IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'I-1' : NEW DELHI)

BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.9714/Del/2019
(Assessment Year : 2015-16)

M/s. MSD Pharmaceuticals Private Limited 1544, Level-15, Eros Corporate Tower, Nehru Place, New Delhi-110019 PAN : AAECM1106C	Vs.	Assistant Commissioner of Income Tax, ADL/JCIT, Special Range-6 New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Ms. Rashmi Chopra, Adv.
Revenue by	Shri Surender Pal, CIT (DR)

Date of hearing:	31.05.2022
Date of Pronouncement:	08.06.2022

ORDER

PER ANUBHAV SHARMA, JM:

The appeal has been filed by assessee against the assessment order dated 30.10.2019 for assessment year 2015-16 passed by ACIT, ADL/JCIT Special Range-6, Delhi u/s 143(3)/144C(13) of the Income Tax Act, 1961, in pursuant to the directions of Dispute Resolution Panel-2, New Delhi.

2. Facts before this Bench are that the assessee company is a part of Merck group. It is engaged in import and resale of pharmaceutical products in the Indian market (including vaccines) developed by the Merck group. It filed return of income on 28.11.2015 declaring total income of Rs 67,01,81,320/-. The case was selected for scrutiny. Accordingly, notice u/s 143(2) of the Act dated 30.08.2016 was sent to the assessee.

2.1 During the year under consideration, the assessee company has entered into transactions with associated enterprises. Therefore, a reference was sent by the Assessing Officer to Transfer Pricing Officer for determining the 'arms' length price' u/s 92CA(3) in respect of 'international transactions' entered into by the assessee during the AY. 2014-15.

2.2 Finalizing the TP proceedings, the TPO has passed an order u/s 92CA(3) of the Income Tax Act, 1961 on 26.10.2018 proposing the substantive adjustment amounting to Rs. 22,28,05,068/- following RPSM and protective adjustment of Rs. 37,47,33,203/- following BLT on account of marketing and market development (AMP) function carried out for the AE. Apart from this TPO proposed Adjustment of Rs. 82,97,774/-, on account of support services. TNMM was also applied by the TPO for benchmarking of Support Service Segment rejecting assessee's approach under CPM method.

2.3 Accordingly a Draft Order computing the taxable income of the assessee company at Rs. 90,12,84,160/- under section 143(3) r.w.s. 144C dated 19.12.2018 was forwarded to the assessee.

2.4 The assessee filed its objections against the Draft Order under section 144C of the Act before the Dispute Resolution. The Dispute Resolution vide

order dated 19.09.2019 received by Ld. AO on 30.09.2019, has issued directions under section 144C(5) of the Income-tax Act, 1961.Based on same order giving effect to the directions of DRP was passed to the following effect, by TPO on 17/10/2019 and Transfer Pricing adjustment of Rs. 36,93,24,653/- was added to the income of the assessee with following observations;.

> *" Following the direction of Ld. DRP revised Computation is hereby computed as above where original adjustment of Rs. 22,28,05,068/- on intensity approach to benchmark AMP Expenses is recomputed to Rs. Nil. Whereas original adjustment of Rs. 37,47,33,203/- on BLT approach is recomputed at Rs. 36,93,24,653/-. In view of the above revised computation, the adjustment of Rs. 36,93,24,653/- (Proposed on BLT approach) is taken as substantive and adjustment under the head support service revised to Nil following the Ld. DRP Direction...."*

The total adjustments made in this case were tabulated as below :

S. No.	*Nature of transactions*	*Adjustment u/s 2CA (Rs.) as proposed vide original TP order dated 26.10.2018*	*Adjustment u/s 92CA (Rs.) as proposed vide TP appeal effect order dated 17.10.2019*
1.	*AMP*	*37,47,33,203**	*36,93,24,653*
2.	*AMP*	*22,28,05,068*	*Nil*
3.	*Support services*	*82,97,774*	*Nil*
Total adjustment u/s 92CA		***23,11,02,842***	***36,93,24,653***

****Protective addition***

> *4. In view the above, the Ld AO assessed income of the assessee company with following recomputation:*

	Income as per return of income	*Rs. 67,01,81,320/-*
Add.	*Transfer Pricing Adjustment (as discussed in para 3 above)*	*Rs. 36,93,24,653/-*
	Total income	*Rs. 103,95,05,973/-*
	Rounded off	*Rs. 103,95,05,970/-*

3. Assessee has come in appeal raising following grounds :

That on facts and circumstances of the case and in law:

1. *The Learned ('Ld.') Assessing Officer ('AO') / Transfer Pricing Officer ('TPO') / Hon'ble Dispute Resolution Panel ('DRP') erred in determining the total income of the Appellant at Rs.1,03,95,05,970 as against Rs.67,01,81,320 reported by the Appellant in the return of income.*

Transfer Pricing issues

2. *The Ld. AO/ TPO/ Hon'ble DRP grossly erred, both in facts and in law, in enhancing the income of the Appellant by Rs. 36,93,24,653 on account of non-receipt of income for "allegedly excessive" AMP expenses incurred by the Appellant.*

3.1. *The Ld. AO/ TPO/ Hon'ble DRP erred in assuming jurisdiction in respect of the AMP expenditure when such expenditure did not satisfy the requisites of being an international transaction under Section 92B read with Section 92F(v) of the Act.*

3.2. *The Ld. AO/ TPO/ Hon'ble DRP erred in not appreciating that expenditure incurred by the Appellant was on account of sales activity and, could not be regarded as a 'transaction' in absence of any understanding/ arrangement between the Appellant and that associated enterprise (AE) for the promotion of brand and therefore cannot be termed as an 'international transaction' between the Appellant and the AE.*

3.3. *The Ld. AO/ TPO/ Hon'ble DRP erred in not holding that the existence of international transaction in respect of AMP has to be seen through the prism of 'conduct of the parties' and the ownership of IPR(s) and their usage.*

3.4 The Ld. AO/ TPO/ Hon'ble DRP erred in re-characterizing the unilateral AMP expenditure being payments made by Appellant to independent third parties as an 'international transaction', in the absence of any material on record and/or any power under Chapter X of the Act.

3.5 The Ld. AO/ TPO/ Hon'ble DRP erred in failing to

appreciate the fact that the Appellant operates in the pharmaceutical industry which is a highly regulated industry which prohibits the Appellant from undertaking any kind of advertising campaign to promote its products as alleged by the Ld. AO / TPO / Hon'ble DRP and that the alleged AMP expenses relate to medical detailing expenses, disease awareness campaigns etc.

3.6 The Ld. AO/ TPO/ Hon'ble DRP erred in holding that the Appellant is adding value to the products sold in India by incurring AMP expenses without appreciating the fact that AMP expenses incurred by the Appellant are primarily for the purpose of selling the products and not towards brand building activity and is interlinked and interconnected to the distribution business of the Appellant.

3.7 The Ld. AO/ TPO/ Hon'ble DRP erred on facts and in law in not appreciating that the AMP expenses are incurred by the Appellant at its own volition for its own benefit and any benefit accruing to the AE is incidental for which no compensation is warranted.

3.8 The Ld. AO/ TPO/ Hon'ble QRP erred in wrongly assuming that the Appellant is operating under directions and for the purposes of the AE.

3.9 The Ld. AO/ TPO/ Hon'ble DRP erred in applying Bright Line Test (BLT) for computing adjustment on account of expenditure on AMP on protective basis without appreciating that in absence of specific provision under the Transfer Pricing regulations in India, an adjustment on account of the arm's length price of AMP expenses could not be made.

3.10 The Ld. AO/ TPO/ Hon'ble DRP erred in applying BLT against the binding precedent as laid down by the Hon'ble Delhi High Court in case of Sony Ericson Mobile Communications [374 ITR 118 (Del)] and Appellant's own case in previous assessment years.

3.11 The Ld. AO/ TPO/ Hon'ble DRP erred in not appreciating that 'bright line limit' is not a prescribed method under the purview of section 92C of the Act.

3.12 The Ld. AO/ TPO/ Hon'ble DRP erred not appreciating that Transactional Net Margin Method (TNMM) analysis included AMP expenses and could not be benchmarked and adjusted as a part of the adjustment pertaining to marketing

intangibles.

