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

BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER

AND

SH. YOGESH KUMAR US, JUDICIAL MEMBER

I.T.A. No. 8167/DEL/2018 (A.Y 2014-15)

Suzuki Motorcycles (1) Pvt. Ltd. IInd Floor, Plot No. 1, Nelson Mandela Road, Vasant Kunj, Nlson Mandela Road, New Delhi **PAN: AAACI5832P** **(APPELLANT)**	Vs.	DCIT, Circle : 24 (2) New Delhi. **(RESPONDENT)**

I.T.A. No. 8054/DEL/2019 (A.Y 2015-16)

Suzuki Motorcycles (1) Pvt. Ltd. IInd Floor, Plot No. 1, Nelson Mandela Road, Vasant Kunj, Nlson Mandela Road, New Delhi **PAN: AAACI5832P** **(APPELLANT)**	Vs.	DCIT, Circle : 24 (2) New Delhi. **(RESPONDENT)**

Appellant by	**Sh. Neeraj Jain, Adv & Mr. Ramit Katyal, AR**
Respondent by	**Shri Rajesh Kumar, [CIT] - D. R.;**

Date of Hearing	**17.11.2022**
Date of Pronouncement	**22.11.2022**

ORDER

PER YOGESH KUMAR U.S., JM

These two appeals preferred by the assessee for the Assessment Years 2014-15 & 2015-16 respectively against the assessment order dated 30/10/2018 & 31/07/2019 passed by the DCIT, Circle-24 (2), New Delhi u/s 143(3) r/w Section 144C of Income tax Act, 1961,('the Act' for short).

2. The assessee has raised the following substantive grounds of appeal:-

"1. That the assessing officer erred on facts and in law in completing the assessment under section 144C read with section143(3) of the Income- tax Act, 1961 ('the Act') at an income of Rs. 25,47,45,430 as against the loss of Rs 33,50,58,004 returned by the appellant.

2.That on the factsand circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation and therefore, is liable to be quashed

3. That the assessing officer erred on facts and in law in making transfer pricing adjustment of Rs. 58,98,03,434 in relation to the advertisement, marketing and sales promotion expenses (hereinafter referred to as 'the AMP expenses') incurred by the appellant.

4. That the DRP/TPO erred on facts and in law in not appreciating that the AMP expenses, etc., unilaterally incurred by the appellant in India could not be characterized as an international transaction as per section 92B, in the absence of any proved understanding / arrangement between the appellant and the

associated enterprise, so as to invoke the provisions of section 92 of the Act.

4.1. That the DRP/TPO erred on facts and in law in holding that there exists an international transaction in connection with incurring of AMP expenses without placing on record any tangible material or evidence to substantiate the existence of such transaction.

5. That the DRP/TPO erred on facts and in law in holding that valuable marketing intangible has been created by the appellant in India in favor of the associated enterprises.

6. That the TPO/DRP erred on facts and in law in holding that there exists an international transaction of incurring AMP expenses allegedly holding that the appellant has reported reimbursement received from associated enterprises on account of AMP expenses as an international transaction in form 3CEB not appreciating that such expenses were reimbursed by the associated enterprise as gratis and not in pursuance of any international transaction.

7. That the DRP/TPO erred on facts and in law in holding that AMP expenses incurred by the appellant constitutes an international transaction on the basis that the associated enterprise has reimbursed a part of AMP expenses not appreciating that such expenses were reimbursed by the associated enterprise in order to support the operations of the appellant and not in pursuance of any understanding, arrangement or action in concert to incur AMP expenses.

8. That the DRP/TPO erred on facts and in law in holding that the associated enterprise not only owns the intangibles but also controls further development and growth of its intangibles.

9. That the DRP/TPO erred on facts and in law in not appreciating that the appellant was performing the critical decision making functions with regard to advertisement and marketing activity and was therefore independently controlling the AMP expenditure incurred by it.

10. That the DRP/TPO erred on facts and in law in relying upon the memorandum entered into between the appellant and the associate enterprises which states that the "AE commissioned the assessee to put in effect the advertisement and publicity of assessee's products in India" to hold that the associated enterprise has a definite say in the decisions regarding incurring of advertisement in India without appreciating that such memorandum provides for advertisement and promotion of appellant's own products in India.

