

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

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

**SH. YOGESH KUMAR U.S., JUDICIAL MEMBER**

**I.T.A. No. 2014/DEL/2017 (A.Y 2012-13)**

Xerox India Limited, 5 <sup>th</sup> Floor, Block One, Vatika Business Park, Sector : 49, Sohna Road, Gurgaon [Haryana] – 122 018.  <b>PAN No. AAFCM8386H</b>  <b>(APPELLANT)</b>	Vs.	DCIT,  Circle : 27 (2)  New Delhi.  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Shri Tarandeep Singh, Advocate;</b>
<b>Respondent by</b>	<b>Shri Rajesh Kumar, [CIT] - D. R.;</b>

<b>Date of Hearing</b>	<b>17.11.2022</b>
<b>Date of Pronouncement</b>	<b>04.01.2023</b>

**ORDER**

**PER YOGESH KUMAR U.S., JM**

The present appeal is preferred by the assessee for the Assessment Year 2012-13 against the final assessment order dated 31/01/2017 passed by the DCIT, Circle-27 (2) New Delhi u/s 143(3) r/w Section 144C (4) of Income tax Act, 1961, (‘the Act’ for short).

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

*“1. That on the facts and circumstances of the case and in law, the impugned final assessment order passed by the Ld. AO/ Deputy Commissioner of Income Tax, Transfer Pricing Officer - 3(3)(2) ("Ld. TPO") is bad in law.*

*2. That on the facts and circumstances of the case and in law, the Ld. AO/ Ld. TPO has erred in making a substantive addition by adjusting the profit margins of the comparable companies for differences in intensity of AMP functions and comparing them with the results achieved by the assessee for arm's length testing purposes. In doing so, the Ld. TPO Ld. AO erred in:*

*2.1. applying an alleged economic adjustment on account of difference in intensity of functions based upon "Other Expenses/ Sales" ratio, which has no legal sanction under the Indian TP provisions;*

*2.2. erroneously computing the intensity of functions undertaken by the comparable companies by a mere comparison of "Other expenses! Sales" ratio and thereby disregarding the qualitative functional comparability test for selection of potential comparable companies;*

*2.3. selection of functionally different comparable companies for determining the arm's length result;*

2.4. *making erroneous computations for the Other expenses/ Sales and profit margins of the selected comparable companies as well as the tested party;*

2.5. *levying the mark-up on account of remuneration for alleged brand building activities and furthermore, calculating the same on entire increased cost base of the comparable companies instead of restricting the same to Advertising, Marketing & Promotion ("AMP") expenses only, thereby leading to uncalled for adjustments to the income of the appellant; and*

2.6. *arbitrarily selecting set of comparable companies engaged in marketing support services for determining the mark-up to be charged by the comparable companies engaged in distribution business for their alleged brand building activities.*

3. *That on the facts and circumstances of the case and in law, the Ld. AO/Ld. TPO has erred in proposing a protective addition in respect of the AMP expenditure incurred by the Appellant by application of Bright Line Test ("BLT"). In doing so, the Ld. TPO Ld. AO erred in:*

3.1. *not appreciating the fact that there are no legal sanctions under Indian tax laws for proposing any protective adjustment on grounds of difference in arm's length pricing of the international transactions of any tax payer;*

3.2. *not appreciating the fact that application of BLT is not having any legal sanction under Indian TP provisions and is also not tenable in the light of recent judicial precedents on the issue;*

3.3. *not appreciating that the AMP expenses incurred by the appellant are out of the absolute need of the business operations relating to distribution function of the assessee and are not incurred for creation of any marketing intangibles;*

3.4. *proposing an erroneous approach for conducting the analysis as per BLT application, without citing any proposed approach for selection of comparable companies and identifying the components of AMP expenses; and*

3.5. *not providing any reason! documentary evidence to demonstrate that the AMP expenses incurred by the Assessee towards unrelated parties constitute an international transaction within the meaning of Section 92F(v) read with Section 92B of the Act.*

4. *That the Ld. AO/ Ld. TPO erred in not considering the correct segmental accounts as furnished by the assessee for calculating the Profit Level Indicator ("PLI") of distribution segment in case of the tested party thereby not allowing the economic adjustments of certain non-operation implicit expenses and other scientifically carried allocations;*

