

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'I' NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA Nos.1504 & 1505/Del/2018
Assessment Years: 2009-10 & 2010-11

M/s. Timex Group India Ltd., 106-107, Ambadeep, 14 Kasturba Gandhi Marg, New Delhi	Vs.	ACIT, Circle-16(1), New Delhi
PAN :AAACT0773C		
(Appellant)		(Respondent)

With

ITA Nos.2013 & 2015/Del/2018
Assessment Years: 2009-10 & 2010-11

ACIT, Circle-16(1), New Delhi	Vs.	M/s. Timex Group India Ltd., 106-107, Ambadeep, 14 Kasturba Gandhi Marg, New Delhi
PAN :AAACT0773C		
(Appellant)		(Respondent)

Assessee by	Sh. Tushar Jarwal, Advocate Sh. Aayush Nagpal, Advocate Sh. Rahul Sateja, Advocate
Department by	Sh. Mrinal Kumar Das, Sr. DR

Date of hearing	16.03.2023
Date of pronouncement	27.03.2023

ORDER

PER SAKTIJIT DEY, JM:

Captioned are two sets of cross appeals arising out of two separate orders of learned Commissioner of Income Tax (Appeals)-38, New Delhi, for assessment years 2009-10 and 2010-11.

ITA No.1504/Del/2018 for AY: 2009-10 (Assessee's Appeal)
ITA No.1505/Del/2018 for AY: 2010-11(Assessee's Appeal)

2. The first common issue arising in the aforesaid appeals relates to adjustment made on account of Advertisement, Marketing and Promotion (AMP) expenses, alleged to have been incurred on behalf of the Associated Enterprises (AEs)

2.1 Before us, it is a common point between the parties that the issue is squarely covered by the decision of the Coordinate Bench in assessee's own case in assessment year 2008-09.

2.2 Having considered rival submissions, we find, the Transfer Pricing Officer (TPO) has made the adjustment to AMP expenses by treating it as international transaction coming within the definition of section 92B of the Act and has computed the adjustment applying Bright Line Test (BLT) method. It is observed, while deciding identical issue in assessee's own case for assessment year 2008-09, the Tribunal in order dated 16.11.2021 passed in ITA No.1502/Del/2018 has held that the transaction relating to AMP expenses will not fall in the category of international transaction. However, the Tribunal restored the issue to the Assessing Officer to decide afresh abiding with the decision of the Hon'ble Supreme Court in similar pending

matters. The observations of the Tribunal in this regard are as under:

"6. A perusal of the order of the Hon'ble jurisdictional High Court in the case of assessee for the assessment year 2011-12 in ITA No. 795 of 2019 makes it clear that the issue is no longer *res Integra*. For the sake of completeness we deem it just and necessary to extract the relevant observations of the Hon'ble High Court, while referring to the observations of the Tribunal in ITA No. 845/del/2016, hereunder,-

"16. The issue relating to adjustment of AMP is covered by the decision of the Court in *Sony Ericsson Indio Pvt. Ltd. v. LIT (2015) 374 ITR liS (Del.)* and *Maruti Suzuki India Ltd. v. CIT (2016) 381 ITR 117*.

17. The Tribunal while dealing with said issue held as under:-

"20. Bare perusal of the order under challenge passed by the Id. TPO particularly at pages 67, 73 and 75 goes to prove that the entire adjustment qua AMP expenses has been made by the TPO on the basis of bright line method and no material whatsoever has been brought on record to show that if the taxpayer and AE have acted in concert and that they have entered into any agreement to enter into international transactions qua AMP expenses.

21. Hon'ble Delhi High Court in *Sony Ericsson Indio Pvt. Ltd. Vs. LIT (2015) 374 ITR IIS (Del.)* and subsequently in *Maruti Suzuki India Ltd. v. CIT (2016) 32S ITR 210 (Del.)* has categorically held that BET is not a valid basis for determining the existence of international transaction or for that matter for computing the ALP of such international transaction involving AMP expenses. So, in these circumstances, the order of TPO passed by making BIT as basis of the ALP adjustment is not sustainable in the eyes of law.

22. Furthermore, Hon 'ble Delhi High Court in subsequent decisions viz. *Bausch & Lamb Eye Care (India) Pvt. Ltd. viz Additional CIT (2016) 3511TR 227 (Del.)* and *Honda Siel*

Power Products Ltd. v. Dy. CIT (2016) 237 Taxman 304 held that it is for the Revenue to firstly discharge the onus to prove the existence of an international transaction between the taxpayer and its AE and only thereafter ALP of international transactions involving AMP can be computed.

23. *It is further contended by the Id. AR for the taxpayer that quantitative adjustment made by the TPO on account of AMP expenses is not permissible within the framework of Chapter-X as has been held by the Hon 'ble Delhi High Court in Maruti Suzuki India Ltd. v. CIT—ITA No.110/2014 & 710/2015). Hon 'We High Court has categorically held that none of the substantive or procedural provisions of Chapter-X permits adjustment on account of AMP expenses.*

24 *The taxpayer has contested before Id. DRP that incurring of AMP expenses are not international transactions and BET method has no statutory basis to infer the existence of international transactions qua AMP expenses, however, the Id. DRP has proceeded to hold inter alia that incurring of AMP expenses is an international transaction and directed to exclude the routine selling and distribution expenses and directed the TPO to use the cost plus method and further directed to apply the markup on excess AMP expenses as per sub-clause (ii) of Rule 108(I)(c).*

25. *However, we are of the considered view that following the decision rendered by Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra), the first step for the Revenue to benchmark the AMP expenses is to establish the existence of international transaction; if it is proved, then to proceed for benchmarking the transactions qua AMP expenses. Now, it is the settled principle of law that existence of international transaction qua AMP expenses requires to be established de hors the "bright line test", particularly when the taxpayer has categorically denied the existence of international transaction and 81% of its*

turnover is from the sale of its manufacturing in India. Moreover, without prejudice, it is the case of the taxpayer that despite the directions issued by the Id. DRP, the TPO has wrongfully proceeded to consider selling and distribution expenses as part of the AMP expenses for the purposes of applying the bright line test.

26. In view of what has been discussed above, we are of the considered view that since the taxpayer is a full-fledged manufacturer as 81% of its turnover is from the sale of its manufactured goods in India and the entire AMP expenses have been incurred by it to enhance its sale in India and not for promoting the brand of its AH and for creating intangibles for its AH, the alleged excess AMP expenditure does not fall in the category of international transactions. Moreover, the Revenue has not brought on record any cogent evidence to prove these facts. So, following the law laid down by the Hon'ble Delhi High Court in case cited as (supra), we are of the considered view that adjustment made by the Revenue on account of incurrance of AMP expenses are not sustainable in the eyes of law.

27. Learned DR for the Revenue, although admitted the legal position enunciated in the preceding paragraphs, but he contended that since all the aforesaid decisions are lying challenged before the Hon'ble Apex Court, the matter may be kept pending till the decision by Hon'ble Apex Court. However, we are of the considered view that since it is a stay granted matter and the proceedings before the second appellate authority have not been stayed by any higher forum, the same cannot be kept pending.

28. After considering the legal position as discussed in the preceding paragraphs, we are of the considered opinion that the ALP of an international transaction involving AMP expenses, the adjustment made by the TPO/DRP/AO is not sustainable in the eyes of law. At the same time, we cannot ignore the submission made by the learned DR that

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

18. Since the aforesaid issues stand covered by the earlier decisions of this Court, no question of law arises for our consideration."

7. It is not in dispute that the case of the assessee has been that the primary engagement of the assessee is in manufacturing operations and the AMP expenditure incurred by it is to the benefit of its operations in India. In the case of the assessee, Tribunal took into consideration the submissions made by the Ld. DR that the matter relating to the international transaction involving AMP expenses is pending before the I-1°11'131e Apex Court and addition of the Hon'ble Apex Court would be binding upon all the authorities and therefore, while returning a finding that the assessee is a full-fledged manufacturer and the entire AMP expenses were incurred by it to enhance its sale in India and not for promoting the brand of its AE and for creating intangibles for its AE, the alleged excessive AMP expenditure does not fall in the category of international transaction and therefore the adjustment made by the Revenue on account of incurrence of AMP expenses is not sustainable in law, set aside the orders of the authorities below and restored the matter to the file of the learned Assessing Officer to act in accordance with the findings of the Hon'ble Apex Court to be given in the pending matters.

8. In view of the view taken by the Hon'ble High Court, and while respectfully following the same, we hold that the alleged excessive

AMP expenditure does not fall in the category of international transaction and therefore the adjustment made by the Revenue on account of incurrance of AMP expenses is not sustainable in law, and set aside the orders of the authorities below. We, however, in consonance with the view taken by the Tribunal in assessee's own case for the assessment year 2011-12, as in the Hon'ble jurisdictional High Court, restore the matter to the file of the learned Assessing Officer to act in accordance with the findings of the Hon'ble Apex Court to be given in the pending matters. We accordingly, allow ground No. 2 of assessee's appeal and grounds No. 3 to 12 of Revenue's appeal, for statistical purpose.”

2.3 Facts being identical, respectfully following the decision of the Coordinate Bench in assessee's own case, as discussed above, we restore the issue to the Assessing Officer with similar direction.

3. The next common issue arising in both the assessment years relate to adjustment made to the Arm's Length Price (ALP) of Information Technology (IT) support services provided by the assessee to its AEs.

3.1 Briefly the facts relating to this issue are, the assessee is a resident corporate entity engaged in the business of manufacturing, marketing and selling of wrist watches and after selling services. Besides the above, the assessee also provides limited IT help desk and support services to AEs. As far as provision of ITES to the AE, the assessee benchmarked the transaction by adopting Transactional Net Margin Method

(TNMM) as, the most appropriate method with operating profit to total cost as the Profit Level Indicator (PLI). The assessee selected 16 comparables in assessment year 2009-10 and 7 comparables in assessment year 2010-11. Since, the margin shown by the assessee in both the assessment years under dispute were within the acceptable range of the average margin of the comparables, the transaction with the AE was claimed to be at arm's length. The TPO, however, did not accept the benchmarking of the assessee. Re-characterizing the assessee as a software development service provider, the TPO rejected the comparables selected by the assessee in the ITES segment and introduced fresh comparables from software development services segment and accordingly, proposed adjustment in both the assessment years under dispute. Based on the adjustment proposed by the TPO, the Assessing Officer made additions in the assessment orders. Though, the assessee preferred appeals challenging the adjustment, however, learned Commissioner (Appeals) upheld them.

3.2 Before us, learned counsel appearing for the assessee submitted that similar erroneous approach was adopted by the TPO in assessee's own case in assessment year 2011-12. While

deciding the issue, the Tribunal rejected the approach of the TPO in selection of comparables. He submitted, the decision of the Tribunal was upheld by Hon'ble Jurisdictional High Court while dismissing the appeal of the Revenue. Thus, he submitted, once, the assessee is held to be an entity in ITES segment, it cannot be re-characterized as providing services under software development service segment. Thus, he submitted, the comparables selected by TPO, being functionally dissimilar, are not at all comparable to the assessee.

3.3 We have considered rival submissions and perused the materials on record. It is a fact on record that the assessee provided services in ITES segment. In fact, in the order passed under section 92CA(3) of the Act, the TPO himself has stated that the assessee provides limited IT help desk and support services to the AEs. In spite of such factual position established on record, the TPO has gone forward to re-characterize the assessee as a software development service provider and selected fresh comparables in the software development segment. Unfortunately, learned Commissioner (Appeals) has also completely misconceived the facts by approving the re-characterization of the assessee. It is observed, similar erroneous approach was adopted by the TPO

while proposing adjustment to similar transaction with the AEs in assessment year 2011-12. While deciding assessee's objections on the issue, learned DRP accepted assessee's business profile as an IT service provider and directed the AO/TPO to select comparables in ITES segment. However, the TPO again selected comparables providing Knowledge Process Outsourcing (KPO) services. While deciding the issue in appeal, the Tribunal in ITA No. 845/Del/2016, dated 20.12.2018 rejected the comparables selected by the TPO. It is relevant to observe, while dismissing Revenue's appeal against the decision of the Tribunal in assessment year 2011-12, the Hon'ble Jurisdictional High Court upheld the decision of the Tribunal holding the assessee as an ITES segment company.

3.4 Thus, the benchmarking exercise undertaken by the TPO fails at the threshold itself. Consequently, the comparables selected by the TPO under the software development segment, being functionally different, cannot be treated as comparables to the assessee. Thus, we direct the Assessing Officer to delete the additions.

ITA No.2013/Del/2018 for AY: 2009-10 (Revenue's Appeal)
ITA No.2015/Del/2018 for AY: 2010-11 (Revenue's Appeal)

4. The first common issue arising in the appeal of the Revenue relates to deletion of addition made on account of advance written off.

4.1 Briefly the facts are, in course of assessment proceeding, the Assessing Officer noticed that the assessee has debited certain amounts on account of advances written off. Being of the view that the deduction claimed by the assessee does not satisfy the condition of section 36(2) of the Act, the Assessing Officer disallowed the deduction. The assessee contested the disallowance before learned Commissioner (Appeals). Relying upon the decision of the Tribunal in assessee's own case in assessment years 2004-05 and 2005-06, learned Commissioner (Appeals) deleted the disallowance.

4.2 We have considered rival submissions and perused the materials on record. It is observed, identical issue came up for consideration before the Tribunal in assessment years 2004-05 and 2005-06. While deciding the issue, the Tribunal deleted the disallowance. As could be seen from the facts on record, certain trade advances in relation to the business operations could not be

recovered even after long lapse of time. Therefore, the assessee has written them off in its books of account. In our view, the Assessing Officer made a fundamental error by holding that the deduction claimed comes under section 36(2) of the Act. Undisputedly, the trade advances were in course of business. Therefore, if the assessee was unable to recover such advances, it can be treated as business loss, hence, allowable. Accordingly, we uphold the decision of learned Commissioner (Appeals) on the issue.

5. The next common issue arising in the appeal relates to payment for stamp duty and brokerage for office lease. While considering assessee's claim of deduction on account of brokerage, the Assessing Officer observed that since, the period of lease is for five years, the brokerage expenditure has to be spread over the period of lease. Accordingly, he allowed part of the expenditure and disallowed the rest. Learned Commissioner (Appeals) deleted the disallowance considering the fact that the expenditure was incurred in the year, hence, has to be allowed.

5.1 Having considered rival submissions, we do not find any infirmity in the decision of learned Commissioner (Appeals). It is a fact on record that the assessee has incurred the brokerage

expenditure in the year under consideration. Therefore, the expenditure has to be allowed in the year under consideration. Merely because the lease of office premises is for particular period, the expenditure actually incurred on brokerage cannot be spread over the period of lease. Accordingly, we uphold the decision of learned Commissioner (Appeals) on the issue.

6. The third issue is with regard to adjustment on account of AMP expenses. Since, we have already decided identical issue, while dealing with assessee's appeals in earlier part of the order and have restored this issue to the Assessing Officer with certain directions, the grounds raised by the Revenue have become infructuous, hence, dismissed.

7. In the result, assessee's appeals are partly allowed, whereas, Revenue's appeals are dismissed.

Order pronounced in the open court on 27th March, 2023

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 27th March, 2023.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi