

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1085/Del./2017
(ASSESSMENT YEAR : 2012--13)**

M/s. Sony Mobile Communication India vs. ACIT,
Private Limited, Spl. Range 8,
(now merged with M/s. Sony India Pvt.Ltd.), New Delhi.
A – 31, Mohan Cooperative Indl. Estate,
Mathura Road,
New Delhi – 110 044.

(PAN : AAKCS7996N)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Nageshwar Rao, Advocate
REVENUE BY : Shri H.K. Choudhary, CIT DR

Date of Hearing : 17.01.2019
Date of Order : 21.02.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

The Appellant, M/s. Sony Mobile Communication India Pvt.Ltd. (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 30.01.2017 passed by the AO in consonance with the orders passed by the Id. DRP/TPO under section 143 (3) read with section 144C

of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2012-13 on the grounds inter alia that :-

"1. That on the facts and circumstances of the case and in law, Assessing Officer ('Ld. AO') erred in assessing the income of the Appellant at INR 1,59,60,90,0001- as against the returned income of INR 13,58,61,680.

2. That on the facts and circumstances of the case and in law, the Final Assessment order passed under section 143(3) read with section 144C of the Income Tax Act, 1961 ('the Act') by the Ld. AO is bad in law as the same does not consider complete and relevant facts, are not in accordance with provisions of law and principles of law as laid down by Hon'ble courts.

TRANSFER PRICING GROUNDS

3. That the impugned order passed by Ld. AO/Transfer Pricing Officer (Ld. TPO) computing the total income at INR 1,59,60,90,0001- is blatantly erroneous since adjustment based on a protective assessment has been added by the Ld. AO in computing the total income of the Appellant.

4. That on the facts and circumstances of present case, the Hon'ble Dispute Resolution Panel ('Hon'ble DRP') has erred in holding that the Appellant has not contested the use of the Bright Line Test ('BLT') for undertaking the adjustment under the protective assessment.

5. That on the facts and circumstances of present case, the Ld. AO/Ld. TPO have erred in determining that the Hon'ble DRP directed them to conclude the assessment based on the BLT.

6. That without prejudice to the above, if BLT was to be applied then the Appellant should have been given reasonable opportunity to present its detailed objections against the approach followed by the Ld TPO.

7. That on facts and circumstances of the case and in law, the Hon'ble DRP erred in upholding Ld. TPO's action, issued much beyond legitimate jurisdiction, in questioning the reasonableness, quantum, and commercial expediency of Advertisement, Marketing and Promotion ('AMP') expenditure incurred by the Appellant.

8. That on the facts and circumstances of present case and in law, Ld. AO/TPO and Hon'ble DRP have erred in holding that AMP expenditure incurred by the Appellant, is an 'international transaction' u/s 92B justifying separate bench marking under chapter X of the Act, disregarding the findings of the Hon'ble Delhi High Court in the cases of Maruti Suzuki India Ltd., Whirlpool of India Ltd., Bausch & Lomb Eye Care India Pvt. Ltd and Honda Siel Power Products Ltd.

9. That on the facts and circumstances of the case and in law, Ld. AO/TPO and Hon'ble DRP failed to appreciate that incurring of AMP expenses was not an international transaction, given that there was no machinery or computation provision in law to test AMP expenses and determine compensation for the same.

10. That the Ld. AO/ Ld. TPO/ Hon'ble DRP has erred in not appreciating that AMP expenses incurred by the Appellant in the normal course of its business were not for the sole benefit of its associated enterprise and thus did not fall within the purview of an "international transaction"

pertaining to rendition of service, as defined in section 92B of the Act, distinct from its functional profile and responsibility as a distributor.

11. Without prejudice, even if AMP expenses are held to be "non-routine" and "excessive", the Appellant was not required to be reimbursed compensated by its AE, considering that the purported benefit caused to the AE on account of incurring of AMP expenses incurred by the Appellant was only incidental.

12. Without prejudice, even if AMP expenses are held to be "non-routine" and "excessive", the Ld. AOITPO/ Hon'ble DRP erred in not appreciating that the 'limited distributor function' performed by the Appellant had already been adequately compensated -by the AE since the Appellant's business model allows it to earn an arm's length margin on all costs incurred including AMP expenses.

13. That the Ld. AO/ Ld. TPO/ Hon'ble DRP erred in not appreciating that the AMP expenses were incurred by the Appellant as part of its distribution business and not for the purpose of providing sole benefit to its associated enterprise and thus could not be considered to be a transaction under section 92F(v) of the Act, since there was no understanding or arrangement or action in concert for provision of service.

14. Without prejudice to the other grounds, the Ld. TPO / has erred in facts and circumstances of the case and in law by ignoring the fact that even if a transaction by transaction approach is applied, the AMP function has been benchmarked under transactional net margin method (TNMM) analysis carried out by the TPO and found to be at arm's length.

15. Without prejudice to other grounds, the Ld. TPO/ Ld. AO/Hon'ble DRP erred in applying the BLT method to determine the excessive/non-routine AMP expenses in complete disregard of the Transfer Pricing Regulations in India, commercial circumstances of the case and the principles and findings laid down by the Hon'ble Delhi High Court.

16. Without prejudice to other grounds, the Ld. AO/ TPO and Hon'ble DRP while computing the protective adjustment have erred in quantifying excessive and/or non-routine AMP expenses by considering rebates and discounts and certain selling and distribution expenses as brand building expenses while performing arm's length analysis without giving cogent reasons for the purpose of benchmarking alleged AMP expenditure. The basis on which all such expenses were determined to be non-routine in nature is also not specified in the order. This is also contrary to the principles and findings laid down by the Hon'ble High Court in the case of Appellant.

17. Without prejudice to all other grounds, the Ld. TPO/Ld. AO/Hon'ble DRP have erred in fact and in law by determining the arm's length level of routine AMP expenses by considering inappropriate companies.

18. Without prejudice to other grounds, that the Ld. AOITPO erred in levying a further mark-up of service providers on AMP expenses for determination of the arm's length price of the alleged brand-promotion services rendered by the Appellant to its AEs and Hon'ble DRP erroneously upheld the approach of the Ld. TPO/AO.

19. Without prejudice to other grounds, that the Ld. AOITPO erred in making inappropriate selection of com parables for the mark-up on alleged AMP expenditure while computing adjustment in protective assessment and Hon'ble DRP erroneously upheld the approach of the Ld. TPO/AO.

20. *That without prejudice to the above, if BLT was to applied then, the Ld. TPO/Ld. AO should have giving effect to the directions of the Hon'ble DRP of regarding the set of comparable companies while computing the protective adjustment since though the same set was applied for the protective adjustment as well as the substantive adjustment.*

21. *That the Ld. AO/ Ld. TPO/ Hon'ble DRP failed to appreciate that once the net operating margins of the Appellant had met the arm's length test, no further adjustment was required for any non-routine function or non-routine AMP expenditure.*

22. *Without prejudice to the other grounds, the Ld. TPO / Hon'ble DRP have erred in facts and circumstances of the case and in law by ignoring the fact that even if the Appellant's remuneration model is to be re-characterised to a service fee for AMP activities, the profit earned by the Appellant over and above the return earned by a distributor undertaking no or limited AMP activities should be considered as a remuneration for its AMP activities, in direct contravention to the principles laid down by the Hon'ble Delhi High Court.*

Miscellaneous contentions

23. *Ld. AO has erred in initiating penalty proceedings under Section 271(1)(c) of the Act on account of an adjustment that was a result of a protective assessment.*

24. *Ld.AO has erred) in charging interest under Sections 234A and 234B of the Act.”*

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Sony Mobile Communication India Pvt.Ltd., the taxpayer is primarily engaged in the business of importing, buying and selling and distributing wide range of mobile phones in India and providing related post sale support services. The year under assessment is the fourth year of the operation of the company. The taxpayer trades Sony Ericsson Mobile handset in India and part of its activity undertakes the promotion, marketing and distribution of mobile handsets. During the year under assessment, the taxpayer entered into international transactions with its Associated Enterprises (AEs) as under :-

S.No.	Description of the transactions	Method Applied	Amount (in INR)
i.	Import of components and trading goods	TNMM	4923551053
ii.	Business promotion expenses		30910663
iii.	Purchase of air time slots		11388952
iv.	Reimbursement of expenses to AE		1260226

3. The taxpayer in order to benchmark its international transaction by aggregating all its international transactions applied Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) with ratio of net profit to sales as Profit Level Indicator (PLI) by using multiple years data with margin of comparables at 0.83% after carrying out working capital adjustment as against PLI of taxpayer at 2.01% and found its international transactions at arm's length, which is accepted by the TPO.

4. However, Id. TPO by applying the bright line method proceeded to benchmark the international transaction for marketing and development of marketing services for its AEs as under :-

“24.3 In line with the benchmarking carried out in earlier year, the ratio of AMP expenditure to sales in the case of the assessee is determined as given below:

<i>Particulars</i>	<i>Amount (in Rs.)</i>
<i>Advertisement and sales promotion</i>	<i>341016698</i>
<i>Selling and distribution expenses</i>	<i>1160939120</i>
<i>Total Expenditure on AMP</i>	<i>1501955818</i>
<i>Value of Gross Sales</i>	<i>6928209949</i>

<i>AMP /Sales of the assessee[%]</i>	21.67%
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24.4 *The list of comparables selected, as per the SCN, along with the calculation of AMP Sales ratio as per Prowess is as follows.:*

<i>Comparables</i>	<i>Selling & Distribution expenses</i>	<i>Sales</i>	<i>AMP/ Sales</i>
<i>Beetel Teletech Ltd.</i>	98.57	1472.4	6.69%
<i>Compuazelnfocom Ltd.</i>	0	1544.4	0.00%
<i>Ingram Micro India Pvt. Ltd.</i>	8.89	9545.1	0.09%
<i>Intex Technologies (India) Ltd.</i>	19.3	782.47	2.47%
<i>Iris Computers Ltd.</i>	1.85	1096.17	0.17%
<i>Munoth Industries Ltd.</i>	0	11.36	0.00%
<i>OptiemusInfracom Ltd.</i>	64.86	1856.86	3.49%
<i>Priya Ltd.</i>	0.68	192.47	0.35%
<i>Redington (India) Ltd.</i>	26.19	9567.82	0.27%
<i>Savex Computers Pvt. Ltd.</i>	105.89	2905.23	3.64%
<i>Vivek Ltd.</i>	19.71	384.31	5.13%
	Average		2.03%

24.5 *As considered in earlier years, entities carrying negligible marketing and market development functions are removed and the final companies considered are as follows :-*

<i>Comparables</i>	<i>Selling & Distribution expenses</i>	<i>Sales</i>	<i>AMP/ Sales</i>
<i>Beetel Teletech Ltd.</i>	98.57	1472.4	6.69%
<i>Intex Technologies (India) Ltd.</i>	19.3	782.47	2.47%
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<i>Redington (India) Ltd.</i>	26.19	9567.82	0.27%
<i>Savex Computers Pvt. Ltd.</i>	105.89	2905.23	3.64%

<i>Vivek Ltd.</i>	<i>19.71</i>	<i>384.31</i>	<i>5.13%</i>
	<i>Average</i>		<i>3.15%</i>

24.6 *The amount which represents the bright -line and the amount that should have been compensated to the assessee company are computed hereunder:-*

<i>Particulars</i>		<i>Value (Rs.)</i>
<i>Value of gross sales of assessee</i>	<i>A</i>	<i>6928209949</i>
<i>Arithmetic mean of AMP /Sales of comparables</i>	<i>B</i>	<i>3.15%</i>
<i>Amount that represents price for routine AMP activities</i>	<i>C = B/A</i>	<i>218238613</i>
<i>Total expenditure incurred by assessee on AMP</i>	<i>D</i>	<i>1501955818</i>
<i>Arm's Length Price of the service/expenditure for creation of marketing intangible in India in favour of the AE</i>	<i>E=D-C</i>	<i>1283717205</i>
<i>Mark-up @ 13.75%</i>	<i>F=13.75% of E</i>	<i>176511116</i>
<i>The amount by which the assessee company should have been reimbursed by A.E, and for which the adjustment is proposed to be made</i>	<i>G=E+F</i>	<i>1460228320</i>
<i>Price Received from the AE for creation of marketing intangibles</i>	<i>H</i>	<i>0</i>
<i>Adjustment required to be made for creation of marketing intangibles</i>	<i>I=G - H</i>	<i>1430228320</i>

24.7 *The markup is considered at 13.75%, being the same as consideration alternative analysis discussed below.*

24.8. *Thus, based on the above computation, an adjustment of Rs.1460228320/- to the total Income of the assessee on account marketing and market development function tarried, out for the AE for which the assessee company was not adequately compensated is required to be carried out.*

24.9 However, the benchmarking carried out above is on protective basis and in case the alternative benchmarking carried out in paras below are not acceptable by the Courts, the above benchmarking may be adjudicated upon.”

5. The taxpayer carried the matter before the Id. DRP by way of filing objections, who has confirmed the adjustment made by the TPO by applying the bright line test but on protective basis. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

7. The Id. AR for the taxpayer, at the very outset, contended that transfer pricing adjustment made by TPO/DRP/AO on account of Advertisement, Marketing & Promotion (AMP) expenses by using the bright line method on protective basis is not sustainable in the eyes of law and relied upon the decisions rendered by the coordinate Bench of the Tribunal in ***MSD Pharmaceuticals Private Ltd. in ITA No.6565/Del/2017, Nikon India Private Limited in ITA No.4574/Del/2017 dated 20.09.2017 & Toshiba India Pvt. Ltd. in ITA No.6531/Del/2017 dated 30.11.2017 and Perfetti Van Melle India Pvt. Ltd. in ITA No.4574/Del/2017.***

8. Ld. DR for the Revenue, on the other hand, to repel the arguments addressed by the Id.AR for the assessee, has filed written submissions also which are part of the file and has requested to restore the file to AO/TPO for determination of ALP of AMP expenses afresh.

9. By now, it is settled principle of law that arm's length price adjustment of AMP expenses by applying the bright line test on protective basis has no statutory mandate as has been held by *Hon'ble Delhi High Court in Sony Ericsson Mobile Communication India (P.) Ltd. vs. CIT-III – (2015) 55 taxmann.com 240 (Delhi)*.

10. 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.”

11. In view of what has been discussed above, we are of the considered view that 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.146,02,28,320/- by applying BLT is not sustainable on protective basis having no statutory mandate. Consequently, protective adjustment made by the TPO/DRP/AO qua AMP expenses by applying bright line test on protective basis is not sustainable in the eyes of law having no statutory mandate, hence appeal filed by the taxpayer is allowed.

Order pronounced in open court on this 21st day of February, 2019.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 21st day of February, 2019
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Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A).
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**