5. *That on facts and in law, the Ld. AO/ Ld. TPO while giving effect to DRP directions erred in holding that expenses related to selling & distributions shall be included within the ambit of AMP for benchmarking purposes.*

6. *That the Ld. AO grossly erred in initiating penalty proceedings u/s 271 (1) (c) read with section ("r.w.s.") 274 of the Act mechanically without recording any satisfaction for its initiation;*

7. *That the Ld. AO has grossly erred in levying an interest U/S 234A, 234B, 234C and 234D of the Act to the taxable income of the Appellant.”*

3. Brief facts of the case are that, the assessee had entered into international transactions with Associate Enterprises in the year under consideration. During the course of assessment proceedings, the case was referred to the Transfer Pricing Officer by this office on 05.12.2014; as the assessee had shown international Transaction with its Associated Enterprises (AEs) of Rs.38.50 crore. The TPO deliberated upon the value of International transactions as shown by the assessee in respect of purchases, sale and other support services. The Ld. TPO determined the Arm's Length Price of the international transaction relating to purchases at Rs. 2,25,90,61,000/- as the assessee has shown Rs. 2,54,36,522,169/-. The TPO has directed that the AO shall reduce the expenses by Rs. 28,45,91,169/- on account of purchases. Accordingly, an addition of Rs. 28,45,91,169/- being made while computing the income of the assessee for the year under consideration.

4. Aggrieved by the draft assessment order, the assessee preferred appeal before the Dispute Resolution Panel (for short 'DRP'). The DRP vide order dated 15/12/2016 directed the A.O/TPO to complete the assessment as per the directions of the DRP. The Ld. A.O. vide order dated 30/01/2017 passed an assessment order u/s 143(3) read with Section 144C (4) of the Act by reducing final adjustment of Rs. 25,36,62,180/- and assessed the income of the tax payer at Rs. 13,83,27,461/- as against the loss declared by the assessee at Rs. 11,53,34,719/-.

5. Aggrieved by the assessment order dated 30/01/2017, the assessee has preferred the present appeal on the grounds mentioned above.

6. The Ld. AR addressing on Ground No. 1 & 2, at the outset submitted that the sole issue involved in the present appeal is a Transfer Pricing Adjustment of Rs. 28.45 core made by TPO which has been upheld by the DRP and further submitted that the Jurisdictional issue which requires preliminary adjudication in the present appeal is as to whether or not exist the international transaction between the assessee and A.E. for brand promotion in India. The Ld. Counsel for the assessee further submitted that the said issue is now well settled in assessee's own case for following orders of the Tribunal:-

- (i) Order dated 16/12/2019 in ITA No. 5528/Del/2012 for the Assessment Year 2008-09
- (ii) Order dated 05/08/2020 in ITA No. 2060/Del/2015 for Assessment Year 2010-11
- (iii) Order dated 19/10/2020 in ITA No. 1088/Del/2016 Assessment Year 2011-12
- (iv) Order dated 19/10/2022 in ITA No. 6151/Del/2013 Assessment Year 2009-10.

7. The Ld. Counsel further submitted that in the present appeal the Ld. TPO held that there exist two international transactions under purchase of finished goods and incurring of excessive AMP Expenses on behalf of the A.E. which requires to be deleted by following the Assessee's own case.

8. Per contra, the Ld. DR has relied on the orders of the Lower Authorities but could not produce any contrary judicial pronouncements.

9. We have heard the parties perused the material available on record and gave our thoughtful consideration. The issue involved in the present appeal is, whether the AMP expenditure incurred by the assessee can be regarded as an international transaction or not. While deciding the said issue the Ld.

DRP has relied upon the decision of the Tribunal's Special Bench in the case of LG Electronic Pvt. Ltd. (ITA No. 5140/Del/2011). However, the ratio laid down in the case of LG Electronics Pvt. Ltd. (Supra) has been disapproved by the Hon'ble Jurisdictional High Court. Therefore, the ratio laid down by the Tribunal in the case of LG Electronics India Pvt. Ltd. (supra) is no more a good law.

10. The identical issue came up for consideration before the Tribunal in assessee's own case for the Assessment Year 2008-09 in ITA No. 5528/Del/2012, vide order dated 16/12/2019 the Co-ordinate Bench has held that AMP Expenses incurred by the assessee does not fall within the definition of International Transaction. Further, the Bench has disapproved the determination of ALP by applying BLT Method. Accordingly, the adjustment made on account of AMP expenses was deleted. The similar view has been expressed in Assessee's own case for the Assessment Year 2009-10, 2010-11 and 2011-12. The latest order for the Assessment Year 2009-10 in ITA No. 6151/Del/2013 of the Coordinate Bench of the Tribunal, wherein held as under:-

*“3.5 We have considered rival submissions and perused the materials on record. The issue arising for consideration is, whether the AMP expenditure incurred by the assessee can be regarded as an international transaction. Undisputedly, while deciding the issue, learned DRP has relied upon a decision of the ITAT, Special Bench in case of LG Electronics India Pvt. Ltd. (supra). However, the ratio laid down in case of LG Electronics India Pvt. Ltd. (supra) has been disapproved by the Hon'ble Jurisdictional High Court, hence, no more a good law.*

3.6 Be that as it may, it is observed, identical issue came up for consideration before us in assessee's own case for the assessment year 2008-09. While deciding the issue in ITA No. 5528/Del/2012, dated 16.12.2019, the Coordinate Bench has held that the AMP expenses incurred by the assessee does not fall within the definition of international transaction. The Bench further disapproved the determination of ALP by applying BLT method. Ultimately, the adjustment made on account of AMP expenses was deleted. Identical view was expressed by the Tribunal while deciding the issue in assessment year 2010-11 in ITA No. 2060/Del/2015, dated 05.08.2020. In the latest order passed for the assessment year 2011-12, the Bench has deleted the adjustment holding as under:-

“6.5 As question of existence of international transaction of AMP and adjustment on account of the same in the case of assessee have been deleted in the assessment year 2008-09 and 2010-11, thus, respectfully following the finding of the Tribunal (supra), we hold that no international transaction of AMP exist in the case of assessee. Hence, we deleted the adjustment made on account of the AMP transaction. Corresponding grounds raised by the assessee are accordingly allowed.. Accordingly, the appeal of the assessee is allowed.”

3.7. For the sake of completeness, we must observe, learned Departmental Representative has cited before us a decision of the Coordinate Bench in case of Ms. Olympus Medical Systems India Pvt. Ltd. (supra). However, in our humble opinion, the decisions rendered by the Coordinate Bench in assessee's case will carry greater precedentiary value. Therefore, facts being identical, respectfully following the consistent view of the Coordinate Benches

*in assessee's own case, as discussed above, we delete the addition made by the Assessing Officer. These grounds are allowed."*

11. By following the principles of consistency, since the facts being identical and by following the order made in Assessee's own case as discussed above, we delete the addition made by the Assessing Officer by allowing the Ground No. 1 & 2.

12. The Ground No. 3 is regarding protective addition made by the A.O/TPO in respect of AMP expenditure incurred by the assessee by applying the of Bright Line Test.

13. The TPO was of the opinion that there is exist two International Transactions under purchase of finished goods and incurring of excessive AMP Expenses on behalf of the A.E. The Ld. TPO/A.O. held that the assessee being a distributor is covered by the High Court Judgment in the case of M/s Sony Ericson wherein the excessive AMP expenditure is considered to be International Transaction. As per the TPO there exist international transaction for brand promotion for incurring excessive AMP, therefore, made a comparability adjustment to the margins of comparable companies and turned it as intensity adjustment.

14. Since by following the Coordinate Bench decisions, we already held that there is no such International Transaction for brand promotion and by following Assessee's own case mentioned supra, in our opinion, there is no basis available to the TPO for making such a comparability adjustment under TNMM. Accordingly, by following the principals of consistency, we restore the issue to the file of TPO for bench marking the analysis applying TNMM in accordance with law. In the result, Ground No. 3 of the assessee is allowed for statistical purpose.

15. In view of deciding the issue No. 3, the Ground No. 4 & 5 have become infructuous. Ground No. 6 & 7 being consequential which require no adjudication at this stage.

16. In the result, appeal filed by the assessee is partly allowed for statistical purpose.

**Order pronounced in the Open Court on : 04.01.2023.**

**Sd/-  
(B. R. R. KUMAR)  
ACCOUNTANT MEMBER**

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

Dated : 04/01/2023

*\*R. N, Sr. PS\**

Copy forwarded to :

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI

