IN THE INCOME TAX APPELLATE TRIBUNAL, 'K' BENCH MUMBAI

BEFORE: SHRI MAHAVIR SINGH, VICE PRESIDENT
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.4576/Mum/2019
(**Assessment Year :2010-11**)

DCIT-15(2)(1) R.No.357, 3rd Floor Aayakar Bhavan M.K.Road, Marine Lines Mumbai – 400 020	Vs.	M/s. Kellogg India Private Limited 1001-1002, 10th Floor Hiranandani Business Park Powai, Mumbai – 400 076
PAN/GIR No.AAACK1748A		
(**Appellant**)	..	(**Respondent**)

Revenue by	Shri Sushil Kumar Mishra
Assessee by	Ms. Hirali Desai / Shri Karan Mehta
Date of Hearing	**19/07/2021**
Date of Pronouncement	**23/07/2021**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.4576/Mum/2019 for A.Y.2010-11 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-56, Mumbai in appeal No.CIT(A)-56, Mumbai/10261/2014-15 dated 30/04/2019 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 144C(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 21/05/2014 by the ld. Dy. Commissioner of Income Tax-10(3), Mumbai (hereinafter referred to as ld. AO).

2. The ground Nos.1 to 3B raised by the Revenue are with regard to deletion of transfer pricing adjustment by the ld. CIT(A) made on account of Advertisement, Marketing and Promotion (AMP) expenses.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is an Indian company incorporated in the year 1990 and engaged in the business of manufacturing and sale of ready to eat cereal products in India. The assessee company is wholly owned subsidiary of Kellogg, USA and operated as licensed manufacturer in India by utilizing the technology and marketing intangibles of Kellogg, USA. During the year under consideration, the assessee entered into various international transactions with its associated enterprises (AEs). After making a detailed analysis of international transaction with AE in the transfer pricing study report, the assessee found them to be at arm's length price. The ld. TPO after examining TP study report as well as other materials on record issued a show-cause notice to the assessee to explain why the arm's length price (ALP) of the AMP expenditure should not be determined by applying the Bright Line Test (BLT) method.

3.1. In response to the show-cause notice, the assessee filed its reply stating that the AMP expenditure incurred by the assessee, is in respect of products manufactured and sold in India and the payment towards such expenditure having made to third parties in India, it cannot be treated as international transaction u/s.92B of the Act. Further, it was submitted by the assessee, since there is no agreement / arrangement with the AE, for incurring AMP expenditure for promotion of the brand of the AE, it cannot form part of the

international transaction. Further, it was submitted by the assessee that the arm's length price of such transaction cannot be determined by applying the BLT as it is not a prescribed method in the statute. In support of such contention, the assessee relied upon various decisions.

3.2. The ld. TPO did not find merit in the submissions made by the assessee and selected M/s. Dabur India Ltd., and M/s. Marico Ltd. as comparables for applying the Bright Line Test and determined the ALP of AMP expenditure by relying on Special Bench decision of Delhi Tribunal in the case of LG Electronics India Pvt. Ltd., vs. ACIT reported in 140 ITD 41. The arithmetic mean margin of these two comparables i.e. M/s. Dabur India Ltd., and Marico Ltd., arrived by the ld. TPO was 12.24%. The ld. TPO observed that the gross sales of the assessee in the manufacturing segment was Rs.272.03 Crores and AMP expenditure after excluding distribution expenses was Rs.53.51 Crores which amounted to 19.67% of net sales. The ld. TPO observed that AMP expenditure of the assessee accounts for 19.67% of income as compared to average AMP expenditure to income ratio of 12.24% for the comparables under Comparable Uncontrolled Price method (CUP). Accordingly, the ld. TPO concluded that the assessee had incurred huge non-routine expenditure to develop marketing intangibles for the AE and accordingly, the said expenditure was incurred for the benefit of the AE. The ld. TPO also took the following comparable companies together with their segmental profitability details as under:-

No.	Company Name	Segment	OP/OC
1.	Crystal Hues Limited	Advertising agency services	9.05%
2.	Cyber Media Research Ltd.	Market research and management consultancy	13.00%
3.	Quadrant Communications Ltd.,	Advertising agency services	13.11%
	Average		**11.72%**

3.3. The ld. TPO proceeded to determine the ALP of reimbursement for brand promotion and marketing intangible of AE in India and made an arm's length price adjustment of Rs.22.58 Crores as under:-

		(**Amount in Crores**)
Gross Sales of the taxpayer	=	Rs.272.03
Arm's length % of AMP Expenditure	=	12.24%
Arm's length AMP Expenditure	=	12.24% of Rs.272.03 Crores
	=	Rs.33.296 Crores
Expenditure incurred by the tax payer on AMP	=	Rs.53.51
		Rs.33.296
	=	Rs.20.214 Crores
Add Mark up@11.72%	=	111.72% of Rs.20.214 Crores
	=	Rs.22.58 Crores
Arm's length value for AMP activity	=	Rs.22.58 Crores
Value received by the tax payer	=	Nil
Difference	=	Rs.22.58 Crores

3.4. This action of the ld. TPO was deleted by the ld. CIT(A). We find that the same issue was subject matter of adjudication by this Tribunal in assessee's own case for A.Y.2009-10 in ITA 2866/Mum/2014 dated 19/07/2019 wherein it was held as under:-

> *"6. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Undisputed facts are, the assessee is not merely a distributor of the products manufactured by the AE but the assessee itself manufactures its own products in India under license from the AE. It is also a fact that for marketing and promotion of its manufactured products in India, assessee has incurred AMP expenditure by making payments to third parties in India. Therefore, the basic issue which arises for consideration is, whether the AMP expenditure incurred by the assessee in India can come within the purview of international transaction as defined under section 92B of the Act. In this regard, the contention of the assessee before the Transfer Pricing Officer was, since the assessee has incurred the AMP expenditure for products manufactured and sold by it in*

India, it does not come within the purview of international transaction. Further, the assessee has also submitted that since there is no arrangement/agreement between the assessee and the AE for incurring such expenditure to promote the brand of the AE, it cannot be said that there is an international transaction relating to AMP expenditure. It is worth mentioning, the Transfer Pricing Officer has also agreed with the assessee that the AMP expenditure was incurred with the third parties in India, hence, do not constitute international transaction. Having held so, the Transfer Pricing Officer has still proceeded to determine the arm's length price of the AMP expenditure on the reasoning that the compensation required in the arrangement between the assessee and the AE for improving the brand intangible of the owner has to be determined. Further, he has observed that the AMP expenditure incurred by the assessee not only benefits the assessee but also the AE in terms of increase in the brand value of Kellogg. Thus, the Transfer Pricing Officer has inferred that there is an arrangement between the assessee and the AE with regard to promotion of the brand of the AE by incurring AMP expenditure. However, he has not provided any factual basis on which he has drawn such inference. By merely stating that there is an arrangement between the assessee and the AE, the Transfer Pricing Officer cannot bring the AMP expenditure within the purview of international transaction. If the Transfer Pricing Officer alleges that the AMP expenditure comes within the purview of international transaction by virtue of an arrangement between the related parties, the burden is entirely upon the Transfer Pricing Officer to demonstrate the existence of such arrangement. A careful reading of the impugned order of the Transfer Pricing Officer does not reveal any such factual basis which can demonstrate the existence of an arrangement between the assessee and the AE for incurring AMP expenditure to promote the brand of the AE. That being the case, the entire approach of the Transfer Pricing Officer in determining the arm's length price of AMP expenditure is fallacious.

7. Moreover, there is no doubt that the Transfer Pricing Officer has determined the arm's length price of AMP expenditure by applying BLT method. While doing so, he has heavily relied upon the Special Bench decision of the Tribunal, in LG Electronics India Pvt. Ltd. (supra). Now, it is fairly well established that determination of arm's length price of AMP expenditure by applying BLT method is not valid.In a catena of decisions, the Hon'ble Delhi High Court while disapproving the decision of the Tribunal in L.G. Electronics India Pvt. Ltd. (supra) have held that BLT method is invalid as it is not prescribed in the statute. In this context, we may refer to the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). Following the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra) and various other decisions, different Benches of the Tribunal have also held that in absence of an express arrangement/agreement between the assessee and the AE for incurring AMP expenditure to promote the brand of the AE, AMP expenditure incurred by making payment to third parties for promoting and marketing the product manufactured by the assessee, does not come within the purview of international transaction.

8. At this stage, it is relevant to observe, while deciding identical nature of dispute in assessee's own case for the assessment year 2011-12, learned DRP in

direction dated 28th December 2015, have deleted the adjustment made by the Transfer Pricing Officer on account of AMP expenditure by recording a factual finding that the Transfer Pricing Officer has failed to demonstrate that there is an agreement/arrangement between the assessee and the AE for incurring AMP expenditure. While doing so, learned DRP has relied upon the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). Thus, viewed in the light of the ratio laid down in the decisions cited by the learned Authorised Representative, including the decision of the Hon'ble Delhi High Court in Martuti Suzuki India Ltd. (supra), it has to be concluded that the AMP expenditure incurred by the assessee in India cannot come within the purview of the international transaction. Hence, the Transfer Pricing Officer has no jurisdiction to determine the arm's length price of AMP expenditure.

9. Having held so, it is now necessary to deal with the contention of the learned Departmental Representative to restore the issue to the Assessing Officer for keeping it pending till the issue is settled by the Hon'ble Supreme Court. In our view, the aforesaid contention of the learned Departmental Representative is not acceptable. As per the prevailing legal position, the AMP expenditure incurred by the assessee in India cannot come within the purview of international transaction. That being the case, the adjustment made by the Transfer Pricing Officer cannot survive. Therefore, we do not find any necessity to restore the issue to the Assessing Officer. Grounds are allowed."

3.5. Respectfully following the aforesaid decision of this Tribunal in assessee's own case, we hold that AMP expenditure is not an international transaction and accordingly, direct the ld. TPO to delete the addition made on account of AMP adjustment for AMP expenditure. The ground Nos. 1 to 3B raised by the Revenue are hereby dismissed.

4. The ground No.4 raised by the revenue is challenging the action of the ld. CIT(A) holding that expenditure incurred on product development is revenue in nature.

4.1. We have heard rival submissions and perused the materials available on record. We find that assessee had debited the product development expenses in its profit and loss account to the tune of Rs.3,18,97,238/-. The ld. AO observed that in earlier assessment years, the said expenses were disallowed for reasons discussed in the respective assessment orders. By following said assessment order, for earlier years,

the ld. AO proceeded to treat the said expenditure as capital in nature and disallowed the same in the assessment. This was directed to be deleted by the ld. CIT(A) by following the decisions of this Tribunal and order of the Hon'ble Jurisdictional High Court in assessee's own case for earlier years. We find that this issue was the subject matter of adjudication by this Tribunal in assessee's own case for A.Y.2002-03 in ITA No.4335/Mum/2008 dated 20/01/2010 wherein it was held as under:-

> *"4 After considering the submissions and perusing the relevant material on record including the details of the expenditure placed on record, we do not find any infirmity in the findings of the Id CIT(A). The findings of the Id CIT(A) have been recorded in para 3.2 at pages 4 & 5 are as under:*
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> > *"3.2 I have considered the facts in this case. The decision of TCI Finance is clearly distinguishable, as held out above. The assessee has incurred the expenditure on upgrading its products. The assessee is manufacturing cereal flakes from corn and other grains. Every year it comes out with new flavours and variants. The expenditure incurred on pre-trial production is revenue in nature as it is incurred on improving/improvising in the existing line of business. It is not as if a new line of business has been set up. The Chandigarh Tribunal in the case of Glaxo Smith Kline Consumer Health Care Ltd vs ACIT, 112 TTJ 80, was considering the nature of expenditure incurred on introducing the developing new products. In that case the assessee was engaged in the business of manufacturing of fast moving consumer products. The Tribunal held that expenditure incurred in development, introduction and launching of newer products merely enable the assessee to remain competitive in the market and retained the customer preferences towards its brand of products. Even though the said advantage spilled over to the future, this was not conclusive to hold that the expenditure in question is a capital expenditure. Both pre and post development of new products the assessee remained in the business of manufacture and sale of food and health products. Therefore, it is erroneous to conclude that the assessee acquired a new line of products. The new products clearly relate to the business that the assessee has been hither to carrying on. On the consideration of the above facts the Tribunal held that the expenditure in question was revenue in nature. The Tribunal relied upon the judgement of the Karataka High Court in the case of CIT vs Bharat Earth Movers Ltd 47 CTR 244, and Delhi Bench of the Tribunal in the case of Honda Siel Cars Ltd (ITA 3688) dt 21.2.2006, In the instant case also the appellant has incurred expenditure in its existing line of business of Corn Products. This is clearly not capital in nature and is allowable u/ 37(1)."*
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> *4.1 Neither the above findings could be controverted by the Id DR nor any other material was brought on record to establish otherwise. No new machinery or assets have been brought during the year under consideration by incurring such expenses*

> *claimed in P&L Account. All the expenses were incurred in manufacturing of cereal flakes from corn and other grains. The assessee produces new flavours and variants every year. Expenditure was incurred on pre-trial production, which in our view, is revenue in nature. Therefore, in view of these facts and circumstances, and in view of the above decision, we confirm the order of the ld. CIT(A) on this issue."*

4.2. We also find that decision rendered by this Tribunal for A.Y.2004-05 in ITA No.7186/Mum/2008 dated 20/05/2011 on the same issue in favour of the assessee was upheld by the Hon'ble Jurisdictional High Court in assessee's own case for A.Y.2004-05 in Income Tax Appeal No.40/2012 dated 18/06/2014. The relevant operative portion of the order of the Hon'ble Jurisdictional High Court in this regard is reproduced hereunder:-

> *"6. In relation to the claim under Section 37(1) is concerned, the Tribunal found that the said issue came up before it in Assessee's own case in earlier years including Assessment Year 2002-03. The Assessment Year in question was 2004-2005. Since the Assessee is in the business of manufacturing ready to eat cereals that these expenses of product development were claimed. The details of such expenses have been set out. The Commissioner of Income Tax (Appeals) had directed deletion of the addition. That order was challenged before the Tribunal, but the Tribunal upheld it. In such circumstances and for the Assessment Year in question, no distinguishable features being pointed out that the Tribunal followed its own order for the prior Assessment Year. We do not find that the issue raises any substantial question of law. The view taken is in consonance with the facts placed on record."*

4.3. Respectfully following the aforesaid decision, we find no infirmity in the order of the ld. CIT(A) granting relief to the assessee. Accordingly, the ground No.4 raised by the Revenue is dismissed.

5. The ground No.5 raised by the Revenue is challenging the action of the ld CIT(A) in deleting the disallowance made u/s.40(a)(i) of the Act by the ld. AO for royalty expenditure. The ground raised by the Revenue in this regard is as under:-

> *"5. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in allowing the ground of appeal of the assessee company on the Royalty payment made by the assessee to its AE making TDS on net amount instead of gross amount and which is not according to the provision of section 195A."*

5.1. We have heard rival submissions and perused the materials available on record. We find that the very same issue was the subject matter of adjudication of this Tribunal in assessee's own case for A.Y.2007-08 in ITA No.431/Mum/2011 dated 22/12/2016 wherein it was held as under:-

> *"5.2 Ground No, 4 relates with addition of royalty payment of Rs.75,27,253/- for non deduction of tax at source. The assessee paid certain royalties which was subject to TDS @15%. However, the payment of tax was the responsibility of the assessee and assessee deducted due TDS @15% on 'net amount' paid as royalty. AO was of the view that the, impugned payments were required to be 'Grossed up' in terms of provisions of Section 195A and thereafter, TDS on gross amount was to be deducted @15%. Thus, there was a shortfall of TDS on royalty payment of Rs.75,27,253/- and hence disallowance of the same was made under Section 40(a)(i). Before CIT(A), the assessee contended that the royalty payments were made by assessee to Kellogg Company, USA under an Agreement dated 18/07/1994. The agreement was entered pursuant to approval granted by Government of India vide letter dated 25/06/1993, Therefore, 'grossing up' was not required to be done for the purposes of TDS in terms of provisions of Section 10(6A). CIT(A) rejected the same on the ground that provisions of 10(6A) were applicable only up to 31/05/2002 and the present AY being 2007-08, the benefit thereof was not available to the assessee. Aggrieved, the assessee is in appeal before us.*
>
> *5.3. The Ld. AR drew our attention to the fact that the provisions of Section 10(6A) has been misunderstood / misapplied by lower authorities to arrive at the conclusion that benefit thereof was not available to the assessee. The assessee fulfilled all the conditions of the said section and was squarely entitled for the benefit of the same. The Ld. DR paced reliance on stand of lower authorities. We have heard rival contentions. The short dispute is with regard to correct interpretation of Section 10(6A) which is extracted below:-*
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> > *"(6A) where in the case of a foreign company deriving income by way of royalty or fees for technical services received from Government or an Indian concern <u>in pursuance of an agreement</u> made by the foreign company with*

Government or the Indian concern after the 31st day of March, 1976 but before the 1st day of June, 2002 and,—
(a) where the agreement relates to a matter included in the industrial policy, for the time being in force, of the Government of India, such agreement is in accordance with that policy ; and
(b) in any other case, the agreement is approved by the Central Government,
the tax on such income is payable, under the terms of the agreement, by Government or the Indian concern to the Central Government, the tax so paid. "

(emphasis supplied by us)

After analyzing the above provisions, we cull out the following essential requirements to be fulfilled to claim the benefits thereof

i. The income is derived by foreign company.
ii. Such income is derived from 'royalty[1] or 'Fees for technical services'.
iii. The income should be derived from Government or Indian Concern.
iv. The income must be derived in pursuance of agreement entered into between 31/03/1976 and before 01/06/2002.
v. Agreement relates to matter included in the industrial policy, it should be in accordance with that policy. In other cases, the agreement should be by the Government.

We find that CIT(A) wrongly interpreted the time window to mean that the benefits of provisions were available only up-to 31/05/2002 which is not the correct interpretation. As the assessee fulfilled all the prescribed conditions, he is entitled for the benefit of the same and hence, we are inclined to delete the impugned additions and allow the appeal of the assessee. We direct so."

5.2. Respectfully following the aforesaid decision, the ground No.5 raised by the Revenue is dismissed.

6. In the result, appeal of the Revenue is dismissed.

Order pronounced on 23/07/2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(M.BALAGANESH)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Mumbai; Dated 23/07/2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai