IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH: 'I' NEW DELHI]

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

I.T.A. Nos. 158/DEL/2021 (A.Y. 2013-14)

DCIT, Circle : 1 (1) New Delhi. **(APPELLANT)**	Vs.	Adidas India Marketing Pvt. Ltd., Office No. 6, 2nd Floor, Sector : B, Vasant Kunj, New Delhi – 110 070. **PAN No. AAACA5313P** **(RESPONDENT)**

I.T.A. No. 159/DEL/2021 (A.Y. 2014-15)

DCIT, Circle : 1 (1) New Delhi. **(APPELLANT)**	Vs.	Adidas India Marketing Pvt. Ltd., Office No. 6, 2nd Floor, Sector : B, Vasant Kunj, New Delhi – 110 070. **PAN No. AAACA5313P** **(RESPONDENT)**

I.T.A. No. 160/DEL/2021 (A.Y. 2015-16)

DCIT, Circle : 1 (1) New Delhi. **(APPELLANT)**	Vs.	Adidas India Marketing Pvt. Ltd., Office No. 6, 2nd Floor, Sector : B, Vasant Kunj, New Delhi – 110 070. **PAN No. AAACA5313P** **(RESPONDENT)**

Assessee by :	**Mr. Rishabh Malhotra, A.R.**
Department by:	**Shri Mrinal Kumar Das, Sr. D. R.;**

Date of Hearing	**28.06.2022**
Date of Pronouncement	**02.09.2022**

ORDER

PER YOGESH KUMAR U.S., JM

These three appeals are filed by the Revenue against separate orders of the ld. Commissioner of Income Tax (Appeals)–44, New Delhi [hereinafter referred to CIT (Appeals)] dated 03/09/2020, 08/09/2020 and 08/09/2020 respectively for the Assessment Years 2013-14, 2014-15 and 2015-16.

I.T.A. No. 158 /DEL/2021 (AY 2013-14)

2. Brief facts of the case are that, for the year under consideration, the assessee filed its return of income declaring at income of Rs. 6,82,34,060/-. An order u/s 92 CA (3) of the Act has been passed by the TPO without drawing any adverse interference in relation to economic analysis with respect to all the international transactions. However, the Ld. TPO of the opinion that, excessive advertisement, marketing and promotion expenses incurred by the assessee as an international transaction and proposed an adjustment of Rs.4,51,14,573/- on substantive basis and Rs. 16,74,91,752/- on protective basis in relation to AMP expenditure incurred by the tax payer. The Ld. A.O further disallowed Rs. 3,20,05, 077/- u/s 40(a)(i) of the Act since the assessee

has not deducted the tax on source while making payment to Adidas International Trading BV buying on account of commission. A draft assessment order came to be passed u/s 143(3) /144C (1) of the Act on 30/12/2016, wherein the aforesaid disallowance were proposed and the final assessment order u/s 143(3) read with Section 144C (3) of the Act was passed on 14/02/2017 and the income of the assessee has been computed as under:-

S. No.	**Particulars**	**Amount**
1	AMP Expense-protective adjustment	Rs. 16,74,91,752/-
2	AMP expense-substantive adjustment	Rs. 4,51,14,573/-
3	Buying Commission	Rs.3,20,05,077
	TOTAL	**Rs. 31,28,45,462/-**

3. Since, the Ld. A.O has considered the Transfer Pricing Adjustment on account of AMP Expenses to be Rs. 21,26,06,325/-, which includes adjustment of Rs. 16,74,91,752/- proposed on protective basis, the assessee has filed an application for rectification of mistake u/s 153/143 of the Act, which has been allowed by the A.O levying the Transfer Pricing Adjustment to Rs. 4,51,14,573/- (being AMP adjustment on substantive basis).

4. As against the order assessment order dated 14/02/2017, the assessee has preferred an Appeal before CIT (A). The Ld. CIT(A) vide order 03/09/2020 allowed the Appeal by rejecting TPO's bright line approach in determining the Arm's Length Price for the AMP expenditure and deleted disallowance of buying commission amounting to Rs. 3,20,05,077/- paid by the A.O on account of non deduction of TDS, wherein the Ld.CIT (A) followed the Assessee's own case for Assessment Years 2006-07, 2011-12 & 2012-13 on the similar issues.

5. Aggrieved by the order dated 03/09/2020 passed by CIT(A), the Revenue has filed the present appeal on following grounds:-

"1.1 Whether on the facts and circumstances of the case, the Ld. CIT(A) was justified in rejecting TPO's bright line approach in determining Arm's Length return for the AMP expenditure incurred by the assessee.

1.2 Whether on the facts and circumstances of the case, the Ld. CIT(A) was correct in law in not accepting the TPO's view that Bright Line concept is an internationally accepted economic tool which determines the expenditure incurred by a routine distributor not promoting any marketing intangible.

1.3 Whether on the facts and circumstances of the case, Ld. CIT(A) is justified in relying upon decision in assessee's own case for A.Y. 2006-07, 2011-12 & 2012-13 wherein the matter is already subjudice before the Hon'ble Supreme Court.

2. Whether on the facts and circumstances of the case, the Ld. CIT(A) erred in deleting disallowances of buying commission amounting to Rs.3,20,05,077/- (for assessment year 2013-14); Rs.5,04,30,589/- and Rs.11,92,392/- (for assessment year 2014-15) and Rs.5,62,61,265/- and Rs.l,48,695/- (for assessment year 2015-16) made by AO on the account of non-deduction of TDS without appreciating nature ol services rendered and the consequential benefits. Ld. CIT(A) has also erred in relying upon decision of assessee's own case for A.Y. 2011-12 and 2012-13 without appreciating the fact that matter is subjudice before Hon'ble High Court.

3. The appellant craves leave, modify, add or forgo any ground(s) of appeal at any time before or during the hearing of this

appeal."

6. We have heard the parties, perused the materials on record and gave our thoughtful consideration.

7. The Ground No. 1 and its sub grounds are in respect of Transfer Pricing Adjustment with respect to AMP expenditure amounting to Rs. 4,51,14,573/- on substantive basis. During the course of transfer pricing proceedings, the Ld. TPO of the opinion that, the AMP Expenditures incurred by the assessee are to promote the brand/trade name which are owned by the AE's and expenditure has resulted into brand building and increased awareness of products bearing brand/trading. Accordingly, under the comparability adjustment to determined the excess AMP by identifying the excess intensity of AMP expenditure incurred by the assessee and comparable companies. Thus, proposed a substantive adjustment of Rs. 4, 51, 14,573/-.

8. It is not in dispute that in Assessee's own case for Assessment Year 2006-07, 2011-12 and 2012-13, the very same issue has been dealt and decided in favour of the assessee by dismissing the Appeal of the Revenue in ITA No. 953/Del/2016 & (A.Y 2011-12) and ITA No. 729/Del/2019 (AY 2012-13) vide order dated 31/07/2019, wherein it is held as follows:-

"6.2 We have heard the submission of the parties and perused the relevant material on record. The issue whether incurring of expenditure on advertisement, marketing and sales promotion by the assessee, amounts to International transaction and determination of its arms length price, has been decided by the Tribunal in assessment year 2006-07 The relevant finding of the Tribunal is reproduced as under:

"8.1.2. We don't deny that there would be incidental benefit to foreign AE, being, Adidas-Saloman AG, which is ultimate

parent of assessee. However, expenditure towards advertisement and marketing incurred by assessee in India is mainly for its own benefit to market products manufactured by it in India. Main purpose of incurring of such huge AMP expenses has largely benefited assessee in India, with an incidental benefit arising to foreign AE. Unless Ld.TPO can establish direct benefit accruing to foreign AE, it is very difficult to accept existence of ITA No.953/Del/2016 & 729/Del/2017 M/s. Adidas India Marketing Pvt. Ltd. international transaction, under present facts of the case. We rely upon decision of Hon'ble Delhi High Court in case of Sony Ericson Mobile Communication India Pvt. Ltd (supra) in support of aforestated observations.

8.2. Further it has been submitted by both sides that facts and circumstances in present appeal are no manner different with that of Maruti Suzuki India Ltd. Reported in 381 ITR 117; and Sony Ericson Mobile Communications (supra), wherein Hon'ble High Court has held that existence of international transaction must be established de hors the Bright Line Test before undertaking bench marking of AMP expenses. We therefore respectfully follow the view taken by this Hon'ble Delhi High Court in Sony Ericson Mobile Communications (supra), and delete adjustment made in respect of AMP expenses.

8.3 However, we appreciate the concern raised by Ld. Sr. DR that decision of Hon'ble Supreme Court will be binding upon assessee as well as revenue.

"19. After considering the legal position as discussed in the preceding paragraphs, we are of the considered opinion that the ALP of an international transaction involving AMP expenses,

the adjustment made by the TPO/DRP/AO is not sustainable in the eyes of law. At the same time, we cannot ignore the submission of the learned DR that the matter is pending before Hon'ble Apex Court and the decision of Hon'ble Apex Court would be binding upon all the authorities. In view of the above, we set aside the orders of authorities below and restore the matter to the file of the Assessing Officer. We hold that as per the facts of the case and the legal position as of now and discussed above in this order, the adjustment made by the TPO/DRP/AO in respect of AMP expenses is not sustainable. However, if the above decisions of Hon'ble Jurisdictional High Court which is under consideration before the Hon'ble Apex Court is modified or reversed by the Hon'ble Apex Court, then the Assessing Officer would pass the order afresh considering the decision of Hon'ble Apex Court. In those circumstances, he will also allow opportunity of being heard to the assessee." Accordingly Grounds 2 to 2.24 stand allowed for statistical purposes."

9. The above ratio laid down by the Coordinate Bench of the Tribunal is squarely applicable to the issue in hand, but the Ld. DR submitted that, the said issue is pending consideration before the Supreme Court and the same is yet to be adjudicated, therefore submitted that, the present Appeal has to be decided against the assessee. In our opinion, mere pendency of the above issue before the Hon'ble Supreme Court cannot be a ground to allow the present appeal filed by the Revenue. By following the rule of consistency and judicial discipline we are inclined to follow the binding precedent orders of the Tribunal Assessee's own case (supra). Accordingly we dismiss the Revenue's Grounds of Appeal No. 1 and its sub grounds.

10. The Ground No. 2 is in respect of deleting the disallowance by CIT(A) of buying commission amounting to Rs. 3,20,05,077/- made by the A.O on account of non deduction of TDS.

11. The Ld. DR submitted that, the Ld. CIT(A) has committed an error in relying on the decision of Assessee's own case for AY 2011-12 and 2012-13 without appreciating the fact that, the matter is sub-judice before the Hon'ble High Court. Therefore, submitted that the present appeal deserves to be allowed.

12. Per contra, the Ld. Counsel for the assessee submitted that, the said disallowance is in respect of buying commission paid to foreign entity on the ground that, the payment made to the foreign entity is in the nature of 'FTS' under Section 9 (1)(vii) of the Act as well as Article 12(5) and the sums chargeable to tax in the hands of recipients. The assessee paid sourcing/buying commission to Adidas International Trading BV Neitherland, under a 'buying agency agreement' in respect of procurement services rendered from outside India and the said issue has also already been considered by the Coordinate Bench of the Tribunal in Assessee's own case in ITA No. 950/Del/2019 (Assessment Year 2010-11), ITA No. 953/Del/2016, (Assessment Year 2011-12) and ITA No. 729/Del/2017 (Assessment Year 2012-13). The relevant portions of the order in ITA No. 953/Del/2016 dated 31/07/2019 are hereunder:-

> *"7.3 We have heard the rival submission of the parties on the issue in dispute. The identical issue of buying commission in the case of sister concern of the assessee has been decided by the Tribunal (supra) as commission and not fee for technical services. The relevant finding of the Tribunal is reproduced as under:*

"5. We have heard the rival contentions and perused the submissions made by the parties in detail. The main issue for consideration is whether the consideration received by the assessee from AIMPL under the Buying Agency Services Agreement ('BAS') ITA No.953/Del/2016 & 729/Del/2017 M/s. Adidas India Marketing Pvt. Ltd. could be characterized as 'fees for technical services' under section 9(1)(vii) of the Act and accordingly by taxed under the provisions of section 1 15A of the Act. Explanation 2 to section 9(1)(vii) defines 'fees for technical services' as under:

Explanation 2.--For the purposes of this clause, 'fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) hut does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

5.1. It is evident that for a particular stream of income to be characterized as 'fees for technical services', it is necessary that some sort of 'managerial', 'technical' or 'consultancy' services should have been rendered in consideration. The terms 'managerial', 'technical' or 'consultancy' do not find a definition in the Income-tax Act, 1961 and it is a settled law that they need to be interpreted based on their understanding in common parlance. Let us examine the meaning of each of these words:

Managerial : the Delhi High Court in the case of J.K. (Bombay) Ltd. vs. CBDT & Anr. (1979) 1 18 1TR 312 (Del) referred to an article on 'Management Sciences' in Encyclopaedia 747, wherein it is stated that the management in organizations include at least the following: (a) discovering, developing, defining and evaluating the goals of the organization and the alternative policies that will lead towards the goals; (b) getting the organization to adopt the policies; (c) scrutinizing the effectiveness of the policies that are adopted and (d) initiating steps to change policies when they are judged to be less effective than they ought to be. Management thus pervades all organizations.

Technical : In the case of Skyccll Communications Ltd. vs. DCIT (251 ITR 53) (Madras), the Hon'ble High Court has held that the popular meaning associated with the word 'technical' is 'involving or concerning applied and industrial science'.

Consultancy : consultancy is generally understood to mean an advisory services. Further, it may be fair to state that not all kind of advisory could qualify as technical services. For any consultancy to be treated as a technical services, it would be necessary that an technical element is involved in such advisory. Thus, the consultancy should be rendered by ITA No.953/Del/2016 & 729/Del/2017 M/s. Adidas India Marketing Pvt. Ltd. someone who has special skills and expertise in rendering such advisory.

5.2. Our attention was also brought to the decision of the Mumbai bench of the ITAT in the case of Linde AG vs ITO (62 ITD 330) wherein it is observed that:

"In the definition for 'fees for technical services' the consideration has to be for rendering technical, managerial or consultancy service. By making purchase for the Indian concern no consultancy services is provided as no advice is given to them. It is a simple procurement of equipments by the assessee for them. It is also not a technical service in the sense of technical education is concerned with leaching applied sciences and special training in applied sciences, technical procedures and skills required for practice of trade or profession, especially those involving the use of machinery or scientific equipment. If the information is given for the use of the machinery or scientific equipment it would partake the character of fees for technical services hut when it is only for the procurement of the scientific equipments it would be a simple service of commercial and industrial nature. It, therefore, cannot be termed as a technical service for which the procurement fees charged by the assessee cannot he a consideration for technical services. The third category is managerial service. The managerial service, as aforesaid, is towards the adoption and carrying out the policies of an organization. It is of permanent nature for the organization as a whole. In making the stray purchases, it cannot he said that the assessee has been managing the affairs of the Indian concern or was rendering managerial services to the assessee. "

5.3. The copies of the Buying Agency Services agreement are placed on record, the nature of services have not been disputed. Department has only interpreted them to be amounting to ' Fees for Technical Services', in our considered opinion these are not technical services but routine services offered in the procurement assistance. The agreements demonstrate that the assessee was

to receive commission for procuring the products of AIMPL and rendering incidental services for purchases. The primary services provided by the assessee to AIMPL in terms of the Buying Agency Services agreement are as under:

(i) Co-ordinate between AIMPL and manufacturers for the purpose of buying the merchandise,

(ii) assisting in negotiations, ITA No.953/Del/2016 & 729/Del/2017 M/s. Adidas India Marketing Pvt. Ltd.

(iii) assist in procurement of samples and sending them to AIMPL,

(iv) maintain relationship with the manufacturers and search for new manufacturers,

(v) supply credit reports and other marketing information concerning manufacturers and

(vi) provide translation services as required for communication between AIMPL and the manufacturers.

5.4. Applying the principles and case laws discussed above to the facts of the present case, we arc of the view that the services rendered by the assessee in this case were purely in the nature of procurement services and cannot be characterized as 'managerial' 'technical' or 'consultancy' services. Accordingly, the consideration received by the assessee was appropriately classified as 'commission' as against 'fees for technical."

13. The Ld. DR has not disputed the above factual matrix, but submitted that, the Department has filed an Appeal before the High Court as against the above-mentioned order made in assessee's own case for Assessment Years

2010-11, 2011-12 & 2012-13 and submitted that, the matter is sub-judice, therefore, the Appeal filed by the Revenue deserves to be allowed. We are not agree with the said contention of the Ld. DR, in our opinion, mere pendency of the appeal before the Hon'ble High Court for the previous Assessment Years on similar issue cannot be a ground to allow the present appeal filed by the Revenue. We are bound by the principle of consistency judicial discipline and the order of the Tribunal is having binding precedents on us. Therefore, we are inclined to dismiss the Ground No. 2 of the Revenue by following the above judicial pronouncement of Co-ordinate Bench.

14. Ground No. 3 being general in nature, requires no adjudication.

15. In the result, appeal filed by the Revenue in ITA No. 158/Del/2021 is allowed.

16. Further, in ITA No. 159/Del/2021, (AY 2014-15) and 160/Del/2021 (AY 2015-16), the Revenue has raised the similar common grounds that of raised in ITA No. 158/Del/2021 (except differences in the amounts). Accordingly, we dismiss the Revenue's Grounds of Appeal by disposing the above Appeals as decided in ITA No. 158/Del/2021.

17. In the result, ITA No. 159/Del/2021, (AY 2014-15) and 160/Del/2021 (AY 2015-16) filed by the Revenue are dismissed.

Order pronounced in the open court on: 02nd September, 2022.

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

Dated : 02/09/2022
R.N Sr. PS*

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI