

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI '1-2' BENCH,
NEW DELHI (THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER, AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER**

SA No. 162/DEL/2021
[In ITA No. 873/DEL/2021 [A.Y 2016-17]

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ITA No. 873/DEL/2021 [A.Y 2016-17]

M/s Olympus Medical Systems Pvt. Ltd
Ground Floor, Tower - C, SAS Tower
The Medicity Complex, Sector - 38
Gurgaon, Haryana

Vs.

The A.C.I.T
Circle - 3(1)
Gurgaon

PAN: AABCO 2131 L

(Applicant)

(Respondent)

Assessee By : Shri Nageshwar Rao, Adv
Ms. Deepika Agarwal, Adv

Department By : Shri Mahesh Shah, CIT-DR

Date of Hearing : 10.01.2022

Date of Pronouncement : 13.01.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 18.05.2021 framed under section 143(3) r.w.s 144C(13) r.w.s 144B of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. Grievances of the assessee read as under:

1. On the facts and circumstances of the case and in law, the assessment order/directions passed by Id. AO / Transfer Pricing Officer ("TPO") / DRP are bad in law.
2. On the facts and circumstances of the case, the final assessment order is bad in law in not following the directions of DRP and the appeal effect order passed by the TPO, consequently all further proceedings are also vitiated and invalid in law.
3. Impugned final assessment order dated 18.05.2021 is invalid and void ab initio since the same is not in accordance with the procedure laid down under the provisions of section 144B of the Act.

4. On the facts and circumstances of the case, Ld. DRP has failed to adjudicate critical grounds of objections raised by the assessee.
5. Without prejudice, impugned demand has been wrongly quantified considering incorrect additions to returned income.

GROUNDS AGAINST ADJUSTMENT MADE IN RELATION TO
ADVERTISEMENT, MARKETING AND PROMOTION ("AMP")
EXPENSES

6. That on the facts and circumstances of the case and in law, Ld. AO / TPO/ DRP erred in treating routine selling expenses incurred by the Appellant as non-routine Advertisement, Marketing and Promotion ("AMP") expenses which have further been assumed to have been incurred solely towards brand promotion of foreign associated enterprise ("AE"). While doing so, Ld AO/TPO/DRP have completely disregarded the nature of industry and business realities of the Appellant
 - a. Determination of selling expenses as non-routine brand promotion expense is also in violation of order of the Hon'ble High Court ('HC') in the case of Sony Ericson Mobile Communications India Pvt. Ltd.

7. That on the facts and in circumstances of the case and in law, Ld. AO / TPO/ DRP erred in holding that sales promotion expenditure incurred by the Appellant in India is an 'international transaction' as per the provisions of the Act without demonstrating the existence of any understanding or an agreement between the Appellant and its AEs which requires the Appellant to spend excessively towards brand promotion.
 - a. The assumption of existence of an 'international transaction' without having any valid agreement.
 - b. Ld. AO/TPO/DRP has erred in making a factually incorrect assumption that the top- level plan reviews of AMP expenses are determined and controlled by the AE
 - c. Ld. AO/TPO/DRP erred in merely relying upon extracts from the Appellant's website and incorrectly interpreting that AMP expenses are influenced by the overall strategy of the Group instead of examining the facts and documentary evidences submitted by the Appellant
8. That on the facts and in circumstances of the case and in law, Ld. AO / TPO/ DRP erred in not appreciating that the sales promotion expenses incurred by the Appellant are wholly and exclusively focused on generating domestic sales for its distribution operations and benefit arising from incurrence of such expenses has been received by the Appellant.

9. That on the facts and in circumstances of the case and in law, Ld. AO / TPO/ DRP erred in not appreciating that if any benefit resulted to its AEs from incurrance of sales promotion expenses, the same is merely incidental.
10. On facts and circumstances of the case and in law, Ld. AO / TPO / DRP erred in assuming that AMP expenses incurred by Appellant have led to creation of marketing intangibles by relying on and with reference to irrelevant material and without citing any valid legal basis.
11. Without prejudice to the other grounds, even if AMP is considered as an international transaction, the TPO has himself considered AMP costs as part of Transaction Net Margin Method ("TNMM") analysis while benchmarking import transaction and the same has been considered to be at arm's length.

Without prejudice to the above grounds and the contentions,

12. that AMP/Sales ratio is not a measure of intensity of AMP function, Ld. AO / TPO / DRP failed to take note of companies which had same level of AMP expenses and use the same to apply aggregation approach using TNMM.
13. Ld. AO / TPO / DRP erred in not benchmarking AMP using the adjusted Resale Price Method ('RPM').

14. Ld. AO / TPO / DRP proposes adjustment to the value of AMP expenses; direct selling expenses should be excluded from the value of such AMP expenses.
15. Ld. TPO erred in including sales promotion expenses amounting to INR 86,61,031 in the ambit of alleged AMP^
16. Ld. AO/TPO/DRP erred on facts and circumstances of the case by considering Residual Profit Split Method ("PSM") as the Most Appropriate Method ("MAM") given multiple fallacies in application of the method.
17. while applying PSM, Ld. TPO again resorted to Bright Line Test in order to compute non-routine AMP expenditure, which has been overruled by the Hon'ble High Court.
18. in the absence of any supernormal profits vis-a-vis comparable companies, PSM cannot be applied to benchmark the alleged transaction of AMP.
19. that on the facts and in circumstances of the case and in law, Ld. TPO/AO/DRP grossly erred in assessment of functional and risk profile of the Appellant/AE while applying PSM.
20. the TPO/AO/DRP grossly erred in allotting weights to FAR of AE/Appellant in an arbitrary manner for computing profit split ratio to allocate residual profits while applying PSM.
21. while applying PSM, Ld. TPO has erred in law and on facts by completely misunderstanding the product profile of the assessee and consequently disregarding the search process adopted by the

assessee and selecting / rejecting companies based on inappropriate and unreasonable criteria.

GROUNDS PERTAINING TO PROTECTIVE ADJUSTMENT MADE IN
RELATION TO ADVERTISEMENT, MARKETING AND PROMOTION
("AMP") EXPENSES - BRIGHT LINE TEST ("BLT")

22. That Ld. AO / TPO / DRP erred in law in making adjustment on a protective basis using BLT as the most appropriate method.
23. That Ld. AO / TPO / DRP erred in law in undertaking alternate assessment or multiple assessments of the same income or transaction using different methodologies without appreciating the fact that there is no such TP provision under the Act.
24. That Ld. AO / TPO / DRP failed to appreciate that as per the provisions of the Act, a transaction can only be benchmarked applying the "Most Appropriate Method" ("MAM") prescribed therein, only once.
25. That protective adjustment based on Bright Line Test as proposed by Ld. AO / TPO / DRP is against the principles laid down by Hon'ble Delhi HC in the case of Sony Ericsson (supra).
26. That Ld. AO / TPO / DRP failed to appreciate that in absence of any stay by the Hon'ble Supreme Court, the decision of Hon'ble High Court in the case of Sony Ericsson (supra) holds the field and is fully operational especially in context to Bright Line Test ("BLT").

27. Without prejudice to all other contentions, if Ld. AO / TPO / DRP proposes adjustment to the value of AMP expenses by BLT; direct selling expenses should be excluded from the value of such AMP expenses.
28. Without prejudice to the above grounds, Ld. TPO/AO/DRP erred in, facts and circumstances of the case and in law in concluding that the assessee has rendered brand building services to its AEs and it should charge markup on cost incurred in rendering such services.
29. Without prejudice to other grounds, that Ld. TPO/AO/DRP erred in making inappropriate selection of comparables for the mark-up on alleged brand building/AMP expenditure while computing adjustment in protective assessment.

Further, since the above-mentioned approach has been followed at present only on protective basis, the Appellant reserves all rights in law to raise suitable objections in future, if office of Ld. TPO propose any adjustment to the Appellant's income using Bright Line or any other variant of the same approach.

GROUND'S AGAINST ADJUSTMENT IN RELATION TO
OUTSTANDING RECEIVABLES

30. That Ld. AO/TPO/DRP has erred, in law and on facts and circumstances of the case by recharacterizing inter-company receivables as unsecured loan in the absence of a statutory provision

and have also erred in benchmarking the same using Comparable Uncontrolled Price ("CUP") Method.

GROUND PERTAINING TO ADDITION UNDER SECTION 36(1 Uiii)
OF THE ACT

31. The AO has erred in law and facts of the case by imputing adjustment on account of disallowance of expenses u/s 36(1)(iii) of the Income Tax Act, 1961 ("Act") amounting to INR 13,97,914 which was deleted by the DRP.

GROUND PERTAINING TO PENALTY PROCEEDINGS

32. That on facts and in laws, the 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 271(1)(c) of the Act.

The Appellant craves leave to add, alter, modify or delete such other objections before or during the course of hearing before the Hon'ble Income Tax Appellate Tribunal ('ITAT'), so as to enable the Hon'ble ITAT to decide on the grounds raised by the Appellant, as per law.

3. At the very outset, the ld. counsel for the assessee argued at length on Ground No. 2 (supra).

4. Representatives of both the sides were heard at length on this ground. Case records carefully perused and the decisions relied upon duly considered.

5. Briefly stated, the facts of the case are that vide order dated 28.11.2019, the AO framed draft assessment order under section 143(3) r.w.s 144C of the Act wherein a reference under section 92CA(1) of the Act was made to the Transfer Pricing Officer [TPO], New Delhi. Accordingly, an order under section 92CA(3) of the Act was passed by the TPO on 28.10.2019, the relevant extracts of which is reproduced as under:

"13. In conclusion, total adjustments in this case amount to as under.

1	<i>Attribution of Advertisement, Marketing and Promotion Expenses to the AE*</i>	<i>Rs.4,85,11,004/-</i>
2	<i>Interest on receivables</i>	<i>Rs. 5,35,331/-</i>
	Total	Rs 4,90,46,335/-

(*Since the BLT approach on AMP issue is sub-judice before various appellate forums, the benchmarking has been initially done on a *protective basis* resulting in an adjustment of Rs. 5,61,,80,593/- u/s

92CA of the Income Tax Act, as stated in detail supra.). Accordingly, the Assessing Officer shall enhance the income of the assessee by Rs. 4,90,46,335/-. The Assessing Officer may examine issue of initiation of penalty u/s 271(l)(c) of the Act in accordance with Explanation 7 of the same."

6. Vide order dated 21.12.2019, post rectification under section 154 of the Act, the AO framed draft assessment order.

7. The assessee raised objections before the DRP.

8. The DRP disposed of the objections of the assessee vide order dated 17.03.2021. The relevant part of the DRP directions read as under:

"Having considered the submission of the assessee, we find that the issue of AMP adjustment has been a widely debated issue in international tax jurisprudence. The assessee has relied upon certain cases where the Hon'ble Delhi High Court has decided this issue against the Department. The Department has filed SLP against these decisions and the decision of the Hon'ble Supreme Court is awaited. The assessee has merely placed reliance on these decisions without

demonstrating how the facts are similar. In Maruti, the brand was not owned by the foreign AE whereas in this case the brand is owned by the foreign AE. The facts in Maruti were also different because in this case, the margin earned by the assessee is not significantly more than the margin of comparables and the assessee has not been able to demonstrate that it has been adequately compensated for the AMP functions, apart from the compensation it has received for its routine functions. The facts in Maruti were also different because in this case, the assessee's agreement with its AE stipulates that the AE would compensate the assessee for the advertising expenditure.

iv. Department's SLP admitted in the Hon'ble Supreme Court

According to Taxsutra, the Hon'ble Supreme Court has admitted the Department's SLP in several cases involving AMP where the Hon'ble Delhi High Court has decided the issue against the Revenue. This has been reported by Taxsutra as follows:

(i) Canon India Pvt Ltd. [TS-748-SC-2016-TF]

Supreme Court (SC) admits Canon's SLP challenging Delhi HC ruling on Marketing Intangibles issue. Also admits appeals in the cases of Daikin Air-conditioning India Private Limited, Sony Ericsson Mobile Communications India Pvt. Ltd., Casio India Co. Pvt. Ltd. Reebok India Company Ltd., Sharp Business Systems India Ltd. and Stryker India

Pvt. Ltd., HC had held that incurrence of AMP expenses qualifies an international transaction, however, rejected application of Bright Line Test for computing adjustment.

(ii) Whirlpool of India Ltd. [TS-784-SC-2016-TP]

SC directs issue of notice in case of Revenue's SLP against Delhi HC judgment deleting marketing intangibles adjustment for whirlpool India (assessee engaged in production, sales and distribution of Whirlpool appliances);

(iii) Maruti Suzuki India Ltd. [TS-747-SC-2016-TP]

SC lists SLP filed by Revenue against Delhi HC judgment on marketing intangibles issue in Maruti Suzuki India Ltd.'s case for final disposal on 4 October, 2016;

v. The issues raised in the various grounds of objections relating to AMP adjustment were considered by the DRP in AY 2012-13 and proposed adjustment of AMP expenses on substantive basis and protective basis was upheld. For the sake of brevity the findings of DRP for A.Y. 2012-13 are not reproduced here. As the factual matrix of the case remains same, following the DRP directions issued in A.Y. 2012-13, the findings of the Ld. TPO/AO are upheld. The objections raised by the assessee are dismissed.

The assessee has raised the objection there are certain inaccuracies in the computation of margins of comparable companies selected for calculating the residual PLI to be conferred to AE which ought to be rectified. DRP directs the Ld. TPO to correct the inaccuracies in the computation of margins of comparable companies while determining the proposed adjustment."

9. Pursuant to the directions of the DRP, the TPO passed order dated 26.04.2021 giving effect to the DRP directions as under:

	Issue	Adjustment Amount [Rs.]
TPO Order	(i) The TPO held that AMP is an international transaction and the same was benchmarked using rPSM method on substantive basis and using BLT method on protective basis. (ii) Interest on receivables	<i>4,85,11,004/-</i> <i>[Substantive Basis]</i> <i>Rs 5,61,80,593/-</i> <i>Protective Basis]</i> Rs 5,61,80,593/- [Protective Basis] 5,35,331/-
DRP Directions dated 21.01.2021	The Hon'ble DRP has upheld the findings of the TPO keeping in view the directions of the Hon'ble DRP in AY 2012-13. The Hon'ble DRP has also directed to correct the inaccuracies in margin calculation of comparable companies, Further, the Hon'ble DRP has issued directions for inclusion/exclusion of certain comparable	Rs. 3,79,72,194/- Substantive Basis) 4,21,71,914/- Protective

	<p>companies.</p> <p>ii) In respect of interest on receivables, the Hon'ble DRP has directed to recompute the applying the Interest as directed by the Delhi High Court in the case of Cotton Naturals Pvt LTd. Therefore, 6 month LIBOR + 400 basis points is being considered the Arms length interest rate i.e. 4,609% as calculated below.</p>	<p>Basis]</p> <p>1,82,361/-</p>
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10. As per the directions of the DRP, in the final set of comparables, Hicks Thermometer [India] Pvt Ltd was included and EDCIL [India] Ltd was excluded. However, we find that in the final assessment order dated 18.05.2021, the Assessing Officer has repeated the draft assessment order verbatim. The relevant part of the final assessment order reads as under:

"The Hon'ble DRP, Delhi vide its order dated 17.03.2021 has upheld the findings of the TPO. Since the objections of the assessee to the draft assessment order u/s 143(3) r.w.s. 144C of the Act dt. 21.12.2019 have been disposed off by the Hon'ble DRP, Delhi vide its order dt.17.03.2021, the income of the assessee for the A.Y. 2016-17 is computed as proposed in the draft assessment order u/s 143(3) r.w.s.144C of the Act dt.21.12.2019 as under:-

<i>Returned Income</i>	<i>Rs.5,37,08,930/-</i>
<i>Addition as per Para.3 of order dt. 21.12.2019</i>	<i>Rs.4,90,46,335/-</i>
<i>Addition as per Para.4 of order dt, 21.12.2019</i>	<i>Rs.13,97,914/-</i>
<i>Total assessed Income</i>	<i>Rs.10,41,53,179/-</i>
Rounded off	Rs. 10,41,53,180/-

6. An addition of Rs. 10,41,53,180/- is made by the undersigned to the taxable income of the assessee on account of the TP adjustment and disallowances of expenses u/s 36(1)(iii) of the Act. I am satisfied that the assessee company has concealed the income/furnished inaccurate particulars of income. Therefore, penalty proceedings u/s 271 (l)(c) of the Income Tax Act, 1961 for concealed the income/furnishing inaccurate particulars of income are being initiated separately,

7. Assessed at a total income of Rs. Rs.10,41,53,180/-as above. Issue Tax and Interest u/s 234B and 234C have been charged as per tax calculation sheet which forms part of this order. Demand notice, and necessary forms are being issued along with copy of this Assessment Order. Penalty notice u/s 271 (l)(c) is initiated separately."

11. Income of Rs.10,41,53,180/- is the same as computed in the draft assessment order dated 21.12.2019. Considering the aforementioned factual matrix, we are of the opinion that as per the provisions of section 144C(5) of the Act, directions given by the DRP are binding on the Assessing Officer and in terms of section 144C(13) of the Act, the Assessing Officer was obliged to pass final order of assessment in accordance with the directions of the DRP. In the present case, final order of assessment does not incorporate the directions of the DRP and is verbatim repetition of the draft order of assessment. We are of the view that final order of assessment, in conformity with the directions of the DRP, has to be passed within one month from the end of the month in which the directions are issued by the DRP. Since the impugned order is not in conformity with the provisions of section 144C of the Act, the same is to be held as bad in law.

12. The ld. DR, however, while not disputing the factual position, as pointed out above, submitted that final order of assessment cannot be quashed, but at best, it can be set aside directing the Assessing Officer to pass final order of assessment in conformity with the DRP directions.

13. We have given thoughtful consideration to the submissions of the ld. DR qua the factual matrix. We find that the coordinate bench at Bangalore in Flextronics Technologies [India] Pvt Ltd IT[TP]A No. 832/BANG/2017 had the occasion to consider identical grievance wherein it followed the decision of the co-ordinate bench in the case Software Paradigms Infotech Pvt Ltd 89 Taxman 339 and on identical facts, this Tribunal in ITA No. 1980/DEL/2014 Global One India Pvt Ltd order dated 10.12.2019, after considering the decision of the co-ordinate bench, has decided the issue. The relevant findings of the Tribunal in ITA 832/BANG/2017 read as under:

"9. We have considered the rival submissions. We find that on identical facts, this Tribunal in the case of Software Paradigms Infotech (P.) Ltd. (supra) has quashed the final order of assessment observing as follows:-

"3.3.1 We have heard the rival contention of both parties in the matter and perused and carefully considered the material on record. The undisputed facts on record, as brought out by the discussions above, is that the AO, as per law, was required to pass the final order of assessment dated 17/1/2014 for asst. year 2009-10 u/s. 143(3) r.w.s. 144C of the Act in conformity

with the directions issued by the DRP u/s. 144C(5) of the Act, which are binding on him as per section 144C(10) thereof and within the time prescribed u/s. 144C(13) of the Act. We find that instead of passing the final order of assessment as required by law, the AO passed the impugned final order of assessment dated 17/1/2014 u/s. 143(3) r.w.s. 92CA of the Act; which, as contended by the id AR, is identical to the draft order of assessment passed on 14/3/2013 by only incorporating this TPO's proposals and, thereby evidently giving the DRP's mandatory directions issued u/s. 144C(5) of the Act a complete go-by. In our view, it is factually established that the AO in the final order of assessment dated 17/1/2014 has not given effect to or carried out the binding directions of the DRP as required u/s. 144C(10) within the time specified u/s. 144C(13) of the Act; which is a clear violation of the binding provisions of sec. 144C(10) and (13) of the Act. Therefore, in our considered opinion, the conduct of the AO/TPO in passing the impugned final order of assessment dated 17/1/2014 is a clear case of defiance and disregard to the binding directions of the higher authorities, i.e., the DRP in the case on hand. In fact, in the impugned order dated 17/1/2014 there is not even a single reference to the DRP's directions issued u/s. 144C(5) of the Act vide order dated 30/12/2013.

3.3.2 In the factual and legal matrix of the case on hand, as discussed above, we are of the considered view that the impugned final order of assessment for asst. year 2008-09 passed u/s. 143(3) r.w.s. 92CA of the Act by the AO, in violation of the express mandatory provisions of sec. 144C(10) and (13) of the Act by not passing the impugned order in pursuance of and in conformity with the binding directions of the DRP issued u/s. 144C(5) of the Act, within the time specified for this purpose, has rendered the said impugned final order of assessment unsustainable in law. We, therefore, quash the impugned final order of assessment for asst. year 2009-10 passed by the AO u/s. 143(3) r.w.s. 92CA of the Act dated 17/1/2014 in the case on hand. We hold and direct accordingly. Consequently, ground No. 17 of assessee's appeal is allowed."

14. Respectfully following the aforesaid view of the co-ordinate bench, we quash the impugned order of assessment. Since the impugned order of assessment is quashed on the ground that the same is not in conformity with the provisions of section 144C of the Act, we are of the view that the other issues raised by the assessee in its grounds of appeal do not require any consideration.

15. In view of the conclusion that the assessment order is null and void, other grounds of appeal raised by the assessee on merits of the addition do not require any adjudication.

16. Since we have decided the appeal in favour of the assessee, the Stay Application becomes infructuous.

17. In the result, appeal of the assessee in ITA No. 873/DEL/2021 is allowed and the Stay Application of the assessee has become infructuous.

The order is pronounced in the open court on 13.01.2022 in the presence of both the representatives.

Sd/-

[SAKTIJIT DEY]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 13th January 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	