

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

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

ITA No.8259/Del/2018
Assessment Year: 2014-15

Luxottica India Eyewear Pvt. Ltd., 7th Floor, DLF Building No.09, Tower-B, Phase-III, DLF Cyber City, Gurgaon PAN No. AABCL3871C (APPELLANT)	Vs	ACIT Circle – 15 (2) New Delhi (RESPONDENT)
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Appellant by	Sh. Nageshwar Rao, Advocate Sh. S. Chakarbotry, Advocate
Respondent by	Sh. Surender Pal, CIT DR

Date of hearing:	27.01.2022
Date of Pronouncement:	27.01.2022

ORDER

PER N. K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order dated 30.10.2018 framed u/s. 143 (3) r.w.s. 144 C of the Act.

2. The substantive grounds are moved before us read as under :-

2.1. *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 sale of its goods in India and not for the purpose of creation of marketing intangible in favour of its AE, a factual position which has been accepted by Hon'ble ITAT in Appellant's own case for AY 2012-13.

3.1 That on the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO have erred in using 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 Resale Price Method ("RPM") 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.

3.2 That on the facts and circumstances of the case and in law, the Hon'ble DRP/ Ld. AO/Ld. TROThqvti 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 as the most appropriate method as selected by the Appellant.

3.7 That on the facts of the case and in law, the Ld. AO/ Ld. TPO/ Hon'ble DRP has erred in selection of functionally non-comparable companies and rejection of comparable companies, for the purpose of determination of ALP of the alleged international transaction on account of AMP on an adhoc basis, without resorting to any reasonable search methodology, thereby resorting to cherry picking of comparable companies.

3.7.1. The Ld. AO/ Ld. TPO, in particular, erred in selecting Titan Company Limited, KDDL Limited, Opal Luxury Time Products and VBL Innovations Limited as comparable companies without appreciating that such companies are manufactures vis-a-vis the Appellant who is a distributor and therefore are not functionally comparable to the Appellant.

3.7.2. The Ld. AO/ Ld. TPO, in particular, erred in rejecting MD Overseas Limited, MIRC Electronics Limited, Month Industries Limited, Beetel Teletech Limited and Optiemus Infracom Limited without giving any reason for their rejection. In doing so he has failed to appreciate that these companies, akin to the Appellant are engaged in distribution function and hence are comparable to the Appellant.

4.1. 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 INR 37,93,50,708 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 (supra) and Maruti Suzuki India Ltd (supra). 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 even if it has been challenged before a higher forum.

3. At the outset the counsel stated that the issues raised in the substantive grounds are intermingled and interlinked and stated that the issues have been decided by this Tribunal in assessee's own case in A.Y.2012-13. The counsel drew our attention to the relevant findings of this Tribunal in ITA No.344/Del/2017 order 26.05.2017.
4. The DR fairly conceded saying that he has no reservations if the order of the Tribunal is followed.
5. On such concession we have carefully perused the orders of the authorities below and the decision of this Tribunal (supra).
6. Briefly stated the facts of the case are that the appellant was incorporated in India on 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. The appellant being a closely held company 99.99 percent of its equity shares are held by Luxottica Holland.

7. The details of the international transaction entered by the assessee with its AE during the year under consideration are follows :-

S. No.	Description of the transactions	Method Applied	Amount (In INR)
i.	Import of finished goods	RPM	1,555,583,988
ii.	Payment of software licensing fee	TNMM	46,476,832
iii.	Payment of IT support charges and rental	TNMM	4,553,118
iv.	Reimbursement of expenses to AEs	Other method as per Rule 10AB	26,940,900
v.	Reimbursement of expenses of AEs	Other method as per Rule 10AB	58,23,768

8. During the course of the transfer pricing assessment proceedings the TPO was of the opinion that the AMP expenses leads to the creation of marketing intangibles. The TPO found the details of AMP/sales, GP /sales, NP/sales for last three years as under :-

