

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE**

Before Shri George George K, JM & Shri Laxmi Prasad Sahu, AM

IT(TP)A No.283/Bang/2022 : Asst.Year 2017-2018

M/s.HP India Sales Private Ltd. No.24, Salarpuria Arena Hosur Main Road Adugodi Bengaluru - 560 030. PAN : AAACC9862F.	v.	The Assistant Commissioner of Income-tax, Circle 3(1)(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.Ajay Vohra, Advocate
Respondent by : Sri.Arun Kumar, CIT(TP)-2-DR

Date of Hearing : 06.12.2022	Date of Pronouncement : 07.12.2022
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ORDER

Per George George K, JM :

This appeal at the instance of the assessee is directed against final assessment order dated 28.02.2022 passed u/s 143(3) r.w.s. 144C(13) of the I.T.Act. The relevant assessment year is 2017-2018.

2. The assessee has raised 13 grounds in its memorandum of appeal dated 22.06.2022. The learned AR during the course of hearing, did not raise any specific plea with regard to grounds 1 to 5, 10, 12 and 13 (also sub-grounds), hence, the same are dismissed. The surviving grounds, namely, grounds 6 to 9, 11 and its sub-grounds, read as follows:-

“Ground no. 6: TP adjustment of 1,11,41,19,868 on account of alleged excess AMP expenditure pertaining to trading segment

6.1 The learned DRP / AO / TPO has erred in law and on

facts, in making TP adjustment of INR 1,11,41,19,868 to the returned income of the Assessee by assuming the existence of an alleged international transaction of brand promotion services to AE.

AMP expenditure not an international transaction:

6.2 The learned DRP / AO / TPO has erred in law and on facts by alleging that the unilateral AMP expenditure, being payments made to third parties, is an "international transaction" as per the provisions of Section 92B of the Act.

6.3 The learned DRP / AO / TPO has erred in law and on facts in not appreciating that there was no agreement, understanding or arrangement between the Assessee and the AE with respect to the alleged AMP expenditure and concluded that an implicit mutual agreement / arrangement existed.

6.4 The learned DRP / AO / TPO has erred in law and on facts by not appreciating that no transfer pricing adjustment can be made in respect of AMP expenses, where the expenses are legitimate, bonafide and deductible business expenditure.

6.5 The learned DRP / AO / TPO has erred in law and on facts by disregarding various judicial and specific jurisdictional pronouncements in making a TP adjustment for AMP for the Assessee who is engaged in distribution.

6.6 The learned DRP / AO / TPO has erred in law and on facts in presuming that an international transaction of brand promotion for the AE has taken place without bringing on record any tangible and reliable evidence on the benefits derived by the AE.

6.7 Without prejudice to the above, the learned DRP / AO / TPO erred in recognizing that even if a mark-up is to be applied on AMP, the same could have been charged only on the value-added expenses incurred by the Assessee and not on the entire quantum.

6.8 The learned DRP / AO / TPO has failed to consider that the alleged AMP expenses were incurred exclusively in relation to the Assessee's business, which is also evident from the fact that the expenditure have been allowed by the learned AO under section 37 of the Act.

Notwithstanding and without prejudice to the above grounds that the AMP expenditure incurred by the Assessee does not constitute an international transaction under Chapter X of the Act, the Assessee craves to raise following grounds on merits:

Ground No.7: Selling expenses in the nature of sales promotions costs cannot be considered as part of the brand promotion / AMP expense

7.1 The learned DRP / AO / TPO has erred' in law and on facts in considering expenses in the nature of sales promotion

as expenses leading to brand promotion as a part of the alleged AMP /brand promotion expenses without due consideration to the Assessee's submissions.

7.2 The learned DRP / AO / TPO has erred in law and on facts in not considering the several judicial precedents, stating that selling expenses are not in the nature of AMP.

Ground No.8 : Alleged DEMPE functions undertaken by the Assessee:

8.1 The learned DRP / AO/ TPO have erred in law and on facts in concluding that the Assessee contributes to the development, enhancement, maintenance, protection and exploitation ("DEMPE") of the alleged marketing intangible generated by the Assessee as a result of incurring AMP expenditure.

8.2 The learned DRP / AO/ TPO have erred in law and on facts in concluding that the distribution and AMP are two distinctive functions and failed to appreciate the aggregation approach adopted by the Assessee.

8.3 Notwithstanding and without prejudice to the above, the learned DRP / AO/ TPO erred in not appreciating the fact that even after including mark-up element in the operating cost base of the distribution segment, the adjusted net margin earned from the trading activity by the Assessee is still at arm's length.

8.4 The learned DRP / AO/ TPO have erred in applying the Bright Line Test as a methodology to quantify the AMP service alleged to have been rendered by the Assessee to its AE despite the fact that BLT is not legally recognized under various legal jurisprudence.

Ground No.9: Benchmarking the alleged international transaction of brand promotion service by Assessee to its AE

9.1 Without prejudice to the legal arguments on AMP, the learned DRP / AO/ TPO has erred in carrying out a search for identifying comparable companies in order to determine the mark-up that the Assessee should have recovered from the AE in relation to the alleged AMP expenses considered to be in the nature of brand promotion service.

9.2 The learned DRP / AO/ TPO has erred in determining the mark-up for the alleged international transaction of brand promotion services by not rejecting following companies since they fail to qualify the comparability criteria of the learned TPO.

a. Armour Display Systems Private Limited;

- b. Tutorial Point India Private Limited;
c. Lokmat Media Private Limited

Ground No. 11: Short grant of credit for tax deducted at source (TDS)

11.1 The AO erred in not allowing appropriate credit for TDS as claimed by the Appellant.

11.2 The AO erred in granting credit for TDS only to the extent of INR 15,32,04,373 as against an amount of INR 62,10,84,286 claimed by the Appellant during the course of assessment proceedings for financial year 2016-17 [i.e., AY 2017-18], thereby resulting to short grant of TDS credit of INR 46,78,79,913.

11.3 The AO has erred in law and on facts, in short granting the TDS credit without considering the TDS claim made by the Appellant, which is against the principles laid down in Instruction No.5/2013 dated 8 July 2013 and the decision of Honorable Delhi High Court, in the case of its Own Motion v. CIT (2012) 21 taxmann.com 372 (Delhi).”

3. The assessee has also raised an additional ground, namely, ground 14 vide its application dated 14.07.2022. The additional ground raised reads as follows:-

“Ground No.14:

14.1 The learned DRP/AO have erred in not granting the leave encashment payments of INR 14,650,125 made during the year under section 43B of the Act.”

We shall adjudicate the above grounds and the additional ground as under:

Grounds 6 to 9 (TP Adjustment of AMP Expenses)

4. The assessee is a company engaged in import of computer peripherals from its Associate Enterprises (AEs) for the sale in India. The assessee also renders certain support

services to its AE's. During the relevant previous year, the assessee had entered into various international transactions with its AEs, which are listed at page 5 of the Transfer Pricing Officer's (TPO) order passed u/s 92CA(3) of the I.T.Act (order dated 29.01.2022). Since the operating margin of the assessee and the margin of the comparable was within arm's length, the international transaction of import of resale of computer and peripherals was considered to be at arm's length. During the course of transfer pricing proceedings, the TPO did not dispute the bench mark analysis of international transaction undertaken by the assessee and accepted the same to be at arm's length. The TPO, however, proceeded to make an adjustment of Rs.158,86,91,498 pertaining to advertisement, marketing and promotion (AMP) expenses.

5. Aggrieved, the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide its directions dated 29.01.2022 rejected the assessee's objections and confirmed the TP adjustment proposed by the TPO.

6. Aggrieved by the directions of the DRP, the assessee has raised this issue before the Tribunal. The learned Senior Counsel Sri.Ajay Vohra submitted that the issue in question is squarely covered by the order of the Tribunal in assessee's own case for assessment year 2012-2013 in ITA No.524/Bang/2013 (order dated 18.08.2022).

7. The learned Departmental Representative supported the orders of the TPO and the DRP.

8. We have heard rival submissions and perused the material on record. We find an identical issue raised in grounds 6 to 9 and its sub-grounds were considered by the Tribunal in assessee's own case for assessment year 2012-2013 (supra). The Tribunal in assessee's own case followed the dictum laid down by the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. v. CIT reported in (2016) 381 ITR 117 (Delhi), the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT reported in (2015) 374 ITR 118 (Delhi) and directed the A.O. to delete the AMP TP adjustment and the mark up thereon. The relevant finding of the Bangalore Bench of the Tribunal in assessee's own case for assessment year 2012-2013, reads as follows:-

"8. We have heard rival submissions and perused the material on record. The issue as to whether AMP expenditure is an international transaction or not was considered by the Delhi High Court in Maruti Suzuki India Ltd. 381 ITR 117 and it was held as under:-

"Step wise analysis of statutory provisions

62. If a step by step analysis is undertaken of [Sections 92B to 92F](#), the sine qua non for commencing the transfer pricing exercise is to show the existence of an international transaction. The next step is to determine the price of such transaction. The third step would be to determine the ALP by applying one of the five price discovery methods specified in [Section 92C](#). The fourth step would be to compare the price of the transaction that is shown to exist with the ALP and make the transfer pricing adjustment by substituting the ALP for the contract price.

63. A reading of the heading of Chapter X ["Computation of income from international transactions having regard to arm's length price"] and [Section 92 \(1\)](#) which states that any income arising from an international transaction

shall be computed having regard to the ALP, [Section 92C \(1\)](#) which sets out the different methods of determining the ALP, makes it clear that the transfer pricing adjustment is made by substituting the ALP for the price of the transaction. To begin with there has 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 ALP.

64. The transfer pricing adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE. And, yet, that is what appears to have been done by the Revenue in the present case. It first arrived at the 'bright line' by comparing the AMP expenses incurred by MSIL with the average percentage of the AMP expenses incurred by the comparable entities. Since on applying the BLT, the AMP spend of MSIL was found 'excessive' the Revenue deduced the existence of an international transaction. It then added back the excess expenditure as the transfer pricing 'adjustment'. This runs counter to legal position explained in [CIT v. EKL Appliances Ltd.](#) (2012) 345 ITR 241 (Del), which required a TPO "to examine the 'international transaction' as he actually finds the same." In other words the very existence of an international transaction cannot be a matter for inference or surmise.

65. As already noticed, the decision in Sony Ericsson has done away with the BLT as means for determining the ALP of an international transaction involving AMP expenses.

Revenue's contentions

66. It is contended by the Revenue that the mere fact that the Indian entity is engaged in the activity of creation, promotion or maintenance of certain brands of its foreign AE or for the creation/promotion of new/existing markets for the AE, is by itself enough to demonstrate that there is an arrangement with the parent company for this activity. It is urged that merely because MSIL and SMC do not have an explicit arrangement/agreement on this aspect cannot lead to the inference that there is no such arrangement or the entire AMP activity of the Indian entity is unilateral and only for its own benefit. According to the Revenue, "the only credible test in the context of TP provisions to determine whether the Indian subsidiary is incurring AMP expenses unilaterally on its own or at the instance of the AE is to find out whether an independent party would have also done the same." It is asserted: "An independent party with a short term agreement with the MNC will not incur costs which give long term benefits of brand & market development to the other entity. An independent party will, in such circumstances, carry out the function of development of markets only when it is adequately remunerated for the same."

67. Reference is made by Mr. Srivastava to some sample agreements between Reebok (UK) and Reebok (South Africa) and IC Issacs & Co and BHPC Marketing to urge that the level of AMP spend is a matter of negotiation between the parties together with the rate of royalty. It is further suggested that it might be necessary to examine whether in other jurisdictions the foreign AE i.e., SMC is engaged in AMP/brand promotion through independent entities or their

subsidiaries without any compensation to them either directly or through an adjustment of royalty payments.

Absence of a machinery provision

68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an exercise. The Court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to [Section 92F](#) (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions". Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negated by the Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT.

69. There is nothing in the Act which indicates how, in the absence of the BLT, one can discern the existence of an international transaction as far as AMP expenditure is concerned. The Court finds considerable merit in the contention of the Assessee that the only TP adjustment authorised and permitted by Chapter X is the substitution of the ALP for the transaction price or the contract price. It bears repetition that each of the methods specified in S.92C (1) is a price discovery method. S.92C (1) thus is explicit that the only manner of effecting a TP adjustment is to substitute the transaction price with the ALP so determined. The second proviso to [Section 92C](#) (2) provides a 'gateway' by stipulating that if the variation between the ALP and the transaction price does not exceed the specified percentage, no TP adjustment can at all be made. Both [Section 92CA](#), which provides for making a reference to the TPO for computation of the ALP and the manner of the determination of the ALP by the TPO, and [Section 92CB](#) which provides for the "safe harbour" rules for determination of the ALP, can be applied only if the TP adjustment involves substitution of the transaction price with the ALP. Rules 10B, 10C and the new Rule 10AB only deal with the determination of the ALP. Thus for the purposes of Chapter X of the Act, what is envisaged is not a quantitative adjustment but only a substitution of the transaction price with the ALP.

70. What is clear is that it is the 'price' of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment.

71. Since a quantitative adjustment is not permissible for the purposes of a TP adjustment under Chapter X, equally it cannot be permitted in respect of AMP expenses either. As already noticed hereinbefore, what the Revenue has sought to do in the present case is to resort to a quantitative adjustment by first determining whether the AMP spend of the Assessee on application of the BLT, is excessive, thereby evidencing the existence of an international transaction involving the AE. The quantitative determination forms the very basis for the entire TP exercise in the present case.

72. As rightly pointed out by the Assessee, while such quantitative adjustment involved in respect of AMP expenses may be contemplated in the taxing statutes of certain foreign countries like U.S.A., Australia and New Zealand, no provision in Chapter X of the Act contemplates such an adjustment. An AMP TP adjustment to which none of the substantive or procedural provisions of Chapter X of the Act apply, cannot be held to be permitted by Chapter X. In other words, with neither the substantive nor the machinery provisions of Chapter X of the Act being applicable to an AMP TP adjustment, the inevitable conclusion is that Chapter X as a whole, does not permit such an adjustment.

73. It bears repetition that the subject matter of the attempted price adjustment is not the transaction involving the Indian entity and the agencies to whom it is making payments for the AMP expenses. The Revenue is not joining issue, the Court was told, that the Indian entity would be entitled to claim such expenses as revenue expense in terms of [Section 37](#) of the Act. It is not for the Revenue to dictate to an entity how much it should spend on AMP. That would be a business decision of such entity keeping in view its exigencies and its perception of what is best needed to promote its products. The argument of the Revenue, however, is that while such AMP expense may be wholly and exclusively for the benefit of the Indian entity, it also enures to building the brand of the foreign AE for which the foreign AE is obliged to compensate the Indian entity. The burden of the Revenue's song is this: an Indian entity, whose AMP expense is extraordinary (or 'non-routine') ought to be compensated by the foreign AE to whose benefit also such expense enures. The 'non-routine' AMP spend is taken to have 'subsumed' the portion constituting the 'compensation' owed to the Indian entity by the foreign AE. In such a scenario what will be required to be benchmarked is not the AMP expense itself but to what extent the Indian entity must be compensated. That is not within the realm of the provisions of Chapter X.

74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to [Section 92B](#) of the Act. The problem does not stop here. Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?

75. As an analogy, and for no other purpose, in the context of a domestic transaction involving two or more related parties, reference may be made to Section 40 A (2) (a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the AO "is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market

value of the goods." In such event, "so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction." The AO in such an instance deploys the 'best judgment' assessment as a device to disallow what he considers to be an excessive expenditure. There is no corresponding 'machinery' provision in Chapter X which enables an AO to determine what should be the fair 'compensation' an Indian entity would be entitled to if it is found that there is an international transaction in that regard. In practical terms, absent a clear statutory guidance, this may encounter further difficulties. The strength of a brand, which could be product specific, may be impacted by numerous other imponderables not limited to the nature of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on. A simplistic approach using one of the modes similar to the ones contemplated by [Section 92C](#) may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance.

76. As explained by the Supreme Court in [CIT v. B.C. Srinivasa Setty](#) (1979) 128 ITR 294 (SC) and [PNB Finance Ltd. vs. CIT](#) (2008) 307 ITR 75 (SC) in the absence of any machinery provision, bringing an imagined international transaction to tax is fraught with the danger of invalidation. In the present case, in the absence of there being an international transaction involving AMP spend with an ascertainable price, neither the substantive nor the machinery provision of Chapter X are applicable to the transfer pricing adjustment exercise."

9. The decision of the Delhi High Court in *Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT* [2015] 374 ITR 118 was followed and it was held that the bright line test followed by the Revenue in making the AMP TP adjustment cannot be accepted. In the present case also, no material is brought on record by the TPO to establish the existence of an arrangement, understanding or action in concert with the AE for incurring the AMP expenses for the benefit of the AE. Merely because the AE has a financial interest, it cannot be presumed that AMP expenses incurred by the assessee are at the instance or on behalf of the associated enterprise. In the absence of any international transaction relating to AMP expenses, the impugned TP adjustment cannot be sustained. Moreover, the TPO having accepted the ALP of other international transactions at the entity level, proceeded to make a separate TP adjustment for the AMP expenses. At para 4.2 of the TPOs order, the TPO has given a finding that the net margins earned by the taxpayer from the product segment is 3.82% and that at the entity level is 7.29%. The margin earned by the taxpayer at the entity level as calculated by the TPO is 2.50%. Hence, no adverse inference drawn by the TPO in respect of the distribution segment results. Thus, the TPO has accepted the entity level margins earned by the assessee but proceeded to make TP adjustment on AMP expenses. The Hon'ble Delhi High Court in *Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT* [2015] 374 ITR 118 held that once the revenue accepts the entity level margins as per the most appropriate method, it

would be inappropriate to treat a particular expenditure as a separate international transaction. It was held that such an exercise would lead to unusual and absurd results. Relevant observations from the above decision in this context are as under:-

“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(J)(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 TN/v! 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.

10. Similarly, in the case of Maruti Suzuki India Ltd v CIT [2016] 381 ITR 117 at para 86 of the judgment, the Hon'ble Delhi High Court held as under:-

'MSIL's higher operating margins

86. In Sony Ericsson Mobile Communications India (P.) Ltd. (supra) it was held that if an Indian entity has satisfied the TNMM i.e. the operating margins of the Indian enterprise are much higher than the operating margins of the comparable companies, no further separate adjustment for AMP expenditure was warranted. This is also in consonance with Rule 10B which mandates only arriving at the net profit by comparing the profit and loss account of the tested party with the comparable. As far as MSIL is concerned. its operating profit margin is 11.19% which

is higher than that of the comparable companies whose profit margin is 4.04%. Therefore, applying the TNMM method it must be stated that there is no question of TP adjustment on account of AMP expenditure.”

11. Respectfully following the above judgment of the Hon'ble Delhi High Court, we delete the AMP TP adjustment of Rs. 25,09,60,200 and the mark up thereon amounting to Rs. 3,93,75,655.”

9. The facts of the instant case being identical to the facts considered by the Tribunal in assessee's own case for assessment year 2012-2013, we delete the TP adjustment made on AMP expenses. It is ordered accordingly.

Ground 11 (Corporate Tax Issue)

10. In the above ground, it is claimed that the A.O. has not allowed appropriate credit for TDS as claimed by the assessee. The issue raised in ground 11 is restored to the files of the A.O. to examine the matter and grant TDS credit in accordance with law. It is ordered accordingly.

11. In the result, ground 11 is allowed for statistical purposes.

Additional ground 14 (Corporate Tax Issue)

12. The brief facts in relation to the above ground are as follows:

In the assessment year 2012-2013, the assessee had claimed deduction towards provision for leave encashment on accrual basis for an amount of Rs.10,68,47,430 by relying on the judgment of the Hon'ble Calcutta High Court in the case

of Exide Industries Ltd. v. UOI reported in 292 ITR 470 (Cal). This claim made by the assessee during the assessment proceedings for A.Y. 2012-2013 was disallowed vide order passed u/s 143(3) of the I.T.Act dated 03.01.2017. The assessee preferred an appeal and the same was adjudicated by the Co-ordinate Bench of the Tribunal in assessee's own case for assessment year 2012-2013 (supra). It is claimed that owing to the decision of the Hon'ble High Court as it was existing at the relevant assessment proceedings, the assessee did not claim any consequential relief for the claim on payment basis. It is submitted that the issue is now settled against the assessee in view of the judgment of the Hon'ble Apex Court in the case of UOI v. Exide Industries Ltd. reported in (2020) 425 ITR 1 (SC).

13. It is claimed by the assessee before the Tribunal that it did not make any claim for payment of leave encashment for Rs.1,46,50,125 owing to the claim made for the assessment year 2012-2013. It is submitted that the details of actual payment of Rs.1,46,50,125 are forming part of the disclosure in the audit report for the subject assessment year as evidenced by the disclosure in clause 26(1) of Form 3CD. Therefore, it was contended that the assessee had filed additional ground 14 for granting consequential relief in respect of deduction u/s 43B(f) of the I.T.Act on the basis of actual payment. In this context, the learned AR relied on the order of the Bangalore Bench of the Tribunal in the case of M/s. Hewlett Packard (India) Software Operation Pvt. Ltd. v.

ACIT in IT(TP)A No.2866/Bang/2017 (order dated 10.03.2021).

14. The learned DR supported the orders of the A.O. and the DRP.

15. We have heard rival submissions and perused the material on record. In view of the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT reported in (1998) 229 ITR 383 (SC), the additional ground raised is admitted and taken on record for adjudication. The Bangalore Bench of the Tribunal in the case of M/s. Hewlett Packard (India) Software Operation Pvt. Ltd. v. ACIT (supra) had categorically held that deduction to the extent of leave encashment has actually been paid should be allowed as deduction u/s 43B of the I.T.Act. The Tribunal in assessee's own case for assessment year 2012-2013 (supra) has also taken a similar view. The relevant finding of the Tribunal in this regard, reads as follows:-

"13. We have heard rival submissions and perused the material on record. The Calcutta High Court in Exide Industries Ltd v UOI 292 ITR 470 struck down the provisions of section 43B(f). However, the Supreme Court in UOI v Exide Industries Ltd [2020] 425 ITR 1 held that clause (f) of section 43B is constitutionally valid and operative for all purposes. Thus, the provision for leave encashment of Rs.10,68,47,430 was rightly disallowed by the AO and we confirm the same. The assessee has taken an alternate plea that AO be directed to grant relief in respect of payment made towards provision for leave encashment in subsequent years. The direction to allow deduction for subsequent years is not pertaining to the year under consideration and hence we refrain from giving such directions. However, we direct the AO to verify the actual payments made during the previous year relevant to the

assessment year under consideration towards leave encashment and allow the same as deduction under section 43B(f). The AO shall also ensure that the assessee does not get double deduction on provision basis and payment basis.”

16. In the light of the above orders of the Tribunal, we restore the issue raised in ground 14 to the files of the A.O. with the direction to allow deduction u/s 43B(f) of the I.T.Act with regard to leave encashment on actual payment basis. It is ordered accordingly.

17. In the result, ground 14 is allowed for statistical purposes.

18. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on this 07th day of December, 2022.

Sd/-
(Laxmi Prasad Sahu)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 07th December, 2022.
Devadas G*

Copy to :

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2. The Respondent.
3. The DRP-1, Bangalore.
4. The Pr.CIT-3, Bengaluru.
5. The DR, ITAT, Bengaluru.
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Asst.Registrar/ITAT, Bangalore