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

BEFORE SHRI G. S. PANNU, PRESIDENT
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 1956/DEL/2021 (A.Y 2017-18)

Casio India Company Pvt. Ltd. A-41, Ist Floor, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi **PAN No. AAACC3448H** **(APPELLANT)**	Vs	DC/ACIT/TP-1(2)(1) Delhi **(RESPONDENT)**

Appellant by	**Sh. Nageshwar Rao, Adv & Ms. Deepika Aggarwal,**
Respondent by	**Sh. Mahesh Shah, CIT (DR)**

Date of Hearing	**06.07.2022**
Date of Pronouncement	**19.07.2022**

ORDER

PER YOGESH KUMAR U.S., JM

The assessee in the above appeal is aggrieved by the final assessment order dated 19/02/2021 passed u/s 143(3) r/w Section 144C (13) read with Section 144B the of Income tax Act, wherein the Ld. A.O has computed the income of the assessee by making adjustment of Rs. 56,877,695/- on substantive basis and a sum of Rs. 211,43,6641/- on protective basis on account of AMP Expenses.

2. The grounds of appeal are as under:-

"1. Based on the facts and circumstances of the case, Casio India Company Private Limited (hereinafter referred to as 'the Appellant')

respectfully craves leave to prefer an appeal under section 253(1)(d) of the Income-tax Act, 1961 (hereinafter referred to as 'Act'), against the order dated 25th November 2021 (hereinafter referred to as impugned order) passed by the Additional/Joint/Deputy/Assistant Commissioner of Income Tax/Income Tax Officer, National e-Assessment Centre (hereinafter referred to as the learned 'AO') under section 143(3) read with section 144C of the Act in pursuance of the directions dated 22th September, 2021 issued by the Hon'ble Dispute Resolution Panel (hereinafter referred to as 'Hon'ble DRP').

In the facts and circumstances of the case and in law, the learned AO/ Transfer Pricing Officer ('TPO') and the Hon'ble DRP have:

1. *erred in law and on facts, by making addition of INR 26,83,14,336/- to the total income of the appellant.*

2. *Erred in adding the adjustment made on protective basis on account of Advertising, Marketing & Promotion ('AMP'P expenses to the total income of the Appellant and computed the tax demand.*

<u>Grounds in relation to treatment of AMP as an international transaction:</u>

3. *erred in holding the AMP expenditure incurred by the Appellant, as an 'international transaction' u/s 92B of the Act, disregarding the findings of the Hon'ble High Court/ Tribunals in number of cases and Appellant's own case for AY 2010-11, AY 2011-12 to AY 2013-14 and AY 2015-16.*

4. *erred in not following the judicial discipline of following the directions of Hon'ble ITAT in Appellant's own case for AY 2010-11, AY 2011-12 to AY 2013-14 and AY 2015-16.*

5. *erred in treating/ upholding the AMP expenses as an 'international transaction', misinterpreting the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd; without appreciating the business model and functional profile of the appellant.*

6. *erred in re-characterization of AMP expenditure incurred by Appellant as rendition of advertisement and brand promotion services to its overseas associated enterprises and without satisfying the criteria of re-characterization as laid out in various judicial precedents.*

7. *erred in disregarding the findings of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd and Sony Ericsson Mobile Communications India Pvt. Ltd., failed to appreciate that once the appellant has satisfied arm's length basis using Transactional Net Margin Method ("TNMM") i.e. operating margin of the appellant is more than the operating margin of comparable companies, no further separate adjustment for AMP expenditure is warranted.*

Common Issues related to transfer pricing adjustment made on protective and substantive basis.

8. erred in quantifying AMP expenses by considering certain selling and distribution Expenses while performing arm's length analysis without giving cogent reasons for the purpose of benchmarking alleged AMP expenditure, disregarding the principles and findings laid down by the Hon'ble High Court in the case of appellant.

9. erred in rejection of comparable companies selected by the Appellant in the transfer Pricing documentation for the purpose of computing the adjustment.

Grounds in relation to Protective adjustment using Bright Line approach

10. erred in applying Bright Line Test ('BLT') for computing adjustment on protective basis on account of AMP, disregarding the principles laid by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd and subsequently followed in case of Maruti Suzuki India Ltd., which rejected the application of BLT.

11. erred in not following the judicial discipline of following the directions of Hon'ble ITAT in Appellant's own case for AY 2014-15 rejecting the application of BLT.

12. erred in not providing set-off against appellant's distribution margins while using the de-bundled approach to benchmark AMP expenditure, as directed by the Hon'ble High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd.

13. Erred in levying a further mark-up of service providers on AMP expenses for determination of the arm's length price of the alleged brand promotion services rendered by the appellant to its AEs.

14. erred in making inappropriate selection of comparable companies for the mark-up on alleged AMP expenditure while computing adjustment.

Grounds in relation to Substantive adjustment using Residual Profit Split Method approach

15. erred on facts and circumstances of the case and in law in holding Residual Profit Split Method ('RPSM') as the most appropriate method ('MAM') for benchmarking AMP spend.

16. erred on facts and circumstances of the case by considering RPSM as the MAM given multiple fallacies in application of the method.

16.1 erred in considering the Appellant's own profitability for undertaking a profit split instead of the combined profits of the group as required for application of PSM. In the absence of reliable information to apply PSM, PSM cannot be applied.

16.2 The first step for computation of non-routine AMP expenses to arrive at profit split for substantive adjustment using PSM is BLT. Thus, the impugned order errs in retaining PSM based on the BLT even though the same has been held to be unlawful by the Hon'ble Delhi High Court in multiple cases and struck down by Hon'ble ITAT in Appellant's own case for AY 2014-15.

16.3 erred in assessment of functional and risk profile of the Appellant/AE while applying RPSM.

Other Grounds

17. erred in initiating penalty proceedings under section 271(1)(c) of the Act.

All the above grounds may be considered independent and without prejudice to each other.

The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide this appeal according to law."

3. Brief facts of the case are that, the assessee is fully owned subsidiary of Casio Japan is a distributor of Casio products in India manufactured by its parent company. Casio India has been operating India since 1996 and has established the distribution channel for its products like watches, electronic diaries and calculator in India. The case of the assessee was selected for compulsory scrutiny on the basis of addition on recurring issue for examining the details in complete manner with specific emphasis on information available in the return of income filed by the assessee company for the year under consideration. Notice u/s 143(2) and 142(1) have been issued, in response Assessee Company has furnished the requisite details on ITBA Portal.

4. As per form 3CEB filed along with the return, the Assessee Company had entered into the international transaction with its AE's in the year under consideration. A reference was made to the TPO to determine the Arm's Length Price u/s 92CA(3) of the Act in respect of the international transaction entered into by the assessee Company. On 25/01/2021, DCIT, IT & TP-1(2)(1), New Delhi has passed an order u/s 92CA (3) of the Act, wherein the Ld. TPO proposed an addition of Rs. 9,57,45,429/- on substantive basis and Rs. 21,14,36,641/- on protective basis which was proposed to be added back to the total income of the assessee. However, demand for protective adjustment of Rs. 21,14,36,641/- was not enforced and put on hold since the judgment of Hon'ble Supreme Court was awaited over the concerned issue. The assessee has objected for the proposed variations in the income returned before the DRP. The DRP vide order dated 22/09/2021 gave a direction to the A.O to incorporate the findings of the panel in respect of various objections suitable in the final order. Consequently, giving effect order passed on 28/10/2021, further final assessment order came to be passed on 25/11/2021 u/s 143(3), Section 144C (13) read with Section 144B of the Act.

5. Aggrieved by the final assessment order, the present appeal has been preferred by the assessee on the grounds mentioned above.

6. The Assessee's Grounds No. 1 & 2 are general in nature. Ground No. 3 to 7 in respect of treating of AMP as international transaction, Ground No. 8 is in respect of exclusion of selling and distribution expenses. Ground No. 9 challenging the exclusion of comparable Companies. Grounds No. 10 to 14 on protective adjustment applying bright line test. Ground No. 15 & 16 on substantive adjustment applying residual profit split method. Ground No. 17 is consequential.

7. The Ld. Counsel for the assessee submitted that, in Assessee's own case for the year 2010-11, Assessment Year 2011-12, 2012-13, 2013-14 and 2015-16 the similar issues were dealt and decided in favour of the Assessee, wherein it is held that AMP Expenditure cannot be treated as separate international transaction and deleted the entire AMP Expenditure made by the Assessing Officer. The Ld. Counsel has relied on the following decisions passed by the Co-ordinate Bench of the Tribunal:-

(i) ITA No. 1764/Del/2015 Assessment Year 2010-11 vide order dated 22/04/2019

(ii) ITA No. 385/Del/2016, 341, 6733/Del/2017 Assessment Year 2011-12, 2012-13 & 2013-14 vide order dated 24/02/2020.

(iii) ITA No. 9312/Del/2019 Assessment Year 2015-16 vide order dated 18/05/2020.

8. Per contra, the Ld. DR submitted that, the previous year's decisions of the Tribunals have been challenged before the Hon'ble High Court wherein Tribunal has not appreciated the facts in the proper prospective. Therefore, submitted that, the present appeal filed by the assessee is required to be dismissed. The Ld. DR further relied on the orders of the Lower Authorities.

9. We have heard the rival submission on the issue under consideration, we have also gone through the entire materials available on record and gave our thoughtful consideration.

10. The Ground No. 3 to 7 is on existence of international transaction. It is not in dispute that, the very same issues have cropped up which have been considered by the Co-ordinate Bench of this Tribunal for Assessment Year 2010-11, 2011-12, 2012-13 & 2013-14, 2014-15 & 2015-16. The Co-ordinate Bench of the Tribunal consistently held that, there exists no international transaction and deleted the Transfer Pricing Adjustment resulting applicability of most appropriate method for determination of Arm's Length Price became academic and has given no specific adjudication/finding on the other issues. Even in the latest Assessment Year 2015-16, the Co-ordinate Bench of the Tribunal vide order dated 18/05/2020 in ITA No. 9312/Del/2019 held as under:-

> *"13. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.*
>
> *14. Now, it is brought to our notice by the ld. AR for the taxpayer that protective adjustment using bright line approach on account of AMP expenses by the Revenue has been held to be not sustainable by the coordinate Bench of the Tribunal in taxpayer's own case in ITA No.8060/Del/2018 for AY 2014-15 vide order dated 24.01.2019.*
>
> *15. Undisputedly, this is a case of AMP adjustment in case of pure distributor. It is also not in dispute that in case of the taxpayer, AMP adjustment has been a legacy issue and the ld. DRP decided the same on the basis of earlier year order by taking defence that*

Revenue has already filed the Special Leave Petition before the Hon'ble Supreme Court. It is also not in dispute that the ld. DRP mentioned in para 3 of its order that during AY 2014-15, the matter as to whether routine AMP spent is an "international transaction" is pending before the Hon'ble Supreme Court for final decision and thereby upheld AMP adjustment made by the AO.

16. We have perused the aforesaid order dated 24.02.2019 passed by the coordinate Bench of the Tribunal having identical issue, which the ld. DR for the Revenue has opposed on the sole ground that the enforcement of protective adjustment would depend on final outcome of the decision of Hon'ble Supreme Court in case of CIT vs. Sony Ericsson Mobile Communication India Ltd. reported in (2015) 55 taxman.com 240 decided by the Hon'ble Delhi High Court vide which bright line approach has been discarded.

17. Hon'ble Delhi High Court in Sony Ericsson India Pvt. Ltd. v. CIT (2015) 374 ITR 118 (Del.) and subsequently in Maruti Suzuki India Ltd. v. CIT (2016) 328 ITR 210 (Del.) has categorically held that BLT is not a valid basis for determining the existence of international transaction or for that matter for computing the ALP of such international transaction involving AMP expenses, the order of TPO passed by making BLT as basis of the ALP adjustment is not sustainable in the eyes of law.

18. The taxpayer has specifically come up with the proposition that there is no separate international transactions between it and its AE qua AMP expenditure and Revenue has failed to bring on record any material whatsoever if there is any explicit arrangement between the taxpayer and its AE by incurring AMP expenses. So, in these circumstances, incurring of AMP expenses cannot be considered as international transaction. Moreover, there is no material on the file if

there is any arrangement between the taxpayer and its AE to undertake brand building activities on behalf of the AE. Rather AMP expenses stated to have been incurred by the taxpayer in which for promoting the sales of its product in India and not to benefit in any manner its AE i.e. Casio Japan.

19. Hon'ble Delhi High Court in subsequent decisions viz. Bausch & Lomb Eye Care (India) Pvt. Ltd. v. Additional CIT (2016) 381 ITR 227 (Del.) and Honda Siel Power Products Ltd. v. Dy. CIT (2016) 237 Taxman 304 held that it is for the Revenue to firstly discharge the onus to prove the existence of an international transaction between the taxpayer and its AE and only thereafter ALP of international transactions involving AMP can be computed.

20. In the instant case, there is not an iota of material on the file apart from applying the BLT and by taking the view that the taxpayer has incurred huge AMP/sales expenses to the tune of 6.42%, no cogent material is there to treat the incurring of AMP expenses as international transaction more particularly when basis for treating the AMP expenses as international transaction i.e. BLT is not a legally sustainable method.

21. Undisputedly, there is no change in the FAR of the taxpayer company since AY 2010-11 and the taxpayer is performing same functions. In AY 2010-11, the coordinate Bench of the Tribunal vide order dated 22.04.2019 passed in ITA No.1764/Del/2015, available at page 484 of the paper book, held that the Revenue has failed to prove that AMP expenditure by the taxpayer is a separate international transaction by returning following findings :-

"29. The entire finding and approach of the TPO and DRP has been purely based on hypothesis and one of the agreement entered in the

earlier year for a limited period of six months and this has been stated to be a material so as to determine that there was an international transaction qua AMP expenditure in this year. Such a presumption based on said agreement cannot be inferred in this year at all as, firstly, it was for a very limited period in one of the earlier year as stated above; and secondly, each year has to be seen independently and if no such material act is permeating then presumption cannot be drawn for perpetuity. Thus, Revenue has failed to bring on record any material or any kind of arrangement existing between the AE and Assessee Company that there was separate international transaction with regard to AMP expenditure. Thus, on the facts and circumstances of the case, we hold that AMP expenditure cannot be treated as separate international transaction which needs separate benchmarking and accordingly we delete the entire AMP adjustment made by the Assessing Officer."

22. So, in view of what has been discussed above and following the order passed by the Tribunal in taxpayer's own case in AY 2010-11, when there is no international transaction no separate benchmarking qua AMP expenditure can be made, hence liable to be deleted.

23. In view of what has been discussed above, the appeal filed by the taxpayer is allowed."

11. By following the above judicial pronouncements which is having binding precedent effect and on the facts and circumstances of the case, we hold that AMP Expenditure cannot be treated as separate international transition which needs separate bench marking. Accordingly, we delete the entire AMP Adjustment made by the Assessing officer.

12. Further, in the above said decision in assessee's own case in ITA No. 9312/Del/2019(supra), the Coordinate Bench of the Tribunal also held that when there is no international transaction, no separate bench marking qua AMP Expenditure can be made. Therefore, by following the said ratio we delete the addition made by the A.O. In view of allowing Ground No. 3 to 7, other Grounds have become only academic and consequential, which requires no adjudication.

13. In view of the above discussions, the Appeal filed by the Assessee is allowed.

14. In the result, the appeal of the assessee is allowed.

Order pronounced in the Open Court on this 19th Day of JULY, 2022

Sd/- **Sd/-**

(G. S. PANNU) **(YOGESH KUMAR U.S.)**
PRESIDENT **JUDICIAL MEMBER**

Dated: 19/07/2022
*R. Naheed **

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4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI