

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

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

<b>IT(TP)A No. 448/Bang/2022</b>
<b>Assessment Year : 2017-18</b>

M/s. Essilor India Pvt. Ltd., 10 <sup>th</sup> Floor, Prestige Trade Tower, 46, Palace Road, High Grounds Sampangi Rama Nagar, Bengaluru – 560 001. <b>PAN: AAACE4623J</b>	<b>Vs.</b>	The Deputy Commissioner of Income Tax, Circle – 2(1)(1), Bangalore.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri Chavali Narayan, CA
Revenue by	:	Shri Praveen Karanth, CIT-DR

Date of Hearing	:	27-07-2022
Date of Pronouncement	:	21-10-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by assessee against order dated 31/03/2022 passed by the National Faceless Assessment Centre, Delhi for A.Y. 2017-18 on following grounds of appeal:

Based on the facts and circumstances of the case and in law, Essilor India Private Limited (hereinafter referred to as "EIPL" or the "Company" or the "Appellant"), respectfully craves leave to prefer an appeal against the order passed by the Additional / Joint / Deputy / Assistant Commissioner of Income Tax / Income Tax Officer, National Faceless Assessment Centre, Delhi (hereinafter referred to as "learned Faceless Assessing Officer" or the "learned FAO"), under section 143(3) read with section 144C(13) read with section 144B of the Income Tax Act, 1961 ("the Act") dated 31 March 2022 for the Assessment Year ("AY") 2017-18 ("impugned order"), in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel (hereinafter referred to as the "DRP"), Bangalore dated 27 January 2022 under section 144C(5) of the Act inter-alia on the following grounds which are without prejudice to each other:

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

1. The learned FAO / Transfer Pricing Officer ("TPO") / DRP has erred, in law and on facts, by making total additions of INR 66,17,10,865 to the total income filed by the Appellant
2. **Validity of Assessment Order**
  - 2.1. The learned FAO has erred, in law and on facts, in passing the final assessment order dated 31 March 2022 after the expiry of the time limit specified under section 144C(13) of the Act and hence the order is bad in law.

Without prejudice to the ground of appeal on validity of the impugned order, the Appellant prefers the grounds of appeals as mentioned below:

3. **Transfer pricing grounds**

- 3.1. The learned FAO/ TPO / DRP has erred, in law and on facts, in making TP adjustment of INR 49,81,34,662 with respect to advertisement, marketing and promotion ("AMP") expenses.
- 3.2. The learned FAO/ TPO/ DRP has erred, in law and on facts, by considering the selling and marketing expenditure of INR 42,67,77,470 incurred by the Appellant during the FY 2016-17, towards value added functions under the AMP activity, and treating it as a separate international transaction.
- 3.3. The learned FAO/ TPO/ DRP has erred in not appreciating that there are no machinery provisions in the Act to make adjustment in relation to AMP expenses.
- 3.4. The learned FAO/ TPO/ DRP has erred, in law and on facts by erroneously concluding that the Appellant has developed intangibles of the associated enterprise ("AE") by promoting brand name of the AE.



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- 3.5. The learned FAO/ TPO/ DRP has erred, in law and on facts in stating/ concluding that the vast distribution network created by the Appellant, a distributor, is an intangible asset that benefits its AE.
- 3.6. The learned FAO/ TPO/ DRP has failed to appreciate that the advertisement and marketing expenses by the Appellant is on its own account and for furtherance of its business and that any benefit to the AE in this regard is purely incidental. Thus, the adjustment made by the lower authorities is erroneous.
- 3.7. Without prejudice to the above grounds, the learned FAO / TPO/ DRP has erred, in law and on facts by ignoring the fact that out of the total expenditure amounting to INR 52,83,14,505 incurred by the Appellant on selling and marketing of its products, INR 35,97,55,995 is purely in the nature of selling expenses.
- 3.8. The learned FAO/ TPO/ DRP has erred, in law and on facts by applying the Bright line test ("BLT") approach to determine excessive AMP or non-routine expenditure which is not in accordance with provisions of the Income Tax Act, 1961.
- 3.9. The learned FAO/ TPO/ DRP has erred, in law and on facts by not following the decision rendered by the Hon'ble Bangalore Income Tax Appellate Tribunal in the Appellant's own case, for following AYs
- a) AY 2009-10 reported at IT(TP)A No. 29/Bang/2014
  - b) AY 2010-11 reported at IT(TP)A No. 227/Bang/2015
  - c) AY 2011-12 reported at IT(TP)A No. 542(B)/2016 and IT(TP)A No.551(B)/2016
  - d) AY 2012-13 reported at IT(TP)A No. 358(B)/2017
  - e) AY 2013-14 reported at IT(TP)A No. 2905(B)/2017
  - f) AY 2014-15 reported at IT(TP)A No. 3328(B)/2018
- 3.10. Without prejudice to the above grounds, the learned FAO/ TPO/ DRP has erred in law and on facts, by not appreciating that even if the incurrence of excess AMP expenditure is considered as cost, the net margin of the Appellant at 4.90% on operating revenue computed by the TPO based on TNMM is higher than the weighted average operating margin earned by comparable companies at 0.68% and thereby indicating that the Appellant has already been adequately remunerated/ compensated for AMP as well.
- 3.11. Without prejudice to the above grounds, the learned FAO/ TPO/ DRP erred in law and on facts, by considering 'Other method' as the Most Appropriate Method ("MAM") and in not appreciating that TNMM has been considered as the MAM and the operating margin of the Appellant is higher than the operating margins of the comparable companies, thus no separate adjustment for AMP expenditure is required.
- 3.12. The learned FAO/ TPO/ DRP has erred, in law and on facts, by making a TP adjustment after applying a markup, of 16.72% on operating cost, on selling and marketing expenditure incurred by the Appellant



