

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No. 206/Bang/2021
Assessment Year : 2016-17

M/s. Epson India Pvt. Ltd., 12 th Floor, The Milenia, Tower A, No. 1, Murphy Road, Ulsoor, Bangalore – 560 008. PAN: AAACE7858F	Vs.	The Deputy Commissioner of Income Tax, Circle 2 (1)(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Padamchand Khincha, CA
Revenue by	:	Dr. Manjunath Karkihalli, CIT DR

Date of Hearing	:	15-06-2022
Date of Pronouncement	:	14-07-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against the final assessment order dated 25/03/2021 passed by National e-assessment Centre, Delhi for A.Y. 2016-17 on following grounds of appeal:

“GENERAL GROUND

1. The Orders passed by learned Additional / Joint / Deputy / Assistant Commissioner of Income Tax / Income-tax Officer, National e-Assessment Centre (hereinafter referred as "AO" for brevity), learned Deputy Commissioner of Income Tax (TP) — 1(2)(1), Bangalore (hereinafter referred as "TPO" for brevity) and the Honourable DRP-1,

Bengaluru ("AO", "TPO" and DRP collectively referred as "lower authorities" for brevity) are bad in law and liable to be quashed.

GROUNDNS RELATING TO TRANSFER PRICING — LEGAL ISSUES

2. The learned AO has erred in:

a) Making a reference for the determination of the Arm's Length Price of the international transactions to the TPO without demonstrating as to why it was necessary and expedient to do so.

b) Passing the order without demonstrating that the Appellant had any motive of tax evasion.

c) Not appreciating that there is no amendment to the definition of "income" and the charging or computation provision relating to income under the head "Profits & Gains of Business or Profession" do not refer to or include the amounts computed under Chapter X and therefore addition made under Chapter X is bad in law.

GROUNDNS RELATING TO TP ADJUSTMENT WITH RESPECT TO ADVERTISEMENT, MARKETING, PROMOTION ('AMP') EXPENSES

3. The lower authorities have erred in making transfer pricing adjustment of Rs. 33,95,60,000/- towards AMP expenses.

4. The lower authorities have erred in:

(i) Not appreciating that the Appellant had incurred AMP expenses with third parties and there was no transaction with the Associated Enterprise ("AE")

(ii) Concluding that there exists international transaction between the Appellant and its AE. In the facts and circumstances of the case, there exist no international transaction of AMP in the case of the Appellant.

(iii) Selecting inappropriate comparables for computing non-routine AMP even though they are not comparable in terms of functions performed, assets utilized, risks assumed etc.

(iv) Not appreciating that the alleged transaction of enhancement of marketing intangibles is closely linked to other international transactions in the distribution segment and when done so, it is discernable that an appropriate quantum of profits is offered to tax in India.

v) Not appreciating that the premium profits in the distribution segment compensates more than any excess AMP expenses incurred by the Appellant.

vi) Not appreciating once the net profit margin is tested on the touchstone of arm's length price under TNMM, it pre-supposes that the various components of income and expenditure considered in the process of arriving at the net profit are also at arm's length

5. *With respect to direct sales made by the AE to the customers in India, the lower authorities have erred, in law and in facts in not appreciating the business/commercial expediencies of the arrangement, the minimal quantum of such sales and also the fact that even in respect of such sales the Appellant is adequately compensated.*

6. *The lower authorities have erred, in law and facts, by:*
(i) Concluding that marketing network constitutes intangible asset which benefits the AE of the Appellant without appreciating the factual position, business and commercial realities.

(ii) Considering certain pure selling expenses as part of AMP expenses, thereby resulting in adopting incorrect base for computing AMP;

(iii) Adopting other method prescribed under Rule 10AB as the most appropriate method;

(iv) Adopting incorrect AMP ratio of the Comparables;

(v) Selecting the following companies as comparables to compute mark-up, which are not appropriate comparables to benchmark the alleged international transaction of enhancing the marketing intangibles:

- *Ugam Solutions Pvt. Ltd.*
- *Killick Agencies and Marketing Ltd.*
- *Majestic Research Services & Solutions Ltd.*
- *Scarecrow Communications Ltd.*

(vi) Charging mark-up on excess AMP expenses, which is not supported by any provision under the Act or Rules.

7. *Without prejudice to above, the learned TPO has erred in rejecting Quadrant Communications Ltd as a comparable.*

8. *Without prejudice to above, the learned TPO has erred in incorrectly computing the operating profit margins in case of the comparables selected by him.*

9. *The Hon'ble DRP has erred in upholding the action of the TPO/ AO of segregating the AMP expenses incurred by the Appellant into routine and non-routine and observing that non-routine AMP expenditure is towards Development, Enhancement, Maintenance, Protection and Exploitation ("DEMPE") functions requiring compensation from AE without placing any evidence on record to demonstrate that there is a transaction as envisaged in section 92F(v) of the Act.*

GROUND'S RELATING TO TP ADJUSTMENT WITH RESPECT TO BUSINESS SUPPORT SERVICES SEGMENT

10. *The lower authorities have erred in making transfer pricing adjustment of Rs. 20,54,912/- for the business support services segment.*

11. *The lower authorities have erred in:*

(i) Rejecting comparables selected and the TP analysis undertaken by the Appellant on unjustifiable grounds. The lower income tax authorities have erred in rejecting following companies selected as comparables by the Appellant:

- Priya International Ltd*
- ICRA Management Consulting Services Ltd*
- MCI Management (India) Ltd*
- Concept Public Relations India Ltd.*

(ii) Conducting a fresh TP analysis despite absence of any defects in the transfer pricing analysis submitted by the Appellant.

