017) has deleted the identical addition of protective nature, and therefore, in the case of the assessee also, no addition could be sustained.

6.2 The Ld. CIT(DR), on the other hand, relied on the finding of the lower authorities.

6.3 We have heard the rival submission and perused the relevant material on record. We find that Tribunal in the case of Nickon India Private Limited (*supra*) has deleted the adjustment made on protective basis applying the BLT. The relevant finding of the Tribunal is reproduced as under:

"18. So, following the decision rendered by Hon'ble Delhi High Court in case of Sony Ericsson Mobile Communications India (P.) Ltd. (*supra*) and coordinate Bench of the Tribunal in Perfetti Van Melle India Pvt. Ltd. (*supra*), TP adjustment amounting to Rs.22,30,18,964/- by applying BLT is not sustainable on protective basis having no statutory mandate. So, ground no. 5 is determined in favour of the assessee."

6.4 We find that the BLT for computing Arm's Length Price of AMP transaction has already been rejected by the Hon'ble Delhi High Court in the case of Sony Ericsson (*supra*), and thus adjustment even protective basis cannot be sustained. The decision of the Hon'ble Jurisdictional High Court is a binding precedent and the lower authorities cannot disregard it merely because the Revenue has challenged it before the Hon'ble Supreme Court. Thus, respectfully following the above decision of the Tribunal, we direct the Ld. AO/TPO to delete the protective addition of Rs.51,09,87,000/-. Accordingly, we allow the relevant grounds of the appeal of the assessee."

10. Since, the matter stands covered in favour of the assessee and in the absence of any material change in the facts of the case brought to our notice, we hereby hold that the adjustment made on protective basis cannot be sustained.

11. As a result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 26/04/2021.

Sd/-

**(Amit Shukla)**  
**Judicial Member**

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**Dated: 26/04/2021**

\*Subodh\*

Copy forwarded to:

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

**ASSISTANT REGISTRAR**