11. That the DRP/TPO erred on facts and in law in not appreciating that the only Transfer Pricing adjustment permitted by Chapter X of the Act. was in respect of the difference between the arm's length price (ALP) and the contract or declared price, but the said provision could not be invoked to determine the 'quantum' / extent of business expenditure.

12. That the DRP/TPO erred on facts and in law in not appreciating that by virtue of long term right to use the 'Suzuki' brand in India, the appellant has gained economic ownership of the said brand.

13. That the DRP/TPO erred on facts and in law in not appreciating that adjustment on account of allegedly excess AMP expenses is not warranted in the case of the appellant, a full risk bearing entrepreneur.

14. That the TPO erred on facts and in law in holding that the associated enterprise is benefiting from the AMP expenses incurred by the appellant on account of royalty, sale of goods etc. not appreciating that such transactions have been separately benchmarked and accepted to be at arm's length

15. That the TPO erred on facts and in law in holding that the associated enterprise is benefiting from the AMP expenses on account of development of brand without appreciating that the associated enterprise is not selling any goods directly in the Indian market.

16. That assessing officer erred on facts and in law in not appreciating that the Transfer Pricing adjustment made by the TPO in the present case was a mere quantitative adjustment, on the footing that the appellant had incurred excessive amount of AMP expenditure and consequently that such Transfer Pricing adjustment was not at all permitted or authorized by Chapter X of the Act.

17. The assessing officer erred on facts and in law in not appreciating that the advertisement and marketing expenses were incurred by the appellant wholly and exclusively for purposes of its business and not on behalf of or for the benefit of the AE; any benefit to the AE being only incidental.

18. The assessing officer erred on facts and in law in applying Bright Line Test not appreciating that use of bright line test for the purpose of undertaking benchmarking analysis has been jettisoned by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications Pvt Ltd 374 ITR 118.

19. Without prejudice that the assessing officer/TPO erred on facts and in law, in not appreciating that the AMP expenses incurred

by the appellant was appropriately established to be at arm's length applying TNMM.

20. Without prejudice that the assessing officer erred on facts and in law in considering rebate amounting to Rs 3,22,89,908 and discount amounting to Rs 83,656,647 for the purpose of calculating alleged AMP expenditure of the assessee.

21. Without prejudice, the assessing officer erred on facts and in law considering companies having different product profile than the appellant as comparable companies for the purpose of benchmarking the alleged international transaction of AMP expenditure incurred by the appellant.

22. Without prejudice, the assessing officer erred on facts and in law in applying a markup of 9.48% on the alleged excess AMP expenditure incurred by the appellant, while computing the value of compensation to be received by the appellant on account of creation of marketing intangible of 'Suzuki' brand."

ITA No. 8054/Del/2019

1. *That the assessing officer erred on facts and in law in completing assessment under section 144C read with section 143(3) of the Income-tax Act, 1961 ('the Act') at Rs 26,24,95,900 as against returned loss of Rs 59,54,13,072*
2. *Thatthe assessing officer erred on facts and in law in erroneously considering the returned loss of the appellant at Rs 33,50,58,004 as against the correct returned loss of Rs 59,54,13,072 for computing the total income of the appellant.*

3. *Thaton the facts and circumstances of the case and in law, the impugned assessment order dated 31.07.2019 was passed beyond the limitation provided under section 153(1) of the Income Tax Act, 1961, is barred by limitation and therefore, is liable to be quashed*

4. *That the assessing officer erred on facts and in law in making transfer pricing adjustment of Rs. 59,73,53,904 in relation to the advertisement, marketing and sales promotion expenses (hereinafter referred to as 'the AMP expenses') incurred by the appellant.*

5. *That the TPO/DRP erred on facts and in law in holding that there exists an international transaction of incurring AMP expenses allegedly holding that the appellant has reported reimbursement received from associated enterprises on account of AMP expenses as an international transaction in Form 3CEB.*

6. That the DRP /TPO factsandin law in not appreciating that

such AMP expenses were reimbursed by the associated enterprise as gratis, i.e. without any quid pro quo. to support the operations of the appellant and not in pursuance of an} understanding, arrangement or action in concert to incur AMP expenses, and. therefore, do not constitute an international transaction.

7. That the DRP/TPO erred on facts and in lav. in allegedly holding that there exists an international transaction in connection with incurring of AMP expenses without bringing on record any tangible material or evidence to substantiate the existence of and international transaction on account of AMP expenses.

8. That the DRP/TPO erred on facts and in law in not appreciating that the AMP expenses, etc., unilaterally incurred by the appellant in India could not be characterized as an international

transaction as per section 92B, in the absence of any proved understanding arrangement between the appellant and the associated enterprise, so as to invoke the provisions of section 92 of the Act.

9. That the DRP erred on facts and in law in holding that the AMP expenses incurred by the appellant resulted in a benefit to the associated enterprise as the appellant was just the transit point for the product towards the end user.

10. That the DRP/TPO erred on facts and in law in not appreciating that the appellant being the full fledged independent manufacturer of two wheelers using the brand name 'Suzuki' is the economic owner of the brand 'Suzuki' in India and therefore enjoys the benefits associated with the AMP expenses and the benefits to the associated enterprise, if any, are merely incidental.

11. That the TPO erred on facts and in law in holding that the associated enterprise is benefiting from the AMP expenses on account of development of brand not appreciating that the associated enterprise is not selling any goods directly in the Indian market

12. That the DRP/TPO erred on facts and in law in not appreciating that the appellant was performing the critical decision making functions with regard to advertisement and marketing activity and was therefore independently controlling the AMP expenditure incurred by it.

13. That DRP erred on facts and in law in not appreciating that the Transfer Pricing adjustment made by the TPO in the present case was a mere quantitative adjustment, on the footing that the appellant had incurred excessive amount of AMP expenditure and

consequently that such Transfer Pricing adjustment was not at all permitted or authorized by Chapter X of the Act.

14. The TPO/DRP erred on facts and in law in not appreciating that the advertisement and marketing expenses were incurred by the appellant wholly and exclusively for purposes of its business and not on behalf of or for the benefit of the AE; any benefit to the AE being only incidental.

15. The assessing officer erred on facts and in law in applying Bright Line Test not appreciating that use of bright line test for the purpose of undertaking benchmarking analysis has been jettisoned by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications Pvt Ltd 374 ITR 118.

16. That the TPO/DRP erred on facts and in law in not following the decision of the Hon'ble Tribunal in the appellant's own case for AY 2010-11 on the basis that the Revenue is in the process of filing an appeal against the order of the Hon'ble Tribunal before the Hon'ble High Court.

17. Without prejudice that the assessing officer TPO erred on facts and in law. in not appreciating that the .AMP expenses incurred by the appellant was appropriately established to be at arm's length applying TNMM.

18. Without prejudice that the assessing officer erred on facts and in law in considering rebate amounting to Rs 207,68,364 and discount amounting to Rs 691,00,934 for the purpose of calculating alleged AMP expenditure of the assessee.

19. Without prejudice that the TPO/DRP erred on facts and in law in considering warranty claims amounting to Rs. 10,43,82,495/ as part of AMP expenses for the purpose of applying the bright line test

20. Without prejudice, the assessing officer erred on facts and in law considering companies having different product profile than the appellant as comparable companies for the purpose of benchmarking the alleged international transaction of AMP expenditure incurred by the appellant.

21, Without prejudice, the assessing officer/ TPO erred on facts and in law in applying a markup of 21.17% on the alleged excess AMP expenditure incurred by the appellant, while computing the value of compensation to be received by the appellant on account of creation of marketing intangible of 'Suzuki' brand.

The appellant craves leave to add, alter, amend or vary from the aforesaid grounds of appeal before or at the time of hearing."

ITA NO. 8167/Del/2018 (A.Y 2014-15)

3. Brief facts of the case are that, the assessee is a subsidiary of Suzuki Motor Corporation, Japan and is engaged in business of manufacture and sale of two wheelers including scooters. The Ld. TPO passed order u/s 92CA (3) of the Income Tax Act, 1961 ('Act' for short) on 27/10/2017 wherein by applying Bright Line Test Method (For short 'BLTM') made an adjustment on account of Advertisement, Marketing and Promotion expenses (AMP expenses) amounting to Rs. 71,19,59,740/- in following manners:-

Particulars	**Amount (Rs)**
Value of sales	13,84,82,75,367
Bright Line (%)	3.036%
Amount that represents bright line	42,04,33,640
Expenditure on AMP by assessee	119,96,95,353
Expenditure in excess of bright line	77,92,61,713
Reimbursement that should have been received along with a mark up of 20.72% for providing services	94,07,24,740
Reimbursement received by the assessee	22,87,65,000
Adjustment	71,19,59,740

4. The DRP vide order dated 17/09/2018, upheld the adjustment made by the TPO and directed the TPO to exclude one Company i.e. Atul Auto Ltd. from the set off comparables for the purpose of applying Bright Line Test (BLT) and further directed the TPO to exclude four comparables i.e. M/s Husys Consulting, M/s HSCC India Ltd., M/s BVG India Ltd., M/s Just Dial Ltd, from the set of comparables selected by the TPO for computing the operating margins for the purpose of calculating the adjustment.

5. In compliance of the directions of the DRP, the TPO computed the average AMP/sales of the comparables Companies at 3.264% and the mark up at 9.48% and made an adjustment of Rs. 58,98,03,434/- on account of AMP Expenses, accordingly the assessment order came to be passed on 30/10/2018 by making an addition of Rs. 58,98,03,434/- in relation to AMP expenses incurred by the assessee.

6. Aggrieved by the above addition the assessee has preferred the present appeal on the grounds mentioned above. The Ld. Counsel for the assessee submitted that the similar adjustment on account of AMP Expenses was made by the TPO in the case of the assessee for the Assessment Year 2010-11 which was called in question by the assessee before this Tribunal in ITA No. 476/Del/2015 on the identical grounds. The Co-ordinate Bench of the Tribunal vide order dated 26/11/2018, held that the there does not exist any international transaction between the assessee and the AE with regard to incurring of AMP expenses. The relevant portion of the order of the Co-ordinate Bench is as under:-

> *"11. Hon'ble Delhi High Court in series of decisions inter alia Maruti Suzuki India Ltd.; Bausch & Lomb Eyecare (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 the Revenue is to discharge first the onus of proving the existence of an international transaction between assessee and the AE and such transactions cannot be inferred merely on the basis of bright line test. Revenue has to discharge the initial onus by bringing on record some tangible material that the taxpayer and its AE have acted in concert and further that there was an agreement to enter into international transactions concerning AMP expenses.*
>
> *12. 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 extent of 10.26%, 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.*

13. So, we are of the considered view that merely by applying the BLT, the existence of international transactions cannot be proved and as such the adjustment made by the TPO/DRP/AO on this account is not sustainable in the eyes of law. We are further of the considered view that ALP expenses incurred by the taxpayer were not for the benefit of AE but only to enhance sales of the taxpayer."

7. Further, the similar adjustment on account of AMP Expenditure for the Assessment Year 2013-14 was also been deleted by the Co-ordinate Bench of the Tribunal in ITA No. 7142/Del/2017 by following order of the Tribunal in Assessee's own case for Assessment Year 2010-11 made in ITA No. 476/Del/2015 (supra).

8. In view of the above discussions, by following the orders of the Tribunal in Assessee's own case for the Assessment Years 2010-11 & 2013-14 and by following the principle of consistency we are of the considered opinion that the adjustment made by the TPO/DRP/A.O by applying BLT on account of AMP expenses in the absence of international transactions between the tax payer and the A.E is not sustainable in the eyes of law. Hence, the same is order to be deleted.

9. In the result, the appeal filed by the assessee is allowed.

ITA No. 8057/Del/2019 (A.Y 2015-16)

10. Even in the present appeal, the assessee has raised similar grounds which was raised in ITA No. 8176/Del/2018 since there is no change of circumstances in the present Assessment Year, and for the discussion made in the ITA No. 8167/Del/2018, by following the orders made in ITA No. 476/Del/2015 for Assessment Year 2010-11 and ITA No. 7142/Del/2017 for Assessment Year 2013-14, we are of the opinion that the adjustment made by the TPO/DRP/A.O. by applying the BLT on account of AMP expenses for the year under consideration in the absence of international transaction between

the tax payer and the A.E is not sustainable in the eyes of law. Hence, the same is order to be deleted.

11. In the result, appeal filed by the assessee in ITA No. 8054/Del/2019 is allowed.

Order pronounced in the Open Court on : 22 .11.2022.

Sd/-	**Sd/-**
(B. R. R. KUMAR)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 22/11/2022

** R.N Sr. PS**

Copy forwarded to :

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

ASSISTANT REGISTRAR
ITAT NEW DELHI