(iii) Adopting inappropriate filters like persistent loss making, RPT filter etc. in the process of selecting comparables.

(iv) Selecting inappropriate comparables and selecting companies as comparables even though they are not comparable in terms of functions performed, assets utilized, risks assumed, size, have unusual business circumstances, high margin, etc. The lower income tax authorities have erred in adopting the following companies as comparables:

- Ugam Solutions Pvt. Ltd.*
- Killick Agencies and Marketing Ltd.*
- Majestic Research Services & Solutions Ltd.*
- Scarecrow Communications Ltd.*

12. Without prejudice to above, the learned TPO has erred in rejecting Quadrant Communications Ltd as comparable.

13. Without prejudice to above, the learned TPO has erred in incorrectly computing the operating profit margins in case of the comparables selected by him:

14. The lower authorities have erred in:

(i) Not making proper adjustment for enterprise level and transactional level differences between the Appellant and the comparable companies:

(ii) Not providing working capital adjustment while computing the Arm's length price; and

(iii) Not recognizing that the Appellant was insulated from risks, as against comparables, which assume these risks and therefore have to be credited with a risk premium on this account.

OTHER GROUND

15. The lower authorities have erred in levying interest under section 234B of the Act amounting to Rs. 5,18,94,900/-. On the facts and in the circumstances of the case, interest under section 234B is not leviable, being consequential in nature. The Appellant denies its liability to pay interest under section 234B.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly.”

2. Brief facts of the case are as under:

2.1 Assessee is engaged in the business of distribution of Epson products like printers, cartridges, scanners, projectors, spares and other consumables. It filed its return of income for year under consideration on 29/11/2016 declaring total income of Rs.56,33,01,500/-. The case was selected for scrutiny and notice u/s. 143(2) and 142(1) of the Act was issued to assessee. In response, assessee filed relevant details as called for.

2.2 The Ld.AO noted that, the assessee had international transaction with its wholly owned company being Epson Singapore Pte Ltd. The Ld.AO noted that the assessee is engaged in the distribution of the products of its AE in India. As the value of international transaction exceed Rs. 15 Crores, reference was made to the Ld.TPO under 92CA of the Act. On receipt of the 92CA reference, the Ld.TPO called upon assessee to furnish economic details of the international transaction between assessee and the AE. The Ld.TPO noted that following were the international transaction reported in Form 3CEB.

S. No.	Transaction	Total Amount
1.	Purchase of traded goods	844,23,34,121
2.	Sale of products	151,59,147
3.	Commission received	1,34,80,501
4.	Technical charges paid	2,88,74,478
5.	License fees paid	18,37,619

6.	Business Support Services	3,09,12,719
7.	Reimbursement of expenses incurred by AEs on Epson India's behalf	3,51,69,479
8.	Recovery of expenses incurred on behalf of AEs	6,52,56,491

2.3 The Ld.TPO was of the view that, the assessee did not confine itself just to distribution of trading goods, but also performed additional functions in the form of advertisement, marketing and sales promotion. The Ld.TPO was of the view that, the assessee has not been adequately compensated for such additional functions undertaken by it on behalf of the AE. The Ld.TPO thus held that, the assessee incurred huge expense towards marketing and promotion activities as under.

Particulars	AY 2016-17
Advertisement expenses	357,669,526
Sales promotion	288,704,661
Total	646,374,187

2.4 The Ld.TPO issued show cause notice to assessee proposing transfer pricing adjustment with a markup of 17.75% being the average PLI, by using OP/OC. The 9 uncontrolled comparables selected by the Ld.TPO are as under:

SI. No.	Company Name	Industry group	Main product/service group	Average op/oc
1	Quadrant Communications Ltd.	Business services & consultancy	Advertising	-0.34%
2	Esha Media Research Ltd.	Business services & consultancy	Market research & public opinion polling	-1.60%

3	Goldmine Advertising Ltd.	Business services & consultancy	Advertising	5.94%
4	Pressman Advertising Ltd.	Business services & consultancy	Advertising	12.99%
5	Ugam Solutions Pvt. Ltd.	Business services & consultancy	Market research & public opinion polling	17.75%
6	Majestic Research Services & Solutions Ltd.	Business services & consultancy	Market research & public opinion polling	20.94%
7	Killick Agencies & Mktg. Ltd.	Other miscellaneous services	Commission agents services	20.99%
8	Scarecrow Communications Ltd.	Business services & consultancy	Business services & consultancy	23.12%
9	Irunway India Pvt. Ltd.	Business services & consultancy	Other consultancy	25.09%

Particular	Data	OP/OC
35th percentile	3.15	12.99
Median	5.00	17.75
65th percentile	5.85	20.94

2.5 Assessee in reply relied on the following decisions

- *Decision of Hon'ble Delhi High Court in case of M/s. Sony Ericsson Mobile Communication India Pvt. Ltd. reported in 276 CTR 97 (2015)*
- *M/s. Maruthi Suzuki India Pvt. Ltd. in ITA No. 110/2014 and ITA 710/2015,*
- *CIT Vs Whirlpool of India Ltd. (129DTR169),*
- *Baush & Lomb Eyecare (India) (P) Ltd. Vs. Addl.CIT (129DTR201)*
- *Yum Restaurants (India) Pvt. Ltd., Vs ITO (ITA No. 349/2015 dtd. 13/01/2016) and Honda Seil Products.*

2.6 The Ld.TPO after considering the submissions of the assessee, proposed adjustment as under:

Particulars	Amount
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Excess AMP incurred for the benefit of the AE	2967.41 lakh
Arm's length Margin (refer para no. 4.7.4.	14.43%
Arm's Length Price (2967.41 lakh *114.43%)	3395.60 lakhs
Price received	-
Adjustments	3395.60 lakhs

Business Support Service segment

2.7 The Ld.TPO observed that, under Business support service segment, the assessee selected following 9 comparables with a weighted average of 7.44% as against assessee's margin at 6.43%.

S.No.	Name of the company	Year wise adjusted operating profits/operating revenue (%)			Weighted average of adjusted operating profits/operating revenue (%)
		FY 2015-16	FY 2014-15	FY 2013-14	
1	Adhaan Solutions Pvt Ltd	0.94%	1.32%	NA	1.05%
2	Priya International Ltd (Segmental)	-0.22%	-6.33%	19.65%	3.47%
3	MCI Management (India) Limited	1.10%	6.89%	5.54%	4.42%
4	India Tourism Development Corporation Ltd	5.11%	11.73%	4.63%	7.44%
5	E D C I L (India) Ltd.(Segmental)	NA	5.04%	12.70%	8.69%
6	I C R A Management Consulting Services Ltd.	7.61%	14.41%	4.31%	8.77%
7	Concept Public Relations India Ltd.	11.31%	16.57%	4.78%	11.63%
8	Kestone Integrated Marketing Services Private Limited	12.60%	18.07%	10.26%	13.98%
9	ICC International Agencies Ltd (Segmental)	-15.64%	44.35%	14.13%	16.06%
	Arm's Length Range			Data Place considered as per multiple year rule	OP/OR (%)
	35th Percentile			4	7.44%
	Median			5	8.69%
	65th Percentile			6	8.77%

The assessee used TNMM as the most appropriate method to determine the arms length price and as the margin was within the permissible limit, the transaction was held to be at arms length by assessee.

2.8 The Ld.TPO dissatisfied with the comparables selected by assessee, shortlisted following 9 comparables having average margin of 13.5%.

SI. No.	Company Name	Industry group	Average op/oc
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1	Esha Media Research Ltd.	Business services & consultancy	-0.10%
2	Goldmine Advertising Ltd.	Business services & consultancy	4.93%
3	Pressman Advertising Ltd.	Business services & consultancy	11.52%
4	Kestone Integrated Marketing Services Pvt. Ltd., (Seg.)	Business services & consultancy	12.85%
5	ICC International Agencies Ltd. (Seg.)	Business services & consultancy	13.50%
6	Ugam Solutions Pvt. Ltd.	Business services & consultancy	14.43%
7	Killick Agencies & Mktg. Ltd.	Other miscellaneous services	18.24%
8	Majestic Research Services & Solutions Ltd.	Business services & consultancy	20.94%
9	Scarecrow Communications Ltd.	Business services & consultancy	23.12%

2.9 The Ld.TPO thus computed proposed adjustment under the business support service segment being the shortfall at Rs.20,54,912/-.

The Assessing Officer also rejected the Working Capital Adjustment to the assessee. Thus the total adjustment proposed by the Ld.TPO under 92CA are as under:

Particulars	Amount
AMP Expenditure	Rs. 33,95,60,000/-
Business Support Services	Rs. 20,54,912/-
Total Adjustment u/s 92CA	Rs. 34,16,14,912/-

2.10 On receipt of the order under 92CA, the Ld.AO passed the draft assessment order incorporating the proposed adjustment on

10/12/2019. On receipt of the draft assessment order by the assessee, objections were filed before the DRP. The DRP rejected the objections raised by the assessee.

2.11 On receipt of the DRP directions, the Ld.AO passed the impugned assessment order by making addition in the hands of the assessee at Rs.34,16,14,912/-.

2.12 Aggrieved by the impugned order, assessee is in appeal before this *Tribunal*.

3. At the outset, the Ld.AR submitted that, Ground no. 1 is general in nature and therefore do not require adjudication.

4. Ground no. 2 has not been argued by the Ld.AR, however it is submitted that, the issue may be kept open to be argued in appropriate situation.

Accordingly, we dismiss Ground no. 2 by keeping the issue open providing the right to argue the issue to the assessee in an appropriate assessment year.

5. Ground Nos. 3-9 are in respect of adjustment with respect to AMP expenses.

6. Ground no. 10 is general in nature and do not require adjudication.

7. Ground no. 11 is in respect of comparables sought for inclusion and exclusion.

8. The Ld.AR submitted that Ground no. 11(i) is raised seeking inclusion of only two comparables being: (i) ICRA Management Consulting Services Ltd. and (ii) Concept Public Relations India Ltd. It is submitted that, the other two comparables raised in this ground is sought to be not pressed by the assessee.

Accordingly the remaining two comparables are dismissed as not pressed.

