

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I', NEW DELHI
BEFORE
SHRI N. K. SAINI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER
I.T.A. NoS.6916 & 2535/Del/2014
(Assessment Years 2009-10 & 2010-11)**

Fujifilm India Pvt. Ltd. Vs. DCIT, Circle 11(1),
C-1/114, Ground Floor, New Delhi
Near Mata Chanan Devi Hospital
And Lal Sai Mandir, Janakpuri,
New Delhi
GIR / PAN :AABCF1594J

**I.T.A.No. 424/Del/2016
(Assessment Year 2011-12)**

Fujifilm India Pvt. Ltd. Vs. DCIT, Circle 11(1),
C-1/114, Ground Floor, New Delhi
Near Mata Chanan Devi Hospital
And Lal Sai Mandir, Janakpuri,
New Delhi
GIR / PAN :AABCF1594J
(Appellant) (Respondent)

Appellant by : Sh. Nageshwar Rao, Adv.
Respondent by : Sh. Amendra Kumar, CIT DR

Date of hearing: 08.03.2016
Date of Pronouncement: 29.04.2016

ORDER

PER BENCH:

The present appeals have been filed by the assessee against the order dated 31.12.2015 passed by the Ld. A.O. for assessment year 2009-10, 2010-11 and 2011-12 . For the sake of convenience, all the three assessment years

are being disposed off by way of this order as the issues involved in them are common.

2. The main issue is on account of transfer pricing adjustment due to difference in the arm's length price of the international transaction of incurring of advertisement, marketing and promotion (AMP) expenses relating to creation of marketing intangibles.

3. Briefly stated the assessee is a subsidiary company of fugitive film Corporation, Japan and is engaged in the import and resale of fugitive film products in India and the provides marketing and technical support services to fugitive film Japan. During the course of the assessment proceedings the AO observed that the assessee has entered into certain international transaction for the year under consideration hence the case was referred to the transfer pricing officer under section 92 CA (3).

3.1. It was observed by the Ld. TPO that the assessee had incurred a cost in connection with the expenses relating to advertisement, marketing and promotion of Fuji Film brand in India. It was submitted by the assessee that the main activity carried out by the assessee was marketing of intangible and selling of fugitive film products in Indian. The assessee contended before the authorities that it is not a brand owner, instead has incurred expenditure for promoting the brand owned by its AE.

3.2. The Ld.AR submitted the issue stands covered by the decision of special bench of this tribunal in the case of M/s LG Electronics India Pvt. Ltd. reported in (2013) 140 ITD 41 (Del) (SB) and Sony Ericson Mobile Communications India Pvt. Ltd. Vs CIT (2015) 374 ITR 118 (Del.).

4. We have heard the rival submissions and perused the relevant material on record qua the addition on account of transfer pricing adjustment of AMP expenses.

5. During the course of hearing the ld. Counsel for the assessee at the very outset submitted that the issue under consideration deserves to be set aside to the TPO/AO as the issue now has been settled by the Hon'ble Jurisdictional High Court in the case of Sony Ericsson Mobile Communications Pvt. Ltd. vs. CIT reported at 374 ITR 118 and in the case of Maruti Suzuki India Ltd. vs. CIT in ITA no. 110/214 and 710/2015 order dated 11 December, 2015. It was further submitted that the aforesaid orders were not available to the T.P.O. / D.R.P. at the time of passing of their respective orders. It was also submitted the TPO/AO/DRP S.A. No.121/Del/2016 (In ITA No. 944/Del/2016) have not brought any evidence on record to demonstrate the existence of any mutual agreement or arrangement between the assessee and the A.E. It was stated that the DRP declined to apply the decisions of M/s Maruti Suzuki India Ltd. vs. C.I.T.

(Supra) on the ground that it was given in the context of a manufacturer and not a distributor, however, subsequent to the said decision the Hon'ble Jurisdictional H.C. in the case of Whirlpool of India vs. DCOT in I.T.A. 228/2015 & C.M.No. 5751/2015 order dated 22.12.2015 and in the case of Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. A.C.I.T. in I.T.A. No. 643 & 675/14 order dated 23.12.2015 examined this aspect and applied the same principle to distribution business as well. It was further submitted that DRP and the TPO failed to give any cogent reason for de-bundling the AMP function of the assessee as a separate transaction which is in violation of the principles laid down in the case of Sony Ericsson Mobile Communications India Pvt. Ltd reported at (2015) 55 Taxman.com.240(Del.) (Supra).

6. In his rival submissions, the ld. DR although supported the order of the Assessing Officer could not controvert the aforesaid contention of the Ld. Counsel for the assessee.

7. We have considered the submissions of both the parties and perused the material available on the record. In the present case it is an admitted fact that the T.P.O. proposed the adjustment by applying the "Bright Line Test", on account of excessive AMP incurred by the assessee on behalf of the A.E. But subsequently the D.R.P. held that the application of "Bright Line Test" has been over ruled in the case of M/s. Sony Ericsson Mobile

Communication India Pvt. Ltd. (Supra). However, the D.R.P. declined to apply the decision of Maruti Suzuki India Ltd. (Supra) on the ground that it was rendered in the context of a manufacturer and not a distributor. Recently, the Hon'ble Delhi High Court, subsequent to the said decision of Maruti Suzuki India Ltd. (Supra), examined this aspect and applied the same principle to the distribution business also in the cases of Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. A.C.I.T. (Supra) and C.I.T. & Ors vs. Whirlpool of India Ltd. (supra) vide order dated 23.12.2015 and 22.12.2015 respectively. These decisions of the Hon'ble Jurisdictional Court which are applicable to the facts of the present case were not considered by the T.P.O. and the D.R.P. since these were not available to them. We, therefore, by considering the totality of the facts and the ratio laid down by the Hon'ble Delhi High Court in the aforesaid judicial pronouncements, deem it appropriate to set aside the issue relating to the adjustment on account of AMP to the file of the TPO/AO to be decided afresh in accordance with the law after providing due and reasonable opportunity of being heard to the assessee.

8. The Hon'ble High Court has held, inter alia, that the international transaction of AMP expenses should be bundled or aggregated with other international transaction carried out by the assessee as a Distributor,

who either simply acts an agent of manufacturer or purchases goods from the manufacturer for resale at his own account. However, in the case of a Manufacturer, the import of raw material has been held to be an independent transaction of marketing and distribution. In the case of a Distributor, the Hon'ble High Court held that where TNMM has been applied as the most appropriate method, which method has not been disturbed by the TPO, then, the international transactions of AMP and Distribution activities should be clubbed. It further held that for determining the ALP of such transactions under a combined approach, only such comparables should be chosen which conform to the AMP functions and other distribution functions conducted by the assessee. If there is some difference in the functions under these international transactions, including that 'of AMP, between the assessee and the comparables, then, suitable adjustment should be made to bring both the transactions at par. If probable comparables are not performing similar functions as done by the assessee and no adjustment is possible for bringing the international transactions of the assessee in an aggregate manner at par with those undertaken by the comparables, then, segregation should be done and the international transaction of AMP spent, should be separately processed under the transfer pricing provisions for the purposes of determining its ALP separately.

9. In such determination of ALP of AMP expenses in a segregated manner, proper set off on account of excess purchase price adjustment should be allowed. The view taken by the Tribunal in segregating routine and non-routine expenses on the basis of bright line test has been set aside by the Hon'ble High Court. The view taken by the Special Bench that the expenses concerned with the sales, such as, rebates and discounts etc., should be excluded from the ambit of AMP expenses, has been upheld. 5 . We can summarize the relevant position emanating from the judgment of the Hon'ble High Court, as under: -

- * AMP expense is an international transaction [Paras 52 & 53 of the judgment] ;
- The TPO has jurisdiction to determine the ALP of the international transaction of AMP expenses [Para 50 of the judgment];
- Inter-connected international transactions can be aggregated and section 92(3) does not prohibit the set- off [Paras 80 & 81];
- AMP is a separate function. An external comparable should perform similar AMP functions. [Paras 165 &166] ;
- Bright line test cannot be applied to work out non-routine AMP expenses for benchmarking [Para 194(x)];

- ALP of AMP expenses should be determined preferably in a bundled manner with the distribution activity [Paras 91, 121 & others] ;
- For determining the ALP of these transactions in a bundled manner, suitable comparables having undertaken similar activities of distribution of the products and also incurring of AMP expenses, should be chosen [Paras 194(i), (ii), (viii) & others];
- The choice of comparables cannot be restricted only to domestic companies using any foreign brand [Para 120] ;
- If no comparables having performed both the functions in a similar manner are available, then, suitable adjustment should be made to bring international transactions and comparable transactions at par [Para 194 (iii)] ;
- If adjustment is not possible or comparable IS not available, then, the TNMM on entity level should not be applied [Paras 100, 121, 194(iii) & (vi)] ;
- In the above eventuality, international transaction of AMP should be viewed in a de-bundled manner or separately [Paras 121& 194(xi)] ;
- In separately determining the ALP of AMP expenses, the TPO is free to choose any other suitable method including Cost plus method [Para 194(xiii)];
- In so making a TP adjustment on account of AMP expenses, a proper set off/purchase price

adjustment should be allowed from the other transaction of distribution of the products [Para 93] ;

- Selling expenses cannot be considered as part of AMP expenses [Paras 175 & 176 of the judgment].

6. We accordingly dispose of the appeals of the assessee for assessment years 2009-10, 2010-11 and 2011-12, we restore the matter to the file of TPO / AO for deciding the issue in conformity with the directions as deduced from the judgment of the Hon'ble Delhi High Court in the case of Sony Ericson Mobile Communication India (P) Ltd. (supra).

7. Accordingly the appeal filed by the assessee stands statistically allowed.

Order is pronounced in the open court on 29.04.2015

Sd./-
(N. K. SAINI)
ACCOUNTANT MEMBER
Date: 29.04.2016

Sd./-
(BEENA PILLAI)
JUDICIAL MEMBER

Sp.

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order
(ITAT, New Delhi)

S.No.	Details	Date	Initials	Designation
1	Draft dictated on			Sr. PS/PS
2	Draft placed before author	2/5/16		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	29/4/16		Sr. PS/PS
6	Kept for pronouncement	29/4		Sr. PS/PS
7	File sent to Bench Clerk	3/5		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			