- 3.13. Without prejudice to the above grounds, the learned FAO/ TPO/ DRP has erred, in law and on facts, by accepting the following as comparable companies:

Sl. No.	Company	Reason for rejection by the Appellant
1	Goldmine Advertising Ltd.	Non-comparable function
2	Pressman Advertising Ltd.	Non-comparable function
3	Scarecrow Communications Ltd.	Non-comparable function
4	Ugam Solutions Pvt. Ltd.	Non-comparable function
5	Majestic Research Services & Solutions Ltd.	Non-comparable function

4. **Validity of Corporate Tax disallowances**

- 4.1. The learned FAO has erred, in law and on facts, in passing the final assessment order without complying with the specific directions of the Hon'ble DRP on corporate tax disallowances and therefore the disallowances / additions are liable to be quashed in total.
- 4.2. The learned FAO has erred, in law and on facts, in making disallowances in the computation sheet annexed to final assessment order without recording any findings nor adjudicating the corporate tax issues in the final assessment order passed under section 143(3) read with section 144C(13) of the Act and hence the order is invalid and bad in law.

Not  
primary  
claim  
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Without prejudice to above grounds on validity of corporate tax disallowances, the Appellant prefers the grounds of appeals as mentioned below:

**Corporate tax grounds**

5. Disallowance under section 14A of the Act amounting to INR. 4,96,73,157
- 5.1. The learned FAO, has erred, in law and on facts, in making disallowance of INR 4,96,73,157 under section 14A of the Act by applying Rule 8D of the Rules.
- 5.2. The order passed by the learned AO is erroneous and bad in law inasmuch as the order is passed without complying with the directions of the DRP as mandated by the provisions of Section 144C(10) of the Act
- 5.3. The learned FAO, has erred, in law and on facts, in not appreciating the fact that that there is no exempt income earned by the Appellant for the year under consideration and therefore, the disallowance under section 14A of the Act cannot be made.
- 5.4. The final order passed by the learned FAO is bad and erroneous in law and on facts inasmuch as the final order was passed without considering the submissions of the Appellant and without considering the prevailing judicial precedents.

6. Disallowance of expenditure of INR 1,72,98,009 claimed under the head "Provision for inventory written off due to obsolescence."
  - 6.1. The learned FAO/DRP has erred, in law and on facts, in making disallowance of INR 1,72,98,009 under section 36(1)(vii) of the Act
  - 6.2. The learned FAO/DRP has failed to appreciate the fact that the reversal of provision claimed as deduction during the year has been offered to tax in the year in which provision was created and therefore, the deduction has been rightly claimed by the Appellant.
  - 6.3. The learned FAO/DRP has failed to consider the details and submission made in this regard by the Appellant during the course of DRP proceedings and therefore, the disallowance made is erroneous and bad in law.
7. Disallowance of expenditure of INR 9,66,05,046 claimed as amount "written off as interest on outstanding debtors"
  - 7.1. The learned FAO/DRP has erred, in law and on facts, in making disallowance of INR 9,66,05,046 under section 37 of the Act
  - 7.2. The order passed by the learned FAO is erroneous and bad in law inasmuch as the order is passed without complying with the directions of the DRP as mandated by the provisions of Section 144C(10) of the Act
  - 7.3. The learned FAO has failed to appreciate that an amount of INR 9,66,05,046 was added and also deducted in the tax computation simultaneously to comply with the Income Computation and Disclosure Standards ('ICDS') regulations, therefore, the learned FAO has erred on facts in making disallowance of INR 9,66,05,046 which was claimed as deduction by the Appellant without considering the fact that the same amount has been offered to tax by the Appellant in the computation of the income.
8. General grounds
  - 8.1. The learned FAO has erred, in law and on facts, in initiating penalty proceedings u/s 274 read with section 270A of the Act.
  - 8.2. The learned FAO has erred, in law and on facts, by computing interest liability of INR 25,00,159 under Section 234A, INR 15,00,09,540 under section 234B and INR 2,22,517 under section 234C of the Act

The Appellant submits that each of above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, 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 on the appeal in accordance with the law.

## **2. Brief facts of the case are as under:**

2.1 The assessee company is engaged in the business of trading in ophthalmic lenses, optical meters and processing of semi-finished ophthalmic lenses.

2.2 The assessee filed its return of income on 01/12/2017 declaring total income of Rs.33,10,52,119/-. The case was selected for complete scrutiny and notice u/s. 143(2) was issued along with notice u/s. 142(1) of the Act.

2.3 During the year under consideration, the assessee had international transaction as per Section 92 of the Income Tax Act, 1961. According to Section 92CA of the Income Tax Act, 1961, the case was referred to the Transfer Pricing Officer in order to determine the Arm's Length Price after obtaining necessary approval of the Ld.Pr.CIT, Bengaluru. The Ld.TPO passed order u/s 92CA of the Income Tax Act, 1961 on 27/01/2021, proposed addition of Rs.49,45,49,732/- as TP adjustment in respect of AMP segment. The Ld.AO further made disallowance u/s. 14A of Rs.4,96,73,157/-, disallowance of provision for inventory written off due to obsolete / bad stock of Rs.1,72,98,009/-, disallowance of interest written off OG debtors of Rs.9,66,05,046/-.

2.4 On receipt of the draft assessment order, the assessee filed objections before the DRP. The DRP upheld the transfer pricing addition proposed. The Ld.AO/TPO however in respect of the corporate tax additions directed the Ld.AO with certain directions to verify the claim based on the evidences filed.

2.5 The Ld.AO on receipt of the DRP directions made addition in the hands of the assessee on corporate tax issues without verifying the evidences filed.

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

3. The Ld.AR at the outset, submitted that, the assessee wishes not to press **Ground nos. 1-2 and 4.**

**Accordingly, these grounds are dismissed as not pressed.**

4. The only issue that remains on the transfer pricing addition made towards the AMP segment.

5. The Ld.AR at the outset submitted that, identical issue was considered in great detail by *Coordinate Bench* of this *Tribunal* in assessee's own case, the details of which are as under:

- a) AY 2009-10 reported at IT(TP)A No. 29/Bang/2014
- b) AY 2010-11 reported at IT(TP)A No. 227/Bang/2015
- c) AY 2011-12 reported at IT(TP)A No. 542(B)/2016 and IT(TP)A No.551(B)/2016
- d) AY 2012-13 reported at IT(TP)A No. 358(B)/2017
- e) AY 2013-14 reported at IT(TP)A No. 2905(B)/2017
- f) AY 2014-15 reported at IT(TP)A No. 3328(B)/2018

The Ld.CIT.DR on the contrary, relied on the orders passed by the authorities below.

6. We note that the assessee gave details of expenses incurred towards the advertisement and sales promotion that was debited to the profit & loss account including the selling expenses, marketing expenses. It was submitted for the year under consideration that, the assessee incurred expenses to enable it to sell its products, rather than, promoting the AE. It is submitted that, the reasoning for disallowing the AMP expenses by the Ld.TPO in the preceding assessment year is identical with the reasoning for the year under consideration. It is submitted that the assessee relied on the decision of *Hon'ble Delhi High Court* in case of *Maruti Suzuki India Ltd. vs. CIT* reported in 381 ITR 117, and in the case of *Sony Ericsson Mobile Communications Pvt. Ltd.*

vs. CIT reported in 374 ITR 118 which were ignored by the authorities below.

7. The Coordinate Bench of this Tribunal by order dated 06.02.2020 for A.Ys. 2011-12 to 2014-15 observed and held as under:

*"16. We have given our careful consideration to the rival submissions. The Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. (MSIL) v. Addl. CIT, TPO [2010] 328 ITR 210 (Delhi), in the case of a licensed manufacturer incurring AMP expenses it was held that it incurring of AMP expenses would be an international transaction and the issue of determination of ALP was remanded. This decision was however overruled in Maruti Suzuki India Ltd. v. Addl. CIT [2011] 335 ITR 121 (SC) wherein the Hon'ble Supreme Court left the question whether AMP expenses gives raise to international transaction or not open with the following observations:*

*"In this case, the High Court has remitted the matter to the Transfer Pricing Officer ("the TPO" for short) with liberty to issue fresh show-cause notice. The High Court has further directed the Transfer Pricing Officer to decide the matter in accordance with law. Further, on going through the impugned judgment of the High Court dated July 1, 2010, we find that the High Court has not merely set aside the original show cause notice but it has made certain observations on the merits of the case and has given directions to the Transfer Pricing Officer, which virtually conclude the matter. In the circumstances, on that limited issue, we hereby direct the Transfer Pricing Officer, who, in the meantime, has already issued a show cause notice on September 16, 2010, to proceed with the matter in accordance with law uninfluenced by the observations/directions given by the High Court in the impugned judgment dated July 1, 2010.*

*The Transfer Pricing Officer will decide this matter on or before December 31, 2010.*

*The civil appeal is, accordingly, disposed of with no order as to costs."*

17. The Hon'ble Delhi High Court in an other case of Maruti Suzuki India Ltd. Vs. CIT 381 ITR 117 (Delhi) held that the fact that the benefit of such AMP expenses would also ensure to the AE is itself insufficient to infer the existence of an international transaction. Similar decision was also rendered by the Hon'ble Delhi High Court in the case of CIT

*(LTU) v. Whirlpool of India Ltd., 381 ITR 154. The bright line test which was applied by the AO in the present case was also applied by the AO in the aforesaid cases. The bright line test which was accepted by the Special Bench of ITAT in the case of L.G. Electronics India Pvt. Ltd. v. ACIT (2013) 22 ITR (Trib.) 1 (Del)(SB) was held by the Hon'ble Delhi High Court to be not correct. In the case of Maruti Suzuki (supra), the facts were Maruti Suzuki India Ltd. (MSIL) was engaged in the manufacture of passenger cars in India. It was a subsidiary of SMC, a Japanese company. MSIL started its business in 1982 as a Government of India owned company. SMC was selected as the business partner independently by MSIL. The co-branded trade mark "Maruti-Suzuki" was used since the inception of MSIL. A licence agreement was entered into between MSIL and SMC in October 1982 for its models M-800, Omni and Gypsy. By the agreement, MSIL was permitted to use the co-branded trade mark "Maruti-Suzuki" on the vehicles. In the assessment of MSIL for assessment year 2005-06, the AO invoked the provisions of section 92CA(1) of the Act and referred the case to the Transfer Pricing Officer for determination of the arm's length price in relation to the international transactions undertaken by MSIL with its associated enterprise, SMC. The Transfer Pricing Officer passed an order making an adjustment of Rs. 154.12 crores towards the advertisement, marketing and sales promotion expenses imputing a notional arm's length compensation towards the advertisement, marketing and sales promotion expenses incurred by MSIL for SMC. On the above facts, the Hon'ble Delhi High Court held as follows:*

*"... when the licence agreements were originally entered into in 1982, MSIL was known as MUL and SMC did not hold a single share in MUL. In 2003 SMC acquired the controlling interest in MSIL. There were various models of Suzuki motor cars manufactured by MSIL and each model was covered by a separate licence agreement. Under these agreements, granted licence to MSIL to manufacture that particular car model and provided technical know-how and information and right to use Suzuki's patents and technical information. It also gave MSIL the right to use Suzuki's trade mark and logo on the product. Pursuant to this agreement, MSIL was using the co-brand, i.e., Maruti Suzuki trade mark and logo for more than 30 years. This co-brand could not be used by SMC and was not owned by it. The clauses in the agreement between MSIL and SMC indicated that permission was granted by SMC to MSIL to use the co-brand "Maruti Suzuki" name and logo. The mere fact*

*that the cars manufactured by MSIL bore the symbol "S" was not decisive as the advertisements were of a particular model of the car with the logo "Maruti-Suzuki". The Revenue had been unable to contradict the submission of MSIL that the co-brand mark "Maruti-Suzuki" in fact did not belong to SMC and could not be used by SMC either in India or anywhere else. The decision in the case of Sony Ericsson requires that the mark or brand should belong to the foreign associated enterprise. The Revenue also did not deny that as far as the brand "Suzuki" was concerned its legal ownership vested with the foreign associated enterprise, i.e., SMC. Moreover as MSIL was concerned, its operating profit margin was 11.19 per cent. which was higher than that of the comparable companies whose profit margin was 4.04 per cent. Therefore, applying the transactional net margin method it must be stated that there was no question of a transfer pricing adjustment on account of advertisement, marketing and sales promotion expenditure. The advertisement, marketing and sales promotion expenses incurred by MSIL could not be treated and categorised as an international transaction under section 92B of the Act."*

*18. In the case of Whirlpool of India Ltd. (supra), it was held that there had to be an international transaction with a certain disclosed price. The transfer pricing adjustment envisages the substitution of the price of such international transaction with the arm's length price. The transfer pricing adjustment was not expected to be made by deducing from the difference between the excessive advertising, marketing and sales promotion expenditure incurred by the assessee and the advertising, marketing and sales promotion expenditure of a comparable entity that an international transaction existed and then proceeding to make the adjustment of the difference in order to determine the value of such advertising, marketing and sales promotion expenditure incurred for the associated enterprise. Thus, the bright line test had been rejected as a valid method for either determining the existence of an international transaction or for the determination of the arm's length price of such transaction. Although under section 92B read with section 92F(v), an international transaction could include an arrangement, understanding or action in concert, this could not be a matter of inference. There had to be some tangible evidence on record to show that two parties had acted in concert. It was also held that the provisions under Chapter X envisaged a separate entity concept. In other words, there could not be a presumption that the assessee was a*

*subsidiary of the foreign company and that all the activities of the assessee were in fact dictated by the foreign company. Merely because the foreign company had a financial interest, it could not be presumed that advertising, marketing and sales promotion expenses incurred by the assessee were at the instance or on behalf of the foreign company. The initial onus was on the Revenue to demonstrate through some tangible material that the two parties acted in concert and further that there was an agreement to enter into an international transaction concerning advertising, marketing and sales pro-motion expenses."*

*19. In the light of the law as it exists today, we shall examine the arguments of the rival parties. There has been no agreement between Essilor International which owns the various brands set out by the TPO in his order and the Assessee to incur any Advertisement and Marketing or Sales promotion expenses. None of the other reasons given by the TPO which have been explained by the Assessee and set out in the earlier paragraph can be the basis to hold that there was in fact an international transaction in the matter of incurring of AMP expenses by the Assessee. The order of the Tribunal in Assessee's own case for A.Y.2009-10 and 2010-11 in our view requires to be followed and there are no reasons whatsoever to take a different view. Consequently, there could not be any exercise of determining the ALP of the AMP expenses by comparing the expenses incurred by the Assessee with comparable companies. In view of the above conclusions, the other aspects whether the comparable companies chosen by the TPO are in fact comparable in terms of Functions performed, Assets employed and Risks assumed (FAR) analysis and other aspects of determination of ALP does not require any consideration. Therefore the addition made on account of determination of ALP of AMP expenses in AY 2011-12 to 2014-15 is directed to be deleted."*

8. We note that the facts and circumstances in respect of this issue is identical and similar to the preceding assessment years considered by this *Tribunal*. Revenue has brought nothing on record to establish that assessee incurred the AMP expenses at the behest of the AE.

8.1 Respectfully following the consistent view in identical facts, we direct the Ld.AO to delete the addition made on account of AMP expenses for year under consideration.

**Accordingly ground no. 3 along with its sub-grounds stands allowed.**

9. In respect of **Ground nos. 5-7**, the Ld.AR submitted that the issues needs to be remanded to the Ld.AO to consider the claims in accordance with the directions of the DRP.

We note that the impugned order has not been passed by following the directions of the DRP in respect of the corporate tax issues and the addition made by the Ld.AO following the draft assessment order.

In the interest of justice, we direct the Ld.AO to consider the claims in accordance with the directions of the DRP, having regard to the evidences / details filed by the assessee on these issues.

**Accordingly, ground nos. 5-7 raised by assessee stands allowed for statistical purposes.**

**10. Ground no. 8** with its sub-grounds are consequential in nature and therefore do not require adjudication.

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

**Order pronounced in the open court on 21<sup>st</sup> October, 2022.**

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 21<sup>st</sup> October, 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