9. In ground no. 11(iv), the assessee seeks exclusion of following four comparables being

- 1) Ugam Solutions Pvt. Ltd.
- 2) Killick Agencies & Mktg. Ltd.
- 3) Majestic Research Services & Solutions Ltd.
- 4) Scarecrow Communications Ltd.

10. Ground no. 12 is sought to be not pressed by assessee.

Accordingly this ground is dismissed as not pressed.

11. Ground no. 13 is seeking correction of margins in case of comparables that are finally retained.

12. Ground no. 14(ii) is on non-granting of working capital adjustment.

Nothing has been argued by the assessee on 14(i) & (iii).

Accordingly the same is dismissed as not pressed.

13. Ground no. 15 is consequential in nature and therefore do not require adjudication.

14. Ground nos. 3-9 – The Ld.AR submitted that Coordinate Bench of this *Tribunal* in *assessee's own case for A.Y. 2015-16* considered the adjustment made by Ld.AO/TPO on account of AMP expenses by observing as under:

“4. The assessee has raised grounds with respect to legal issues and grounds on merits against the TP adjustment. The assessee has also raised additional ground on the legality of reference made to the TPO when the assessee has raised objection to the reopening u/s.147 before the AO. During the course of hearing the Ld AR pressed only for grounds on merits with respect to AMP expenses. Therefore the issue for our consideration is whether the assessing officer is correct in treating the AMP expenses as

a separate international transaction from the distribution segment, and making a TP adjustment for the same.

5. The assessee is involved in two segments viz., (i) Trading (Distribution) segment & (ii) Business Support Services. The Business Support Services Segment was accepted as at Arm's length by the TPO. The assessee has chosen Resale Price Method (RPM) as the most appropriate method for the Trading (Distribution) segment and arrived at the average mean of gross profits margin(GPM) of 7 comparables which is at 4.44% whereas the GPM of the assessee is at 17.87%. Hence the assessee claimed that the transactions of the trading (Distribution) segment to be at arm's length as per the TP Study. The assessee incurs AMP expenses in order to carry out its distribution business. The TPO held that the assessee in trading / distribution segment has not confined itself just to distribution of trading goods but has performed additional functions in the form of AMP expenses. The TPO concluded that the assessee needs to be adequately compensated for such additional function undertaken and proceeded to compute the ALP following the 'Other Method'. The TPO segregated the AMP expenses as routine and non-routine and made a TP adjustment by adding a margin @ 11.20% on the non-routine AMP expenses. The DRP confirmed the TP adjustment and accordingly the AO passed the final order.

6. The Ld AR submitted that

(i) The functional profile of the assessee (pages 173-182 of paper book) identifies marketing activities as a key function performed by the assessee for distribution of products and the functional profile of the assessee has not been disputed by the TPO in his order.

(ii) The assessee is procuring finished products from its AE and distributing them in India under the brand name of the AE. The Hon'ble Delhi High Court in the case Sony Ericsson mobile communication India Private Limited 55 Taxmann.com 240 (Delhi) has held that the workings of section 92F and that Rule 10A explicitly states that the term transaction includes a number of closely linked to transaction thus making it clear that it was never the intent of the Legislature to abandon the general principles of plurality. Therefore the contention of the TPO of adopting 'transaction by transaction approach' is not liable to be rejected.

(iii) Under the net operating margins the assessee has earned an Operating margin of 3.12 % as against the operating margin of 1.08% (Page 7 Para 4.6 of TPO's order) In the process of arriving at this margin the advertising and sales promotion expenses were considered as part of operating cost. Once the assessee has established that it has earned adequate margins at the net level (i.e. after considering AMP expenses and other indirect operating expenses) the TPO cannot segregate a particular line of item of expense and make adjustments to it.

(iv) The fact the TPO has made adjustments only towards AMP expenses would substantiate the fact that the TPO has accepted that the gross margin and the net margin of the assessee for the distribution segment is higher than that of the comparables.

(v) The assessee also places reliance on the judgment of jurisdictional Bangalore Tribunal in the following cases wherein it is held that once the net margin are at arm's length no separate adjustment is required for a AMP expenses

(a) M/s. Essilor India Pvt Ltd – 68 Taxmann.com 311

(b) M/s. Lenovo India (P) Ltd – [TS-148-ITAT-2022 Bang-TP]

(c) Himalaya Drug Company vs ACIT [2020] 119 taxmann.com 421 (Bang Trib)

(vi) By segregating the AMP expenses and treating it as a separate International transaction the TPO in substance made an attempt to re- characterize the transaction from manner in which the assessee and its AE had originally structured which is not permissible.

7. Ld DR supported the views taken by the lower authorities. The Ld DR also submitted that the coordinate bench of the Tribunal in assessee's own case for the assessment year 2012-13 and 2013-14 [IT(TP)A No 293 & 2479/Bang/2017] has remanded the matter back to the TPO/AO and prayed for a similar adjudication.

8. We have heard the rival submissions and perused the materials on record. The assessee has chosen RPM as the most appropriate method (MAM) for arriving at ALP. The assessee has chosen 7 comparables based on various filters applied and the median of weighted average of adjusted gross profit on sales % of these comparables was 4.44% (page 189 to 190 of paper book). The gross profit margin of the assessee from undertaking distribution

activities during the year under consideration resulted in gross profit of 17.87% on sales (Page 254 of the paper book). Since the assessee's margin is more than the arm's length range, the margin of the assessee from its distribution activities is considered to be at arm's length from TP perspective. In a corroborative analysis done under Transaction Net Margin Method (TNMM) the assessee's margin is taken to be at arm's length as the median of the comparables was 1.08% whereas the operating profit of the assessee from undertaking the distribution activities was 3.12% (Page 255 of the paper book). We notice that while arriving at the operating profit of the assessee the 'Selling and Marketing expenses' to the tune of Rs.68,16,40,898 has been included. The TPO in the order (Page 13 of TPO order para 4.7.5) has mentioned that TP analysis with respect to AMP and the mark up the methods as used by the assessee like RPM with GPM as the PLI and TNMM with OP/OC as the PLI are not suitable, however he had not rejected the TP analysis of the distribution segment. This issue is particularly dealt with by the Hon'ble Delhi High Court in the case of Sony Ericsson mobile communication India Private Limited (*supra*) where it is held that –

101. However, once the Assessing Officer/TPO accepts and adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would as noticed above, lead to unusual and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the inter-linked transaction. This would be also in consonance with Rule 10B(1)(e), which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the 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.

9. The coordinate bench of the Tribunal in the case of Himalaya Drug Company (*supra*) has held that for the AMP expenses to fall under the category of 'international

transaction' the revenue should show that there existed an agreement between the assessee and its AE in the matter of incurring AMP expenses. We notice that in assessee's case the revenue has not shown that there is any agreement in place between the assessee and the AE with regard to incurring AMP expenses. The Hon'ble Tribunal has also held that when the MAM for the entire international transaction is accepted by the TPO, no separate adjustment is required to be done for AMP expenses. The Hon'ble Tribunal has held that –

34. We notice that the co-ordinate bench has, following various decisions, held that the revenue has to first show that the AMP expenses would fall under the category of "international transactions". For that purpose, the revenue has to show that there existed an agreement between the assessee and its AE in the matter of incurring of AMP expenses. Admittedly, it is not shown in the instant case that there existed any agreement relating to incurring of AMP expenses. Thus, we notice that there is no change in facts relating to this issue between the current year and the AY 201011/2011-12. It was also held that when TNMM method is applied to benchmark the entire international transactions, then there is no requirement of making separate TP adjustment on account of AMP expenditure. In the earlier paragraphs, we have also held that TNMM as most appropriate method and has also held that the international transaction of Exports to AEs is at arms length.

Hence, no separate adjustment is required to be made in respect of AMP expenses on this account also.

10. We have considered the Ld DR's submission that the coordinate bench of the Tribunal in assessee's own case (*supra*) has remanded the case back to the TPO. In the said assessment years, the case was remanded back mainly for the purpose of determining whether the AMP expenses in an international transaction or not. The relevant para from the judgment is reproduced here for reference

“ In the present case also TPO had not brought anything on record to show existence of international transaction whereby the assessee was obliged to incur AMP expenditure for the purpose of promoting brand, intangible to its AE. Similarly the assessee-company also has not furnished FAR analysis of AMP functions in its TP study. In our considered opinion, the matter requires remission to the TPO for undertaking fresh analysis to establish existence of international transaction in respect of AMP

expenditure and true nature of transaction between the appellant and its AE. After due analysis of FAR of the AMP functions carried out by the appellant and having regard to the actual conduct of the appellant vis-à-vis its AE and economic substance of the transactions between the appellant and its AE if the TPO is of the opinion that there existed an international transaction in the form of AMP function, then to undertake the exercise of determination of ALP by adopting a suitable method of compensation to the appellant for performing the AMP functions of its AE”

11. For the year under consideration, the issue for consideration is treating the AMP expenses as a separate transaction from the distribution segment and making TP adjustment for the same. The Ld AR submitted that whether AMP expenses is a separate international transaction is not contended in the year under consideration and prayed that the decision rendered by the coordinate bench on this specific count need not be applied in the year under consideration.

12. Considering the ratio laid down by the Hon’ble Delhi High Court in the case of Sony Ericsson mobile communication India Private Limited (supra) and the other decisions of the coordinate bench of the Tribunal, with respect to treating AMP expenses as a separate transaction when the TPO has not otherwise rejected the gross margin and the net margin of the assessee, we hold that there is no separate adjustment to be made in respect of AMP expenses. The appeal is allowed in favour of the assessee.”

14.1 It is submitted that the issues raised in the present appeal is identical with that of the A.Y. 2015-16. Nothing has been placed on record by the Ld.DR contrary to the above observations by *Coordinate Bench of this Tribunal* in order to take different view. Respectfully following the same, we are directing the Ld.AO to delete the adjustment made on account of AMP expenses by treating it as separate international transaction.

Accordingly, ground nos. 3-9 raised by assessee stands allowed.

15. Before dealing with the comparability analysis, it is necessary *sine qua non* to understand the functions performed, assets owned and risks assumed by the assessee under the business support service segment.

Functions

Epson India is engaged in providing business support services to its parent entities Seiko Japan and Epson Singapore. These services are in the nature of business support and other customer support services.

Strategic Management Functions

Epson India operates under the broad strategy framework set out by its AEs. Epson India primarily performs the tactical managerial functions regarding day to day management of business.

Corporate Services

With respect to human resources, financial management, routine administration etc., Epson India is responsible for arranging the necessary resources. It is responsible for managing its accounts payable, accounts receivables, employee management, management information systems and day to day management of business. It undertakes the management of human resources / hiring and training is done by Epson India within the broad framework of policies defined by the Group.

Epson India provides the services within the framework set by Epson group.

Quality Assurance

Epson India is primarily responsible for quality assurance in respect of the business support services provided to Epson group. Quality is monitored through various performance metrics. At this

end, Epson Group only provides directions to Epson India as and when required.

Project management and supervision

In this regard Epson India is responsible for management of its support operations. Epson India interacts regularly within Epson group and tracks the projects through periodic correspondences. Epson group provides necessary directions to Epson India.

Risks assumed

In relation to the support services provided by Epson India, Epson India does not have exposure to market risks.

Epson India bills Epson group companies in foreign currency and thus assumes the risk of foreign exchange fluctuations.

Epson India provides business support services only to its AEs and therefore bears limited credit and collection risks since it provides services to the group itself.

Epson India provides support services exclusively to Epson Group based on the directions and instructions received from Epson Group. While Epson India is responsible for the quality of the work assigned to it, the risk is transferred to the group due to the transfer pricing policy.

Assets owned

Epson India does not own goodwill related intangibles.

Characterisation

In relation to the support service activities undertaken by Epson India it does not bear any significant risk. Hence it can be characterized as a captive service provider in respect of provision of business support services.

16. Based on the above comparability of the comparables sought for inclusion / exclusion which are considered as under:

Assessee has been characterised to be a limited risk distributor and the captive service provider in respect of Business support service segment.

Ground No. 11(i)- Assessee is seeking inclusion of following two comparables:

18. ICRA Management Consulting Services Ltd.

18.1 The Ld.AR submitted that, this comparable was rejected by the Ld.TPO on the ground of functional dissimilarity as it was engaged in providing management services and professional consulting services.

18.2 It was submitted that Ld.TPO for A.Y. 2014-15 had accepted this comparable. The Ld.AR referred to page 832 of the paper book wherein the order dated 30/10/2017 passed by the Ld.TPO for A.Y. 2014-15 is placed.

18.3 The Ld.AR thus submitted that this company is functionally similar with that of the assessee and passed all filters applied by the Ld.TPO.

19. Concept Public Relations India Ltd.

19.1 The Ld.AR submitted that, this company is engaged in building relations and imaging for its clients. It is submitted that it also passes all the filters applied by the Ld.TPO. The Ld.AR submitted that, the Ld.TPO rejected this comparable, as it did not fall in the search matrix carried out by him.

19.2 On the contrary, the Ld.DR relied on orders passed by authorities below.

19.3 We note that, the DRP has not adjudicated the submissions of the assessee in respect of both the comparables. We find force in the argument of Ld.AR in respect of ICRA Management Consulting Services Ltd., wherein it was accepted by the Ld.TPO himself for A.Y. 2014-15. We therefore do not find any reason to reject the comparable from the final list.

We direct the Ld.AO to include this comparable in the final list.

19.4 In respect of Concept Public Relations India Ltd., we note that the Ld.TPO did not get an opportunity to verify the segmental results of the comparable. We are therefore remanding Concept Public Relations India Ltd. back to the Ld.TPO to consider the claim of assessee in the light of audited details filed by assessee in respect of the same.

Accordingly, ground no. 11(i) stands partly allowed.

20. Ground no. 11(iv) – In this ground, the assessee is seeking exclusion of following 4 comparables.

- a) Ugam Solutions Pvt. Ltd.
- b) Killick Agencies & Mktg. Ltd.
- c) Majestic Research Services & Solutions Ltd.
- d) Scarecrow Communications Ltd.

20.1 Ugam Solutions Pvt. Ltd.

20.1.1 Ld.AR submitted that, complete set of annual report of this comparable is not available in public domain. He submitted that relevant extract of database available from website are placed at page 304-306 of Paper Book I. This company has been stated to be operating in one primary segment being managed analytics. He submitted that this company even otherwise going by the website information is functionally not similar with that of the assessee, as

the clientele of this company services and provides solutions to global market research firms which include research operations, technology infrastructure transition, data warehousing aggregation and visualisation, sample management optimisation, global program management, custom panel solution, reporting solution and mobile solutions etc. He thus submitted that this comparable is functionally not similar with that of the assessee, who is a captive service provider and provides limited functions required by the associated enterprise.

20.1.2 Ld.CIT DR relied upon authorities below.

20.1.3 We have perused submissions advanced by both sides on the basis of records placed before us. Admittedly this company is into managed analytical services and provides solutions to global market research firms, retailers, leading brands as has been observed by DRP in para 8.2.1. On comparing the functions rendered by the assessee to the associated enterprise, this company cannot be a fit comparable, due to functional dissimilarities and risk assumed by this company.

Accordingly we direct this comparable to be excluded from the final list.

20.2 Killick Agencies & Mktg. Ltd.

20.2.1 With regard to the inclusion of comparable namely, "Killick Agencies and Marketing Ltd. (Killick)", it was argued before us that the comparable was functionally different, whereas the DRP held that, the business model and type of income does not matter with reference to functional comparability. The DRP also held that, the comparable provides lot of services which help the companies to sustain the market. We find that, "Killick" is engaged in acting as agent for various foreign principals for sale of dredgers, dredging equipment, steerable rudder propellers, maritime and aviation lighting, acoustic communication equipment etc. and sales services. Apart from this, the company is involved in exports of micro switches, engineering items, acoustics

items & headsets. It is engaged in the business of marine equipment like specialized propulsion systems, marine engines, industrial & marine gear boxes, ballast water treatment system, special purpose sea going vessels, industrial & marine exhaust system, ship lighting & navigation lighting systems, dredges and dredge equipment, ship building presses, rescue boats and specialized davits, reverse osmosis water systems and special acoustic communication equipment for defence. "Killick" provides after sales services for the equipment's supplied by its principals.

20.2.2 Whereas, the assessee is involved in corporate services and market research & business development. The corporate service includes assisting the day-to-day management of the organization (e.g. finance, human resources, information systems etc.). With respect to human resources, financial management, routine administration etc., QIPL Mumbai is responsible for arranging the necessary resources. It is responsible for managing its own cash flows, accounts payable, accounts receivables, employee management, management information system and training and hiring employees. Though QIPL Mumbai drafts its policies within the broad framework of Qualcomm, it receives Nil or little support from its overseas entities in terms of implementation of those policies.

20.2.3 With regard to the marketing strategy functions includes those activities that determine the positioning of a firm's product in a market and that establish marketing techniques that bring the products to the customers' attention. The AEs are responsible for branding activities to ensure that a consistent message is conveyed across the globe. Further, the business unit leaders of the AEs develop market strategies and relay this information to QIPL so that QIPL may undertake market research and business development activities on behalf of the AEs in

India, and augment the AE's efforts in raising awareness of Qualcomm's technology to manufacturers in India.

20.2.4 Thus, on going through the functions, we find that the comparable "Killick" is functionally different from the assessee, hence, we direct the same may be excluded from the list of final comparables.

20.3 Majestic Research Services & Solutions Ltd.

It is submitted that this comparable is a market research agency relying exhaustively on usage of technology for data acquisition, it offers a wide range of quantitative and qualitative research both nationally and internationally. The company focuses on market research, advertising research, and brand research, thus making it entirely different from the services provided by Epson India to its associated enterprises.

The Ld.AR submitted that this is functionally different and not be considered a comparable to business support services segment of the assessee.

The Ld.AR also submitted that this company fails RPT filter of 25% of sales adopted by the Ld.TPO. In support he referred to page 309 of Paper Book-I. We are of the view that this company is rendering advertisement functions which are not akin to Business Support Services rendered by the assessee.

Therefore we do not hold this comparable to be included in the final list. Accordingly this comparable is directed to be excluded from the final list.

20.4 Scarecrow Communications Ltd.

20.4.1 We have considered the submissions advanced by both sides in the light of records placed before us.

This company is rendering service pertaining to advertisement in radio and television and public shows which are different from the business support service rendered by the assessee. Pages 315-316 of Paper Book Vol. I gives the details of revenue generated by this comparable. Further, this comparable is rendering services not on the similar profile as that of assessee. Therefore we do not hold this comparable to be included in the final list. Accordingly this comparable is directed to be excluded from the final list.

Accordingly ground nos. 11(iv) raised by assessee stands allowed.

21. Ground no. 13 is on incorrect computation of margin. We direct the Ld.TPO to verify the correct margins of the comparables while computing the operating margin used for determining the ALP. Assessee is directed to furnish relevant information in support of the same.

Accordingly this ground raised by the assessee stands allowed as indicated hereinabove.

22. Ground no. 14 is in respect of Working Capital Adjustment not granted while computing the margins.

22.1 It has been submitted by Ld.AR that working capital and risk adjustment has been denied to assessee on the ground that assessee failed to demonstrate such differences could have any impact on assessee's profit. It has been submitted by Ld.AR that the submissions advanced by assessee demonstrating computational impact has not been considered by the Ld.AO/TPO.

22.2 Before us, Ld.AR submitted that it is an accepted principle upheld in various decisions of this *Tribunal* that working capital adjustment should be allowed on actual. It has been submitted

that all relevant details for computation of working capital was provided to AO/DRP which has been disregarded. He placed reliance upon the decision of coordinate bench of this *Tribunal* in case of *Huawei Technologies India (P.) Ltd. v. Jt. CIT* reported in (2019) 101 *taxmann.com* 313, wherein it has been held that the working capital has to be granted in actual.

22.3 On the contrary, Ld.CIT DR placed reliance upon orders passed by authorities below.

22.4 We have perused submissions advanced by both sides in light of records placed before us including the decision relied upon by Ld.AR in case of *Huawei Technologies India Pvt. Ltd. (supra)*.

22.5 A reading of Rule 10B(l)(e)(iii) of the Rules read with sec. 92CA of the Act, would clearly shows that the net profit margin arising in comparable uncontrolled transactions has to be adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, which could materially affect the amount of net profit margin in the open market.