Particulars	AY 2012-13	AY 2013-14	AY 2014-15
AMP/Sales %	7.90%	10.21%	9.7%
GP/Sales %	28.48%	24.41%	15.84%
NP/Sales %	1.17%	2.25%	-18.6%

9. The comparables identified and finally selected are as under :-

S.No	Name of the company	TPO's Observation
i.	Indo Bonito Multinational Ltd	This company can't be taken as comparable.
ii.	Minal Industries Ltd	This company can be taken as comparable.
iii.	Narbada Gems & Jewellery Ltd	This company can be taken as comparable.
iv.	Rajesh Exports Ltd	This company can be taken as comparable.
v.	Sunraj Diamonds Ltd	This company can be taken as comparable.
vi.	M D Overseas Ltd.	This company can't be taken as comparable.
vii.	Beetle Teletech Ltd.	This company can't be taken as comparable.
viii.	JMD Telefilms Industries Ltd.	This company can't be taken as comparable.
ix.	MIRC Electronics Ltd.	This company can't be taken as comparable.
x.	Munoth Ind. Ltd.	This company can't be taken as comparable.
xi.	Optiemus Infracom Ltd.	This company can't be taken as comparable.

Sr. No.	Name of the company	TPO Observation
1	Titan Company Ltd.	The company is functionally similar to the assessee company
2	Himalaya Optical Pvt Ltd.	The company is functionally similar to the assessee company
3	Kothari Products Ltd.	The company is functionally similar to the assessee company
4	KDDL Ltd.	The company is functionally similar to the assessee company
5	NGDA Watches Pvt Ltd.	The company is functionally similar to the assessee company
6	Opal Luxury Time Products Ltd.	The company is functionally similar to the assessee company
7	Rahul Ion-Tech Ltd.	The company is functionally similar to the

		assessee company
8	VBL Innovations Pvt Ltd.	The company is functionally similar to the assessee

13. The AMP/ sales of the final comparables are as under:

Company Name	AMP/Sales %
Minal Industries Ltd	0.00
Narbada Gems & Jewellery Ltd	0.00
Rajesh Exports Ltd	0.00
Sunraj Diamonds Ltd	0.00
Titan Company Ltd.	3.7
Himalaya Optical Pvt Ltd.	0.0
Kothari Products Ltd.	0.0
KDDL Ltd.	0.0
NGDA Watches Pvt Ltd.	0.0
Opal Luxury Time Products Ltd.	2.1
Rahul Ion-Tech Ltd.	.06
VBL Innovations Pvt Ltd.	0.0
Average	1.6**

14. The mean of the "expenditure incurred on AMP/sales" of such companies is the "bright line". Any expenditure in excess of the bright line is for the promotion of brand/trade name (which is owned by the AE) that needs to be suitably compensated by the AE. The amount which represents the bright line and the amount that should have been compensated to the taxpayer company are computed hereunder:

Value of Gross Sales	3,16,59,71,062
AMP/Sales of the Comparables	1.6%
Amount that represent bright line	50655536
Expenditure on AMP by taxpayer	30,91,24,093
Expenditure in excess of bright line	25,84,68,557

10. To the show cause notice in reference to the above the assessee replied as under :-

- (A) It has been submitted that AMP expenditure incurred by the Assessee in absence of an agreement/arrangement/understanding does not result in an international transaction under Section 92B(1) of the Act read with Section 92F(v) of the Act. It has been stated that there are no machinery provision in the Act to make adjustment in relation to the AMP expenses.
- (B) It has been stated that the Hon'ble Delhi HC in the case of Sony Ericsson Mobile Communications India Private Limited vs. CIT (supra) on AMP being regarded as international transaction does not apply to the case of the Assessee.
- (C) It has been submitted that advertising and marketing activity is a "function" performed by the Assessee as a part of its roles and responsibility as a distributor and does not constitute a separate transaction.
- (D) Assessee has stated that TPO has failed to comprehend that AMP expenditure incurred by the Assessee is for own benefit and incidental benefit, if any, arising to AE owning the brand name on account of the AMP expenditure incurred by the Assessee does not constitute separate international transaction requiring determination of ALP.
- (E) It has been stated that AMP expenses do not result in creation of an intangible asset which is owned by the AE.
- (F) Assessee has stated that even if the incurrence of excessive AMP expenditure is considered as a separate international transaction, the same has been suitably benchmarked under application of Resale Price Method ("RPM") carried out by the Assessee.
- (G) The assessee submitted that the matching of the intensities is not a prescribed comparability condition under the IT Act, 1961. The use of intensity adjustment is synonymous with bright line.
- (H) The assessee submitted that no material has been provided on record to show how the intensity of functions undertaken by the assessee does not match with the comparables.
- (I) It was submitted that the intensity adjustment would lead to re-characterization of the entity so as to force the assessee to earn margin equivalent to marketing function in addition to the routine distributor.
- (J) The assessee has stated that gross margin earned by it compensates it for the excessive AMP as gross margin is much higher than the comparables.
- (K) The assessee submitted that the primary reliance on bright line approach is erroneous.
- (L) **No direct agreement with AE for distribution functions.**
- (M) Assessee has stated that the AMP has resulted in promotion of licensed brands not owned by AE.

11. After considering the reply of the assessee the TPO concluded that the AMP expenses incurred by the assessee is an international transaction u/s.92B of the Act and within the scope of chapter 10 provision. There are statutory and machinery

provision in the Act and in the rule to make the adjustment in relation to the AMP expenses.

12. The TPO further observed that from the TP document it is seen that the assessee has used resale price method (RPM) as the most appropriate method for benchmarking its international transaction of purchase of goods from the AE for distribution in India.

13. The TPO was not convinced with the most appropriate method adopted by the assessee and was of the firm belief that TNMM is the most appropriate method providing for intensity as comparability adjustment.

14. In this background the comparables identified by the assessee were examined and TPO found that the comparables were carrying out activities which can be considered to be at the most in the nature of buy and sell. The TPO was of the firm belief that the intensity of functions carried out by assessee is very different from the comparables.

15. After considering the objections raised by the assessee against the show cause notice the list of comparables alongwith calculation of AMP/Sales ratio was taken as under :-

Company Name	AMP/Sales %
Minal Industries Ltd	0.00
Narbada Gems & Jewellery Ltd	0.00
Rajesh Exports Ltd	0.00
Sunraj Diamonds Ltd	0.00
Titan Company Ltd.	3.7
Himalaya Optical Pvt Ltd.	0.0
Kothari Products Ltd.	0.0
KDDL Ltd.	0.0
NGDA Watches Pvt Ltd.	0.0
Opal Luxury Time Products Ltd.	2.1
VBL Innovations Pvt Ltd.	0.0
Average	0.53

The amount which represents the bright line and the amount that should have been compensated to the assessee company are computed hereunder:

Particulars		Value(Rs)
Value of gross sales of assessee	A	3,16,59,71,062
Arithmetic mean of AMP/Sales of comparables	B	0.53%
Amount that represents price for routine AMP activities	$C = B * A$	1,67,79,646
Total expenditure incurred by assessee on AMP	D	37,36,81,244
Arm's Length Price of the service/expenditure for creation of marketing intangible in India in favour of the AE	$E = D - C$	35,69,01,598
Mark-up @ 15.18%	$F = 15.18\% \text{ of } E$	5,41,77,662
The amount by which the assessee company should have been reimbursed by A.E, and for which the adjustment is proposed to be made	$G = E + F$	41,10,79,260
Adjustment required to be made for creation of marketing intangibles	G	41,10,79,260

The markup is considered at 15.18%, being the same as considered in the alternative analysis discussed below.

Thus, based on the above computation, an adjustment of Rs. 411,079,260/- to the total income of the assessee on account of marketing and market development function carried out for the AE for which the assessee company was not adequately compensated is required to be carried out.

However, the benchmarking carried out above is on protective basis and in case the alternative benchmarking carried out in paras below are not acceptable by the Courts, the above benchmarking may be adjudicated upon.

16. Finally the computation arm's length price was computed as under :-

Particulars	Amount In INR
Operating Revenue	3,16,59,71,062
Arm's length margin (%)	8.72%
Arm's length margin (Rs.) @8.72%	27,60,72,676
Arm's length Price	288,98,98,386
Price paid by the assessee	339,60,00,000
International Transaction	155,55,83,988
Difference between ALP and Price charged by assessee	50,61,01,614
% of revenue with AE	45.80
Proportionate Adjustment-45.80% of Difference	23,18,26,728

17. In the background the above factual matrix let us now consider the findings of this Tribunal ITA No.344/Del/2017 for A.Y. 2012-13 :-

13. All the grounds taken by the assessee in its appeal assail the transfer pricing adjustment of AMP expenses. Ground no. 1 is general. Ground no. 2 is the main ground, with several sub-grounds. Such main

ground has been captioned as :`Transfer pricing adjustment in respect of AMP expenses'. The sub-grounds are: `No transaction much less than an international transaction'; `No arrangement/ Agreement/ Understanding/ contract with AEs'; `Erroneous approach for determining the ALP of alleged AMP expenses'; etc. etc. Though all the grounds are aimed at challenging the addition of transfer pricing adjustment on AMP transaction treated as an international transaction, we notice that the TPO has not made any separate transfer pricing adjustment for AMP expenses. In fact, the transfer pricing adjustment is only for the international transaction of `Import of finished goods', albeit, factoring in the AMP intensity adjustment in the profit rates of comparables. The Id. AR fairly accepted this position and requested for proceeding with the issue actually arising from the impugned order. The Id. DR did not raise any serious objection to it. We are, therefore, espousing the issue in the appeal *de hors* the language of separate grounds taken in the memorandum of appeal.

14. Succinctly, the facts for the year under consideration are that the assessee reported three international transactions, viz., 'Import of finished goods' amounting to Rs.81,78,20,743 and two other transactions of reimbursement to and by AEs. The Assessing Officer referred the determination of ALP of the international transactions to the TPO, who observed that the assessee benchmarked its international transaction of 'Import of finished goods' with the Resale Price Method (RPM) as the most appropriate method. The assessee claimed that the import of finished goods by the assessee was at ALP. The TPO noticed that the assessee incurred significant amount of AMP expenses and opined that the AE of the assessee was the ultimate beneficiary of such AMP expenses, as the value of the brand owned by the latter was increasing due to the marketing efforts of the assessee. The same was considered as the discharge of marketing functions by the assessee. It was thus held that the assessee was creating marketing intangibles in favour of the AE by carrying out AMP efforts in the Indian sub-continent. In this backdrop, the TPO opined that for the purpose of benchmarking, the comparables should also have equal intensities of the

expenses incurred for sales and marketing. Out of four comparable companies chosen by the assessee to benchmark its international transaction of Import of finished goods, the TPO accepted three, namely, Deep Diamonds India Ltd., Emsons Chain Ltd. and Minal Industries Ltd. On going through the financials of the above three comparable companies, the TPO noticed that they were carrying out low or negligible marketing functions. Since the comparables identified were having low intensity of marketing functions, the TPO held that a comparability adjustment was required to be made to the profits of the comparables before comparing their PLIs with the assessee for determining the ALP of the international transaction. He, therefore, made the AMP intensity adjustment in the margins of the comparables by identifying the excess intensity of expenditure incurred by the assessee on its AMP function *vis-à-vis* such comparables. Conscious of the fact that the Hon'ble Delhi High Court has rejected the contention of the Revenue on the applicability of the bright line test and the consequent determination of separate ALP of the AMP expenses, the

TPO adopted this alternative approach in this year, which has been outlined on page 42 of his order as under:-

- “The taxpayer’s selling, marketing and promotion expenses were determined as a percentage of sales – Intensity of expenses incurred by taxpayer.
- Companies which were comparable with the taxpayer were identified.
- Selling, marketing and promotion expenses as a percentage of sale of such comparable companies were determined – Intensity of expenses incurred by comparable companies
- The intensity of expenses of taxpayer was compared with the intensity of expenses of comparable.
- The excess intensity of expenses in taxpayer’s expenses as compared to the intensity of comparable was considered as excessive AMP expenditure considered by the taxpayer. ”

15. The assessee claimed before the TPO that out of total AMP expenses incurred by it to the tune of Rs.13.01 crore, only the AMP

expenditure incurred on in-house brands of Luxottica Group i.e. Rs.11.55 crore, should be considered for the purposes of benchmarking. This contention was accepted and the TPO carried out the excess AMP intensity adjustment in the profit margins of the comparables and computed their average reselling margin at 6.03%. By applying such average adjusted margin, the TPO proposed transfer pricing adjustment amounting to Rs.4,25,51,845/-. The assessee's contention for allowing (+)/(-) 5% was accepted in principle, but, found, on the factual application, to be not sending the case out of the transfer pricing addition. The assessee unsuccessfully challenged the TPO's order before the DRP. In the final order passed by the Assessing Officer on 13.12.2006, a transfer pricing addition of Rs.4.25 crore and odd was made. The assessee is aggrieved against the addition.

16. We have heard the rival submissions and perused the relevant material on record. It is noticed that there is a significant departure from the course of action adopted by the TPO in this year *vis-à-vis* the earlier years. Whereas up to the assessment year 2011-12, the TPO was

treating AMP expense as a separate international transaction and determining its ALP independently, in this year, such a line of action has been dispensed with. Treating the marketing activity as a function performed by the assessee as a part of its role and responsibility as a distributor, the TPO has not treated AMP expense as a separate international transaction. Instead, he made AMP intensity adjustment to the profit rates of the comparables for bringing the intensity of AMP functions of the assessee at par with theirs in computing the ALP of the international transaction of Import of goods. This view of treating AMP as a function has been taken by considering the judgment of the Hon'ble jurisdictional High Court in the case of *Bausch & Lomb Eyecare India Pvt. Ltd. and Ors. Vs. Addl.CIT and Ors. (2016) 381 ITR 227 (Del)* in which it has been held: "that a distinction is required to be drawn between 'a function' and 'a transaction' and that every expenditure forming part of the function cannot be construed as a transaction." We are satisfied with the view taken by the TPO in this regard, which is also supported by the judgment in *Sony Ericsson (2015) 374 ITR 118 (Del)* in which it has been observed in para 166 that : `On behalf of the assessee,

it was initially argued that the TPO cannot account for or treat AMP as a function. This argument on behalf of the assessee is flawed and fallacious for several reasons. There are inherent flaws in the said argument'. Then, it has been held in para 165 that : '*An external comparable should perform similar AMP functions.... Comparable analysis of the tested party and the comparable would include reference to AMP expenses*'. The Id. AR has not raised any objection, and rightly so, to the carrying out of the AMP intensity adjustment to the profit rates of the comparables, as the same is in accordance with the view of the Hon'ble jurisdictional High Court. It will be seen *infra* that his objection is confined only to the computation of the amount of transfer pricing adjusting by using the ratio for apportionment of the excess cost incurred by the assessee over and above arm's length cost. Coming back, the TPO carried out the AMP intensity adjustment in the profit rates of the comparable as under :-

TABLE-A

Name of the company		Deep Diamond India Limited	Emsons Chain Limited	Minal Industries Limited	Luxottica India Eyewear Private Limited
Total Operating Revenue	A	3,22,16,619	1,19,85,019	1,01,41,00,364	2,14,01,47,987.00
Cost of Materials Consumed	B	2,81,30,612	56,88,354		
Purchase of Stock in Trade	C	58,89,612	17,74,997	1,31,76,42,609	1,67,00,45,000
Add .Change Inventory	D	(1,10,93,726)		(34,03,12,253)	(5,91,20,985)
Direct Cost	E=B+C+D	2,29,26,498	74,63,351	97,73,30,356	1,61,09,24,015
Gross Profit	F=A-E	92,90,121	45,21,668	3,67,70,008	52,92,23,972
Employee expenses	G	9,57,087	22,49,316	6,04,703	10,48,67,204
AMP Cost	H	-	-	73,395	13,01,81,750
Other Expenses	I	52,05,279	18,25,730	68,71,888	24,88,49,373
Total Indirect Cost	J=G+H+I	61,62,366	40,75,046	75,49,986	48,38,98,327
Total Operating Cost	K=E+J	2,90,88,864	115,38,397	98,48,80,342	2 09,48,22,342
Net Profit	L=A-K	31,27,755	4,46,622	2,92,20,022	4, 53,25,645
GP/Sales	M=F/A	28.84%	37.73%	3.63%	24.73%
NP/Sales	N=L/A	9.71%	3.73%	2.88%	2.12%
AMP for in-house brands	=115,516,314/ A				5.40%
AMP/Sales	O=H/A	0.00%	0.00%	0.01%	5.40%
Difference In Intensity of AMP	P=5.40%-O	5.40%	5.40%	5.39%	
Difference in Cost	Q=P*A	17,38,920	6,46,902	5,46,63,538	
Adjusted Cost	R=K+Q	3,08,27,784	1,21,85,299	1,03,95,43,880	
Adjustment in sales	S=1.1817*Q	20,54,881	7,64,444	6,45,95,902	
Adjusted sales	T=A+S	3,42,71,500	1,27,49,463	1,07,86,96,266	
Adjusted profit	U=T-R	34,43,717	5,64,164	3,91,52,387	
Adjusted OP/OR	V=U/T	10.05%	4.43%	3.63%	
Average Margin		6.03%			

17. It can be seen from the above Table that the TPO has carried out AMP intensity adjustment in the profit margins of the comparables and that is how the adjusted average margin of the comparables has been computed at 6.03%. This exercise done by the TPO has not been disputed by the assessee. The Id. AR challenged the computation of ALP of the international transaction of import of finished goods determined by the TPO as under:-

TABLE-B

Computation of Arm's Length Price (in INR)	
Total Revenue	2,14,01,47,987
Arms Length Margin (OP/OR)	6.03%
Arms Length Cost	2,01,10,04,721
Actual Cost incurred	2,09,48,22,342
Difference in cost	8,38,17,621
International Transaction	81,78,20,743
Purchase of traded goods and change in inventories	1,61,09,24,015
Proportionate	50.77%
Proposed Adjustment	4,25,51,845

18. The above computation of ALP shows that the total revenue of the assessee is Rs.214.01 crore. Arm's length margin of 6.03% has been applied on this figure of the revenue for computing the arm's length cost at entity level, in backward manner, at Rs.201.10 crore. As against such

arm's length cost, the assessee actually incurred cost of Rs.209.48 crore, leading to the payment of excess differential cost to the tune of Rs.8.38 crore on entity level. We can find from the last column of the Table A that the total direct cost of Material (finished goods) incurred by the assessee at the entity level is Rs.161.09 crore. This direct cost of material comprises of two figures, viz., the purchase of stock-in-trade from AEs and non-AEs as adjusted due to opening and closing inventory. Purchase of Material from the AE, being the international transaction, stands at Rs.81.78 crore. Thus, it is clear that out of total direct cost of Material incurred by the assessee to the tune of Rs.161.09 crore, the value of international transaction of purchase of Material is Rs.81.78 crore. The TPO apportioned the entity level excess cost incurred by the assessee over and above the arm's length cost, to the international transaction by multiplying it with the cost of Material purchased from AE and dividing it with the total cost of Material consumed, purchased from AEs and non-AEs. That is how, he proposed transfer pricing adjustment of Rs.4.25 crore by multiplying the entity level cost over and above the arm's length cost (Rs.8.38 crore) with the

21
21/11/2017

value of international transaction of purchase of Material (Rs.81.78 crore) and dividing it with the total cost of Material consumed, namely, purchased from AEs and non-AEs (Rs.161.09 crore). The Id. AR has objected only to the use of denominator as the total cost of Material consumed (Rs.161.09 crore). He contended that, instead, the denominator should have been total operating costs (Rs.209.48 crore) which, apart from the cost of Material also include Employees cost, AMP cost and other indirect costs. This argument is fallacious inasmuch as it seeks to do apportionment by taking only the purchase cost of Material from AE (to the exclusion of the proportionate indirect costs) as numerator and total purchase cost of Material consumed from AEs and non-AEs (including all the indirect costs) as denominator. Such a basis is totally illogical. Components of the numerator and denominator have to remain same. There cannot be item-wise difference in the composition of the two. If the numerator has only the purchase cost of Material from AEs, then the denominator should also have only the purchase cost of Material consumed from AEs and non-AEs. As the numerator in the instant case is the purchase cost of Material from the

AE, which is not disputed by the assessee, then as a natural corollary, the denominator cannot be any figure other than the purchase cost of Material consumed purchased from AEs and non-AEs. If we accept the view buttressed by the Id. AR and proceed with restricting the numerator as the purchase cost of Material from the AEs and extend the denominator also to other indirect costs, the result will obviously be distorted. Such a contention advanced on behalf of the assessee is aimed at expanding the denominator to the maximum possible extent so that the amount of the resulting transfer pricing addition, from the total excess cost over the arm's length cost attributable to international transaction of purchase of Material, could be reduced. We cannot countenance it. As such, we hold that the TPO has taken an unimpeachable view in making apportionment of the excess cost incurred on entity level to the international transaction.

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.

14. Respectfully following the findings of the coordinate bench (supra) we direct accordingly.

15. In assessment year 2013-14 this Tribunal in ITA No.126/Del/2018 led the occasion to consider the quarrel relating to the use of BLT approach for computing transfer pricing adjustment on a protective basis. The relevant findings of this Tribunal read as under :-

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/-.

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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:

On Substantive Basis			
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

On Protective Basis			
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.

16. Respectfully following the findings of the coordinate Bench (supra) we hold accordingly.

17. It would not be out of place to refer to the order giving appeal effect to the decision of the Tribunal in A.Y. 2012-13. After discussing the various findings of the Tribunal the AO concluded as under :-

8. Hon'ble ITAT has set-aside the instant proceedings to the file of AO/TPO to finalize the matter afresh in pursuance to the directions given by the Co-ordinate Bench for the A.Y. 2009-10 in ITA No. 1115& 617/Del/2014 order dated 06.06.2016 wherein Ld. TPO has passed consecutive resultant order u/s 92CA r.w.s. 254 of the Act on 30/10/2018 revising original adjustment at Rs. NIL.

9. For the year under consideration, Hon'ble ITAT has already stated that RPM was the most appropriate method in preference over the TNMM adopted by the TPO as well as application of RPM has been finally approved for the A.Y. 2009-10.

10. In view of the above judicial pronouncements, functional and economic analysis of the taxpayer and facts of the instant case, the original adjustment on AMP made earlier by the TPO is revised to Rs. NIL in respect of the 'International Transactions' related to AMP expenses undertaken by the assessee during the F.Y. 2011-12.

18. The counsel has also argued that the TPO has erroneously taken certain comparables which are manufacturer and the appellant is only a distributor, therefore, such comparables are functionally different.

19. We direct the AO/ TPO to consider the comparables which are akin to the business profile of the assessee and decide the issue afresh after affording a reasonable and fair opportunity of being heard to the assessee.

20. In the result, the appeal filed by the assessee is allowed with the above directions.

21. Decision announced in the open court in the presence of both the parties on 27.01.2022.

Sd/-
[SAKTIJIT DEY]
JUDICIAL MEMBER

Sd/-
[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: .01.2022

Neha

Copy forwarded to:

1. Appellant
2. Respondent
3. CITi
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 file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	