Notwithstanding and without prejudice to the above grounds, the Appellant craves to raise following grounds on merits:

3.13 The Ld. AO / TPO / Hon'ble DRP erred in not granting set-off of excess profit from distribution of products while benchmarking the alleged international transaction of incurrence of excessive AMP expenditure as has been held by the Hon'ble Delhi High Court in the case of Sony Ericson Mobile Communications [374 ITR 118(Del)].

3.14. The Ld. AO/ TPO/ Hon'ble DRP erred in not appreciating that the Appellant has not provided any value added/ brand building services to its AE by incurring AMP expenditure, and therefore, no mark-up could have been charged/ levied on such expenditure, even if the same was to be characterized as an 'international transaction'.

3.15. *Notwithstanding and without prejudice that no mark-up could have been levied, the Ld. AO/ TPO/ Hon'ble DRP erred in applying an ad-hoc mark-up of 12.15% on allegedly excess AMP expenses incurred by the Appellant by selecting improper comparable companies for application of mark-up, being entities providing market support functions.*

3.16. *The Hon'ble DRP erred in not directing Ld. AO / TPO to exclude the selling and distribution expenditure from the quantum of alleged excessive AMP expenditure while benchmarking the alleged international transaction using substantive and / or protective methods, which is against the binding principles of the Hon'ble High' Court in case of Sony Mobile Communications [374 ITR 118(Del)] and various other cases.*

3.17. *The Ld. AO/ TPO/ Hon'ble DRP erred in giving an erroneous finding of using comparables selected by the Ld. TPO, which are, neither functionally comparable, nor into similar business activities to benchmark the AMP expenses of the Appellant.*

3. ***Penalty proceedings under section 271(l)(c) of the Act***

The Ld. AO erred in holding that the Appellant has furnished inaccurate particulars of its income and initiated penalty

proceedings under section 271(l)(c) of the Act.

4. ***General***

Each one of the above grounds of appeal is without prejudice to one another.

The Appellant craves leave to add to, alter, amend, vary, withdraw or substitute all or any of the grounds of appeal or add a new ground or grounds of appeal at anytime before or at the time of hearing of the appeal."

4. Heard and perused the record.

5. During the course of arguments, ld. Counsel appearing for the assessee submitted at Bar that although the appeal has been filed against the addition of Rs. 36,93,24,653/- in respect of ALP adjustment made on protective basis by applying BLT and appellant has filed various grounds against this addition however, given the main ground of contention being use of BLT approach by the TPO the other grounds are not being pressed upon. It was further submitted that as such the issue that survive are covered by ground no. 2 read with 3.9 and 3.10.

5.1 The Ld. Counsel submitted that application of BLT to the facts and circumstances on account of marketing and market development functions carried out for the AE is not sustainable as held in appellant's own case for the assessment year 2013-14 and further reliance was also placed on decision of Hon'ble Delhi High Court in case of **Sony Ericsson Mobile Communications** India Pvt. Ltd. vs. Commissioner of Income Tax - III, (2015) **374 ITR 118** (**Delhi**).

6. Now it can be observed from the matter on record that the Ld. TPO has observed in para 13.1

"13.1 Benchmarking of AMP expenditure - Bright line concept (Protective Adjustment)

As far as the primary reliance of this office on segmentation estimating the segregation of routine promotional expenditure for purchase resale of products from the expenditure on marketing and market development service to the AE termed as brightline approach is concerned, it has already been discussed in great details in the order above that the Revenue Department has proposed a SIP before the Hon'ble Supreme Court of India. The assessee has pointed out that the rejection of stay by the Hon'ble Supreme Court was limited to the objection of the assesse on the existence of the international transaction and the same was not on the rejection of brightline. The assessee has not produced any order of the Hon'ble Court which has led It to believe so. Since the judgment of the Hon'ble High Court has not been stayed and in view of the objections of the Revenue to the judgement in the case of Sony Ericsson coupled with the fact of proposing an SLP on this issue, the contention to not consider Brightline analysis as primary method is not found acceptable. Moreover this method is in accordance with the provisions of rule 10AB as already discussed in details above. Keeping alive such stand of the revenue, benchmarking of International transaction for marketing and development of market services for the AE is carried out as under:"

7. The Ld. DRP in para 2.3.1 of his order has observed as follows -:

"2.3.1 All these objections relate to the adjustment made by the TPO following BLT on protective basis by re-characterising the AMP spend as international transaction, determine the cost of the AMP spend following BLT and adding mark-up for marketing functions, and also with regard to the inclusion of sales, trade discount, rebates etc. in the AMP cost by the TPO. We have already upheld the treatment of the AMP spend as international transaction herein above. Though in Sony Ericsson Mobile Communications India (P.) Ltd. ***v.*** *Commissioner of Income-tax -III [2015] 55 taxmann.com 240 (Delhi) the Hon'bie Delhi High Court has disapproved the bright line test for finding out the cost/value of international transaction as well as directed exclusion of sales, trade discount, rebates etc. from the AMP cost, the Hon'bie Delhi High Court (supra) has not been accepted and SLP has been*

filed before the Hon'bie Supreme Court with regard to validity of Bright Line test as also on excluding selling and distribution expenses, discount and rebates, and other sales promotion expenses to the expenses relating to marketing intangibles for the brand owned by the AE."

8. However, as a matter of fact in assessee's own case for the assessment year 2013-14, ITA No. 6565/Del/2017 it was held in para no. 8 as follows :-

"So far as the question of set off of the brought forward business losses is incurred, learned representatives fairly agree that the matter is required to be remitted to the file of the Assessing Officer for fresh adjudication in the light of the result of the appellate proceedings in respect of the preceding assessment years in which the related disputed additions have been made. It is pointed out by the learned counsel that, in any event, the assessee has claimed set off of the loss of Rs 26,25,85,933/- incurred in the assessment year 2012-13 which could not have been set off for the prior years, and the only year following the said assessment year is the year before us. It is also pointed out that the ALP adjustment, in respect of AMP expenses by applying the bright line test (BLT), which is now decided in favour of the assessee. While learned Departmental Representative did not really address on all these aspects, he fairly agreed to our suggestion that the matter is required to be examined afresh by the Assessing Officer in the light of outcome of the appellate proceedings for the other assessment years as also by way of a speaking order dealing with the specific contentions of the assessee. In the light of this undisputed position within a narrow compass of material facts, we remit the matter to the file of the Assessing Officer for fresh adjudication in the light of our above observations. We also direct the assessee to fully cooperate with the Assessing Officer in expeditious disposal of the remanded proceedings. Ordered, accordingly."

9. Further in assessment year 2014-15, ITA No. 7569/Del/2018 the Co-ordinate Benche's order in ITA No. 6565/Del/2017 has been followed.

10. As the matter of fact, the revenue's appeal against the order dated 07.03.2019 in ITA No. 7569/Del/2018 for assessment year 2014-15 has been dismissed vide ITA No. 891/2019 order dated 11.10.2019 by Hon'ble High Court wherein it is observed by Hon'ble Delhi High Court.

> *"The Department has preferred the present appeal to assail the order dated 07.03.2019 passed by the Income Tax Appellate Tribunal (ITAT) Delhi Bench: I-l', New Delhi in ITA No. 7569/Del/2018 in respect of the respondent assessee for the assessment year 2014-15. The Transfer Pricing Officer had sought to apply the Bright Line Method for determination of the price adjustment on protected basis since this Court has already rendered its decision in the case of Sony Ericsson Mobile Communications India Private Limited Vs. Commissioner of Income Tax, (2015) 374 ITR 118.*
>
> *Considering the fact that this Court has already rendered its decision in* ***Sony Ericsson*** *(supra) rejecting the adoption of the Bright Line Method by the TPO, in our view, the Assessing Officer could not have proceeded to make the protective assessment by applying the Bright Line Method.*

11. The Ld. DR could not cite any factual distinction or different proposition of law then followed in the assessee's own case for aforesaid previous years. Consequently the grounds pressed and argued, no. 2 read with 3.9 and 3.10 are sustained and **appeal is allowed** and the adjustment of Rs. 36,93,24,653/- proposed on BLT approach is set aside.

Order pronounced in the open court on 8th June, 2022**.**

Sd/-	Sd/-
(SHAMIM YAHYA)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:- 8th .06.2022

Binita, SR.P.S

Copy forwarded to:

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3. CIT
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ASSISTANT REGISTRAR
ITAT, NEW DELHI