Chapters I and III of OECD Transfer Pricing Guidelines contain guidelines on comparability analyses for transfer pricing purposes. Guidelines on adjustments to be provided is found in paragraphs 3.47-3.54 and in the Annex to Chapter III. The guidelines must be followed for computing arm's length principle, and for comparing comparable uncontrolled transactions. Reasonably accurate adjustments should be made to eliminate effect of any such differences

Paragraphs 13 to 16 of OECD guidelines, emphasizes need for working capital adjustment in terms of receivables and payables as under:

"13. In a competitive environment, money has a time value. If a company provided, say, 60 days trade terms for payment of accounts, the Price of the goods should equate to the price for immediate payment plus 60 days of interest on the immediate payment price. By carrying high accounts receivable a company is allowing its customers a relatively long period to pay their accounts. It would need to borrow money to fund the credit terms and/or suffer a reduction in the amount of cash surplus which it would otherwise have available to invest. In a competitive environment, the price should therefore include an element to reflect these payment terms and compensate for the timing effect.

14. The opposite applies to higher levels of accounts payable. By carrying high accounts payable, a company is benefitting from a relatively long period to pay its suppliers. It would need to borrow less money to fund its purchases and/or benefit from an increase in the amount of cash surplus available to invest. In a competitive environment, the cost of goods sold should include an element to reflect these payment terms and compensate for the timing effect.

15. A company with high levels of inventory would similarly need to either borrow to fund the purchase, or reduce the amount of cash surplus which it is able to invest. Note that the interest rate July 2010 Page 6 might be affected by the funding structure (e.g. where the purchase of inventory is partly funded by equity) or by the risk associated with holding specific types of inventory)

16. Making a working capital adjustment is an attempt to adjust for the differences in time value of money between the tested party and potential comparables, with an assumption that the difference should be reflected in profits. The underlying reasoning is that:

- A company will need funding to cover the time gap between the time it invests money (i.e. pays money to supplier) and the time it collects the investment (i.e. collects money from customers)*
- This time gap is calculated as: the period needed to sell inventories to customers + (plus) the period needed to collect money from customers - (less) the period granted to pay debts in suppliers"*

22.6 The reverse applies to huge accounts payable. By having high accounts payable, a company is benefitting from a relatively long

period to pay its suppliers. It would need to borrow less money to fund its purchases and/or benefit from an increase in the amount of cash surplus available to invest. In a competitive environment, the cost of goods sold should include an element to reflect these payment terms and compensate for the timing effect. A company with high levels of inventory would similarly need to either borrow to fund the purchase, or reduce the amount of cash surplus which it is able to invest. Making a working capital adjustment is an attempt to adjust for the differences in time value of money between the tested party and potential comparables, with an assumption that the difference should be reflected in profits. Methodology to compute working capital adjustment is given in Paragraphs 13 to 16 of the aforesaid *OECD Guidelines (supra)*. These guideline also indicate factors that needs to considered like;

22.7 The point in time at which the Receivables, Inventory and Payables should be compared between tested party and comparables, and whether it should be the figures of receivables, inventory payable at the yearend or beginning of the year or average of these figures that should be considered;

22.8 In the matter of determination of Arm's Length Price, it cannot be said that the burden is on the assessee or the Department to show what is the Arm's Length Price. The data available with the assessee and Department should be the starting point and depending on the facts and circumstances of a case, further details can be called for. As far as the assessee is concerned, the facts and figures with regard to its business must be furnished. In so far as applying inventory, receivables and payables for computing working capital adjustment alleged by

DRP/TPO in case of certain comparables, ITAT Delhi Bench in case of *ITO v. E Value Servc.com* reported in (2016) 75 *taxmann.com* 195 held that, insisting on daily balances of working capital requirements to compute working capital adjustment is not proper, as it will be impossible to carry out such exercise and that working capital adjustment has to be based on the opening and closing working capital deployed.

22.9 It must not be forgotten that transfer pricing analysis is estimation and not an exact science. One has to see that, reasonable adjustment must be made where ever it is needed, so as to bring both comparable and test party on same footing. In present facts of case, DRP may be correct in denying working adjustment due to unavailability required data, however there is no merit in observations of DRP/TPO as supported by Ld.CIR DR, in denying working capital adjustment due to absence of details for working out adjustments in comparable companies chosen. If we appreciate the argument advanced by Ld.CIT.DR, there would remain no comparables for the purpose of comparability analysis to determine ALP of an international transaction, and this would be fatal to entire exercise of transfer pricing analysis.

22.10 Regarding comparable companies, one has to fall back upon only on information available in public domain. If that information is insufficient, it is beyond the power of the assessee to produce correct information about comparable companies. Revenue on the other hand has sufficient powers u/s.133(6) to compel production of required details from comparable companies. If this power is not exercised to find to get information required, then it is no defense to say that Assessee has not furnished required details to deny

any adjustment on account of working capital differences. Therefore this objection of DRP is not sustainable. Therefore in, endeavor should be made to bring in comparable companies for the purpose of broad comparison and working capital adjustment claimed by Assessee should be analysed, keeping in mind, OECD guidelines (supra).

22.11 Based on the above discussions, and respectfully following decision of coordinate Bench of this *Tribunal* in the case of *Huawei Technologies India (P.) Ltd. (supra)*, we direct working capital adjustment to be computed and to allow as per actual, after considering exclusion/inclusion of comparable companies in the final set of comparables as discussed hereinabove.

Accordingly this ground raised by assessee stands allowed.

In the result, the appeal filed by the assessee stands partly allowed.

Order pronounced in open court on 14th July, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 14th July, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore