

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I : DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

ITA No.1800/Del/2022
Assessment Year: 2017-18
&
Stay Application No.256/Del/2022
(ITA No.1800/Del/2022)
Assessment Year: 2017-18

Nikon India Pvt. Ltd.,
Plot No.71, Sector-32,
Institutional Area,
Gurgaon, Haryana – 122001.

Vs ACIT,
Circle-3(1),
Gurgaon.

PAN: AACCN5100F

(Appellant)

(Respondent)

Assessee by	:	Shri Vishal Kalra & Shri Ankit Sahani, Advocates; & Shri Yishu Goel, AR
Revenue by	:	Shri Rajesh Kumar, CIT-DR
Date of Hearing	:	19.07.2023
Date of Pronouncement	:	27.07.2023

ORDER

PER M. BALAGANESH, AM:

The appeal in ITA No.1800/Del/2022 and the Stay Application in SA No.256/Del/2022 filed by the assessee arise out of the order of assessment passed u/s 143(3) r.w.s. 144C(13) r.w.s. 144B of the Income-tax Act, 1961

(hereinafter referred to as 'the Act') dated 25.07.2022 by the Assessment Unit, of the Income Tax Department (hereinafter referred to as 'Id. AO').

2. The Ground No.1 raised by the assessee is general and does not require any specific adjudication.

3. Though the assessee has raised several grounds of appeal, the only effective issue to be decided in this appeal is as to whether Advertising, Marketing and Promotion (AMP) expenses incurred by the assessee could be subject matter of transfer pricing adjustment in the facts and circumstances of the instant case.

4. We have heard the rival submissions and perused the material available on record. Nikon group is involved in a broad spectrum of businesses centred on precision equipment, imaging products, instruments and other business. The activities of the Nikon group are carried on through the following divisions:-

- i) Precision equipment business;
- ii) Imaging products business;
- iii) Instruments business; and
- iv) Other businesses.

5. It also provides after-sales services for the complete range of Nikon imaging and instruments products. The return of income was filed by the assessee on 09.11.2017 for the AY 2017-18 declaring the total income of Rs.56,19,42,877/-. Nikon India was incorporated in May, 2007. The company started full-fledged operations from August, 2007 and operates through a

network of local distributors. Nikon India Pvt. Ltd., i.e., the assessee herein, is engaged in import, sales and distribution for Nikon Imaging products in India. The assessee company is fully owned by Nikon Singapore Pvt Ltd., as per the ownership structure provided in para 2.2, page 3 of the order of the Id. TPO u/s 92CA(3) of the Act dated 28.01.2021.

6. A reference u/s 92CA(1) of the Act was made by the Id. AO to the Id. TPO to benchmark the international transactions carried out by the assessee. The complete details of the international transactions carried out by the assessee as reflected in Form No.3CEB were fully furnished by the assessee before the Id.TPO duly mentioning the value of transactions and the most appropriate method adopted by the assessee. The Id. TPO observed that the assessee had incurred AMP expenses to the tune of Rs.108,55,75,662/- which was not reflected as an international transaction by the assessee in the transfer pricing study report as well as in Form No.3CEB. The Id. TPO held that this AMP expense was incurred for the development of brand owned by its foreign AE and such sum would amount to an international transaction. The Id. TPO proceeded to benchmark the international transaction and proposed the following adjustments in his order on substantive as well as protective basis:-

	<i>Method of Benchmarking</i>	<i>Adjustment in INR</i>
<i>Substantive</i>	<i>Residual Profit Split Method (RBW)- Intensity Test</i>	<i>71,45,33,227</i>
<i>Protective</i>	<i>Bright Line Test (BLT)</i>	<i>127,52,94,223</i>

7. The Id. AO passed a draft assessment order u/s 143(3) of the Act on 23.09.2021 by making an addition of Rs.71,45,33,227/- in respect of TP adjustment on account of AMP expenses on substantive basis. The assessee

filed objections before the Id. DRP and the Id. DRP, vide its directions u/s 144C(5) dated 27.05.2022, considered the assessee to be a distributor and noticed that the issue raised before the Panel in AYs 2015-16 and 2016-17 are identical to the issue raised for AY 2017-18, i.e., the year under consideration. The Id. DRP also held at page 14 of its directions that the factual matrix of the case remained unchanged during AY 2017-18 also and hence, it followed the directions given by it for AY 2015-16 and 2016-17 *mutatis mutandis* for AY 2017-18 also. The Id. DRP upheld the AMP expenses incurred to be an international transaction. The Id. DRP upheld application of AMP expenses under Intensity Approach for benchmarking the transaction on substantive basis. Final assessment order pursuant to the directions of the DRP was passed accordingly by the Id. AO. Aggrieved, the assessee is in appeal before us.

8. It is not in dispute that the addition on account of transfer pricing adjustment of Rs.127,52,94,223/- was made in respect of AMP expenses on protective basis using Bright Line Test and Rs. 71,45,33,227/- was made on substantive basis using Intensity Test. With regard to the issue of AMP expenses being not an international transaction, the Id. AR fairly stated that this issue has been decided against the assessee by the orders of this Tribunal upto AY 2016-17. The appeals preferred by the assessee against the Tribunal orders are pending before the Hon'ble Punjab & Haryana High Court. However, the Id. AR stated that every year the Tribunal has been following only the order passed by them in immediately preceding year and the decision of the Special Bench of the Delhi Tribunal in the case of *LG Electronics India Pvt. Ltd. vs. ACIT, reported in 140 ITD 41* wherein it was held that AMP expenses would be construed as an independent international transaction warranting benchmarking. The Id. AR pointed out that subsequent to those orders of the Tribunal and the order of the Special Bench, the Hon'ble Delhi High Court in the case of *Maruti Suzuki India*

Ltd. vs. CIT, 381 ITR 117; and CIT vs. Whirlpool India Ltd., 381 ITR 154 had held that AMP expenses would not be an international transaction at all. Accordingly, the Id. AR prayed for reconsideration of the decision taken by the Tribunal and held that AMP expenses is not an international transaction.

8. *Per contra*, the Id. DR vehemently argued that the issue is decided in favour of the Revenue in assessee's own case by a series of Tribunal orders.

9. Apart from this, the Id. AR drew our attention to the latest Tribunal order passed in assessee's own case for AY 2016-17 wherein similar transfer pricing adjustment made on account of AMP expenses was deleted by the Tribunal.

10. We find that this Tribunal in ITA No.428/Del/2021, order dated 09.02.2022 for AY 2016-17, had held as under:-

"22.3.0 Ground no. 8 challenges the action of the AO/TPO in not excluding the sales and distribution expenses from the ambit of alleged excessive AMP expenditure whilst bench marking under both substantive as well protective basis. The Ld. AR has placed reliance on the judgment of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India (P) Ltd vs. CIT (2015) 374 ITR 118 (Del) and has argued that direct marketing and sales expenditure cannot be treated as AMP expenditure as the same had not been incurred for brand enhancement but was connected to direct sales of products in India. The Ld AR also pointed that directions for exclusion of sales related expenses have been given earlier as well in favour of the assessee. The relevant extract of the order for AY 2011-12 arising out of ITA No. 6314/ Del/ 2015 in this regard is as under:

"19. We have heard the rival submissions and perused the relevant material on record. The Id. AR tried to harp on certain agreements and other documents to buttress his point that there was no international transaction on account of AMP expenses in terms of the judgment in the case of Whirlpool (supra). On perusal of the order of the TPO, it emerges there is no discussion about any of these documents. Since the TPO held AMP expenses to be an

international transaction, he did not have any occasion to consider these documents in the light of the judicial views now available for consideration. Respectfully following the Tribunal orders of co-ordinate benches, placed on record by the Id. DR we are of the considered opinion that it would be in the fitness of things if the impugned order is set aside, and the matter is restored to the file of TPO/AO for a fresh determination of the question as to whether there exists an international transaction of AMP expenses. If the existence of such an international transaction is not proved, the matter will end there and then, calling for no transfer pricing addition. If, on the other hand, the international transaction is found to be existing, then the TPO will determine the ALP of such an international transaction in the light of the relevant judgments of the Hon'ble High Court, after allowing a reasonable opportunity of being heard to the assessee. In doing so, the selling expenses directly incurred in connection with sales not leading to brand promotion, should not be brought within the ambit of AMP expenses. This view taken by the Special Bench of the Tribunal in the case of LG Electronics India Pvt. Ltd. vs. ACIT (2013) 152 TTJ (Del)273 (SB) has been upheld by the Hon'ble Delhi High Court in the case of Sony Ericson Mobile Communications (India) Pvt. Ltd. vs. CIT (2015)374 ITR 118 (Del. The contention of the Id. DR that SLP has been admitted against the exclusion of selling expenses from the ambit of AMP expenses in the case of Amadus India Ltd., does not alter the legal position prevailing as on today. "

22.3.1 The Ld. AR has also contended that even the TPO, in Assessment Years 2013-14 and 2014-15, had excluded the selling expenses while making the AMP expenditure and, therefore, for this reason also, sales related expenses should be excluded while benchmarking the AMP expenditure both under the substantive and protective approaches. Considering the factual matrix and the legal position as propounded by the earlier order of the division Benches in assessee's own case, the sales related expenses amounting to Rs 62,36,17,830/- deserve to be excluded before undertaking benchmarking of brand related AMP expenses. It is ordered accordingly.

22.4.0 Ground No. 9 challenges the protective adjustment made on alleged AMP transaction amounting to Rs. 1,04,26,24,356/-. It has been submitted that the TPO had applied mark-up on 2-.75% (being margin of comparables engaged in marketing support: services) on the alleged excess AMP expenditure accordingly resulting in adjustment of Rs.1,04,26,24,356/- on protective basis. The Ld. AR has submitted that it was now settled judicial position that Bright Line Test ('BLT) cannot be applied for benchmarking the AMP expense of an assessee. Our attention was drawn to the Tribunal

decision in assessee's own case for Assessment Year 2010-11 wherein vide order dated 20.09.2017 in ITA No.4574/Del/2017 in ITANo.4575/Del/2017 on similar facts it has been held that BLT cannot be applied for benchmarking the PMP expenses even on protective basis. Reliance was also placed on the order of the Tribunal in assessee's own case for assessment year 2014-15 wherein vide order dated 24.01.2019 in ITA No.6870/Del/2018 a similar view was taken by the Tribunal. The relevant extract from the said order is being reproduced herein under:

"8. So far as ground of appeal No. 6 to 7.2 are concerned, the Id. counsel for the assessee, at the outset, submitted that this issue stands decided in favour of the assessee by the decision of the Tribunal in assessee's own case for A.Y. 2010-11 vide ITA No.4574/Del/2007, order dated 20th September, 2017. Following the decision of the Tribunal, the Tribunal, again, in assessee's own case for A.Y. 2013-14, has decided the issue in favour of the assessee. Therefore, this being a covered matter in favour of the assessee, the above grounds raised by the assessee should be allowed.

The Id. DR, on the other hand, fairly conceded that the issue has been decided in favour of the assessee by the Tribunal in assessee's own case for assessment year 2010-11 and. 2013-14.

9. After hearing both the sides, we find identical issue had come up before the Tribunal in assessee's own case for assessment year 2010-11. The Tribunal vide ITANo.4574/Del/2007, order dated 20th September, 2017 has discussed the issue from para 15 to 18 of the order and decided the issue in favour of the assessee. The relevant observations of the Tribunal from para 15 onwards reads as under:-

"15. TPO by applying the Bright Line Test (BLT) proposed adjustment of Rs.22,30,18,964/- on protective basis. The Id. AR for the assessee by relying upon the decisions rendered by the coordinate Bench of the Tribunal in Tianjin Tianshi Biological Development Company Ltd. vs. DCIT - (2014) 52TAXMANN.COM 518 (Delhi-Trib, ITO vs. M/s. Fussy Financial Services Pvt.Ltd. in ITA No.4227/Del/2014 dated 05.06.2017, Perfetti Van Melle India Pvt. Ltd. vs. DCIT in ITA No. 1073/Del/2017 dated 24.05.2017, decision rendered by Hon'ble Delhi High Court in Sony Ericsson Mobile Communications India (P.)Ltd. vs. CFT-IU - (2015) 55 taxmann.com 240 (Delhi) and decision rendered by Hon'ble Gujarat High Court in Veer Gems vs. ACIT - (2011) 15 taxmann.com355 (Gujarat) contended that TP adjustment on protective basis is not sustainable and order is itself void ab initio. The Id. AR for the

assessee further contended that BLT could have been applied at the first stage.

16. The coordinate Bench of the Tribunal in case cited as Perfetti Van Melle India Pvt Ltd. vs. DCIT in ITA No.1073/Del/2017 dated 24.05.2017 determined the issue as to applying the BLT for determining the ALP of AMP expenses and observed as under:-

"13. We want to clarify that if a situation for determining the ALP of AMP expenses arises, then no transfer pricing adjustment should be made by applying the bright line test, as has been done on protective basis, because of Hon'ble High Court has not approved the application of the bright line test in several decisions. "

17. Furthermore, Hon'ble Delhi High Court in Sony Ericsson Mobile Communications India (P.) Ltd. vs. CIT-IH -(2015) 55 taxmann.com 240 (Delhi) also determined the identical issue as to applying the BLT for determining ALP of the AMP in favour of the assessee and has categorically held that BLT has no statutory mandate and it is not obligatory to subject AMP expenses to BLT and considered non-routine AMP as separate transactions by making following observations

"III Section 92C of the Income-tax Act, 1961 - Transfer pricing -Computation of arm's length price (Comparables and adjustments/ Adjustments - AMP expenses) Assesseees were several Indian subsidiaries of Multi National Enterprises (MNEs) engaged in distribution and marketing of imported and branded products, manufactured and sold to them by foreign AEs - They had applied TNMM/RPM for computing ALP - TPO accepted 5 methods so applied by assesseees, however, found that assesseees had incurred AMP expenses towards promotion of brand in India, however, no reimbursement of expenses was made from AEs - Hence, he used bright line test by segregating non-routine expenses and by deducting amount representing bright line from value of gross sales and determined excess AMP incurred by assessee ,and added same to income of assessee :- Whether where comparables adopted by assessee, with or without making adjustments as a bundled transaction

had been accepted by TPO, it would be illogical and improper to treat AMP expenses as a separate transaction - Held, yes- Whether brightline test has no statutory mandate and it is not obligatory to subject AMP expenses as a bright line test and consider non-routine AMP as a separate transaction - Held, yes"

18. So, following the decision rendered by Hon'ble Delhi High Court in case of Sony Ericsson Mobile Communications India (P.) Ltd. (supra) and coordinate Bench of the Tribunal in Perfetti Van Melle India Pvt. Ltd. (supra), TP adjustment amounting to RS.22,30,18,964/- by applying BLT is not sustainable on protective basis having no statutory mandate. So, ground no. 5 is determined in favour of the assessee.

10. We find following the above decision, the Tribunal in assessee's own case vide ITA No.6299/Del/201.7, order dated 06.11.2017, for assessment year 2013-14 has, again, allowed the appeal filed by the assessee by directing the Assessing Officer to delete the addition made on account of AMP adjustment on protective basis by applying the BLT. Since the Tribunal in assessee's own case has already decided the issue and directed the Assessing Officer/TPO to delete the addition made by them by applying brightline test, therefore, in absence of any contrary material brought to our notice, we set aside the order of the Assessing Officer and direct him to delete the addition."

22.4.1 Accordingly, in view of the settled legal position as discussed in the preceding paragraphs, ground no. 9 stands allowed as in our view the AO/ TPO/ Ld. DRP have grossly erred in not following order(s) of the Tribunal for earlier AYs while making TP adjustment on protective basis. Accordingly, the adjustment, on protective basis amounting to Rs.104,26,24,35/- is hereby deleted."

11. The Id. AR also submitted that Rs.60,43,94,333/- out of the total AMP expenses of Rs.108,55,75,662/- directly relate to the sales and same constitutes sales related expenses. The same has been incurred on dealers' gifts, financial schemes, freebie items, distributor meeting expenses, etc, and would be outside the ambit of AMP expenses. The detailed break-up of expenses of Rs. 108,55,75,662/- was given to the Id. TPO, vide letter dated 27.11.2020. It was

pleaded that, in any case, the sales related expenses need to be excluded from the overall AMP expenses as the same is not incurred for brand enhancement of AE, but is connected directly to sale of products in India. We find that this aspect has been duly appreciated by the Tribunal in assessee's own case for AY 2016-17 referred (supra) and, accordingly, we allow this aspect of the ground of the assessee.

12. However, with regard to the remaining AMP expenses, we find that the Id. TPO had made adjustment on protective basis by applying BLT on the ground that the same had been incurred for creating of marketing intangibles and consequently required to be reimbursed by the AEs along with mark up. For this purpose, the Id. TPO had applied a mark up of 20.24% being margin of comparables engaged in marketing support services on the alleged excess AMP expenses incurred by the assessee and had made an upward adjustment on protective basis and Rs.71,45,33,226/- on substantive basis. The Id. AR stated before us that the addition made on substantive basis had been deleted by the Id. DRP against which the Revenue is not in appeal before us. As far as the addition made on protective basis by applying BLT, we find that the issue stands covered in favour of the assessee by the order of this Tribunal for AY 2016-17, the relevant operative part of which have already been reproduced supra. Hence, ground No.7 raised by the assessee is allowed.

13. We find that the assessee had raised ground No.5.1 challenging the action of the Id. TPO in taking *suo moto* cognizance of the alleged excess AMP expenditure by concluding it to be an international transaction with the AE and, thereafter, proceeding to benchmark the same eventhough the same was neither referred by the Id. AO u/s 92CA(1) of the Act nor reflected by the assessee in

Form No.3CEB. The Id. AR fairly conceded that this issue is decided against him and accordingly ground No.5.1 is dismissed.

14. In view of our aforesaid decision for grounds No.6 and 7, wherein relief is granted to the assessee on merits of the transfer pricing adjustment, the adjudication of other grounds i.e., grounds 2 to 5 need not be gone into and they are left open.

15. Similarly, in view of the deletion of transfer pricing adjustment on account of AMP expenditure on merits, vide grounds No.6 and 7 (supra), the adjudication of grounds No.8-11 would become academic in nature.

16. Ground No.12 raised by the assessee is consequential in nature.

17. Since the appeal is already disposed of hereinabove, the Stay Application of the assessee is hereby dismissed as infructuous.

18. In the result, the appeal of the assessee is partly allowed and the Stay Application of the assessee is dismissed as infructuous.

Order pronounced in the open court on 27.07.2023

Sd/-

(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 27th July, 2023.

dk

Copy forwarded to:

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

Asstt. Registrar, ITAT, New Delhi