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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER
[Through Video Conferencing]

ITA No.3750/Del/2018
Assessment Year: 2010-11

ACIT, Circle-14(1), New Delhi	**Vs.**	Karl Storz Endoscopy India Pvt. Ltd., 11th Floor, Gopaldas Building, Barakhamba Road, New Delhi
		PAN :AAACK4816D
(Appellant)		**(Respondent)**

Appellant by	Sh. Bhagwati Charan, Sr.DR
Respondent by	Sh. V.K. Sabharwal, Adv. Sh. Ravi Kapoor, CA

Date of hearing	09.09.2021
Date of pronouncement	17.09.2021

ORDER

PER O.P. KANT, AM:

This appeal has been filed by the Revenue against order dated 22/03/2018 passed by the learned Commissioner of Income-tax (Appeals)-44, New Delhi [in short 'the learned CIT(A)]for assessment year 2010-11 raising following grounds:

1. *Whether in the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the AMP activities of the assessee should be aggregated with other international*

transactions of the assessee, in absence of evidence from the assessee to prove that these transactions are homogenous and interlinked?

2. *Whether in the facts and circumstances of the case and in law, the Ld. C1T(A) was justified in holding that commission is an appropriate remuneration for the marketing and support services which have been rendered by the Assessee?*
3. *Whether in the facts and circumstances of the case and in law, the Ld. C1T(A) has erred in not appreciating the fact that brand building and creation of marketing intangibles is a separate function altogether, and thus requires separate benchmarking?*
4. *Whether under the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that fact that as per India Transfer Pricing legislation, compensation for the function performed AMP services rendered to the AEs in this case] needs to be benchmarked separately?*
5. *That the grounds of appeal are without prejudice to each other.*
6. *That the appellant craves leave to add, alter, amend or forego any ground(s) of the appeal raised above at the time of hearing.*

2. The Facts in brief of the case are that in the scrutiny assessment completed on 07/03/2014, the Assessing Officer made addition of ₹ 4,13,60,114/- for transfer pricing adjustment on account of Advertisement, Marketing and Promotion (AMP) expenses and disallowance of late payment of interest amounting to ₹ 37,980/-. On the issue of AMP expenses, the Ld. CIT(A) allowed relief to the assessee and second issue of late payment of interest on TDS was sent for verification. Aggrieved with the deleting of AMP expenses, the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

3. Before us, the parties appeared through Video Conferencing facility and filed paper-book physically as well as through email.

4. The sole issue involved in all the grounds of the Revenue is deletion of AMP adjustment made by the Assessing Officer.

5. Before us, the learned DR submitted that assessee is manufacturer and therefore findings in the case of Sony Erriction

(supra) followed by the ld. CIT(A) is not applicable, which is in the case of distributor company.

6. On the other hand, learned Counsel of the assessee refuted the claim of the Learned DR and submitted that assessee is importee of trade goods and not manufacture and therefore squarely covered by the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson (supra).

7. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The brief profile of the assessee mentioned by the Ld. CIT(A) has not been disputed by the parties and therefore for ready reference, we are extracting the same as under:

> *"5.2 The appellant provides marketing and service support to the existing dealer network or Karl Storz Germany in India. It also sold products in India which were manufactured by the AE during the year under reference. The marketing support provided by the appellant primarily encompasses sponsorship of seminars and conferences of prominent associations of the medical community and advertisement campaigns in the print media while service support pertains to warranty repair and exchange of damaged equipments sold by Karl Storz Germany's dealers in India. In return for the services rendered and in return for the significant expenses incurred by the appellant on marketing, Karl Storz Germany pays a commission to the appellant on the sales made by it's distributors in India. The appellant also provides post warranty repair and maintenance service on chargeable basis.*
>
> *5.3 During the year under reference, the appellant applied the TNMM as the most appropriate method and calculated its operating margin as 8.57% in comparison to 6.29% earned by the comparables in the same industry. The appellant clubbed its transactions relating to provision of marketing and warranty services to its other transactions pertaining to sale of imported goods etc. The appellant claimed that, in view of the above, its transactions were at Arm's Length.*
>
> *5.4 The TPO did not accept the contention of the appellant. The AO held that the appellant was providing services to its AEs because its AMP expenses were excessive. The TPO applied a markup of 15% on*

the non-routine expenditure of the appellant based on the PLR of the SBI. Thus the TPO made an addition of account marketing intangibles developed by the appellant as a result of marketing expenditure on the basis of Bright Line Test (BLT)."

7.1 The Learned CIT(A) has deleted the transfer pricing addition observing as under:

"5.7 The main contention of the appellant and an admitted fact that the appellant is providing marketing / and support services which had already been remunerated by the AE as commission which covers not only the expenses incurred by the appellant but also a reasonable return for such expenses and activities. The commission income received by the appellant is in lieu of marketing support services to the exiting dealer network in India and hence the marketing expenditure of the appellant is towards the marketing activities undertaken on behalf of the AE for which the appellant has specifically received commission income.

5.8 It is also noted that the year under reference is the first year in which a transfer pricing adjustment has been made by the TPO on the basis of 'Bright Line Test' using SBI PLR as mark up. It is also seen that a transfer pricing adjustment were made by the TPO in the subsequentyear-LeAY20ll-l_2_which has been related by the CIT (A). In AY 2011-12, the appellant had prepared separate segmental accounts for the marketing segment and used TNMM as the most appropriate method. Transfer pricing adjustments on account of AMP expense had not been made in AYs 2012-13, 2013-14 and 2014-15.

5.9 In the year under reference, the TPO/AO has accepted that TNMM at the entity level is the most appropriate method for determination of ALP. However, the TPO has considered marketing services provided by the appellant as a separate international transaction and applied a markup of 15% on the same. However, it is seen that the appellant has received commission and reimbursement of cost for all marketing activities undertaken by it on behalf of its AE. It is also seen that its marketing activities are inter linked with other international transactions i.e. import of goods for sale and earning of service income for warranty services provided on behalf of the AE, In view of the above, placing reliance on the order of the Hon'ble Delhi High Court in case of Sony Ericsson(supra), it is held that the transfer pricing adjustments made by the TPO gives rise to an incongruous situation as such expenses are factored in the net profit of the inter linked transactions as stated by the Hon'ble Delhi High Court in the case of Sony Ericsson (supra) :-

> *"This would be also in consonance with Rule 10B(l)(e), which mandates only arriving at the net profit margin by comparing the profits and loss assumption that functions, assets and risk being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible. "*
>
> *5.10 In accordance with the principle of consistency and respectfully following the order of the jurisdiction High Court in the case of Sony Ericsson(supra) the transfer pricing adjustment made by the AO on account of AMP expenses is deleted. The grounds of appeal are decided in favor of the appellant."*

7.2 In our opinion, the contention of the Learned DR that the assessee is manufacturer is not found to be correct. The assessee has reported international transaction of purchase of trade goods and capital goods from its AEs for further sale in India and thus status of the assessee is in the nature of distributor of goods of AEs. Further, we find that Ld. CIT(A) has deleted the addition on two grounds. Firstly, the Assessing Officer has marked up expenses incurred by the assessee on advertisement and marketing on behalf of its Associated Enterprises (AEs) following the Bright Line Test (BLT). The Bright Line Test approach has been rejected by the Hon'ble Delhi High Court in the case of Sony Erriction (supra). The Ld. CIT(A) following Hon'ble Delhi High Court, being a binding precedent has deleted the addition. Secondly, the Learned CIT(A) has noted that in subsequent assessment years, i.e., 2012-13, 2013-14 and 2014-15, the Assessing Officer himself has not made any transfer pricing adjustment on account of AMP expenses in same set of

circumstances and, therefore, keeping in view of the principle of the consistency, the Assessing Officer is not justified in making adjustment in the year under consideration.

7.3 Further, we note that the assessee has already been remunerated for the marketing expenses incurred on behalf of the AEs along with commission markup, and, therefore, there was no requirement of making separate AMP addition in the case of the assessee.

7.4 In view of the above facts and circumstances, we do not find any error or infirmity in the order of the Ld. CIT(A) on the issue in dispute and accordingly, uphold the same. The grounds raised by the Revenue are accordingly dismissed.

7.5 In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 17th September, 2021

Sd/-	***Sd/-***
(AMIT SHUKLA)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 17th September, 2021.
RK/-(DTDC)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi