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

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 5146/DEL/2017 (A.Y 2011-12)

Nikon India Pvt. Ltd. Plot No. 71, SEctdor-32, Institutional Area, Gurgaon, Haryana PIN 122001 AACCN5100F **(APPELLANT)**	Vs	DCIT Circle-3(1) 2nd Floor, HSIIDC Building, Vaniyjaya Nikunj, Udyog Vihar, Gurgaon, Haryana **(RESPONDENT)**

Appellant by	**Sh. Vishal Kalra, Adv & Sh. Ankit Sahni, Adv**
Respondent by	**Sh. Mritunjoy Baranwal, Sr. DR**

Date of Hearing	**06.11.2020**
Date of Pronouncement	**14.12.2020**

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 10/07/2017 passed by the Assessing Officer u/s 144C(3) read with Section 143(3) of the Income Tax Act, 1961 for Assessment Year 2011-12.

2. The grounds of appeal are as under:-

1. That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant under section 143(3) read with section 144C and 254 of the Act, for the relevant assessment year at INR 16,66,11,280 as against the returned income of INR 12,35,25,748.

2. That on the facts and circumstances of the case and in law, the AO / Transfer Pricing Officer ("TPO") have erred in making an adjustment of INR 4,30,85,529 to the arm's length price ("ALP") of (alleged) international

transaction of Advertisement, Marketing and Promotion ("AMP") expenditure holding the same to be not at ALP, applying the intensity approach.

3. That on the facts and circumstances of the case and in law, the order dated May 16, 2017 passed by the TPO is non-est and invalid since the TPO rectified its order dated November 10, 2016 giving effect to the directions of the Hon'ble Tribunal without specifying the mistakes (which is apparent from records) in that order and without considering objections of Appellant.

4. That on the facts and circumstances of the case and in law, the impugned order passed by the AO / TPO is bad in law as it has concluded existence of 'international transaction' without discharging onus to prove existence of an agreement, understanding or arrangement between the Appellant and the AE for incurrence of AMP expenditure.

5. That on the facts and circumstances of the case and in law, the order of the TPO is non-est and invalid as the TPO has computed ALP of AMP expenditure (alleged international transaction) simultaneously on substantive as well as protective basis which is against the contours of transfer pricing.

6. That on the facts and circumstances of the case and in law, the AO / TPO have grossly erred in applying Bright Line Test ('BLT') to propose transfer pricing adjustment amounting to INR 30,99,61.631, on protective basis, without appreciating that BLT has been rejected by the Hon'ble Tribunal vide its order dated July 15, 2016 (in first round) thus the order is bad in law and void-ab-initio.

Notwithstanding and without prejudice;

7. That on the facts and circumstances of the case and in law, the AO / TPO. have erred in not allowing the benefit of (+/-) 5% as per second proviso to section 92C(2) of the Act.

8. That on the facts and circumstances of the case and in law, the AO / TPO erred in not granting quantitative / economic adjustments while quantifying arm's length price of the alleged international transaction of AMP expenditure.

9. That on the facts and circumstances of the case and in law, the AO have erred in levying / charging interest under sections 234B and/or 234C of the Act.

Each of the above grounds are independent and without prejudice to the other grounds of appeal preferred by the Appellant."

3. Nikon India Private Limited (the assessee company) is a wholly owned subsidiary of Nikon Corporation, Japan ("Nikon Japan"). The assessee company is inter-alia engaged in import, sales and distribution for Nikon Imaging products in India through network of local distributors. For the

relevant Assessment Year ("AY"), the assessee company filed its return of income on September 21, 2011 declaring income of Rs. 12,35,25,748/-. The case of the assessee company was selected for scrutiny under section 143 (3) of the Act. During the relevant Assessment Year 2011-12 the assessee company had following 'international transactions' with its Associated Enterprise (AE), which were duly reported in Form 3CEB and TP Study.

INTERNATIONAL TRANSACTIONS:

S. No.	International Transaction	Transfer Pricing Method	Amount (in INR)
1	Purchase of products Spares, promotional and Other Supplies	Resale Price Method ("RPM")	366,11,59,289
2	Purchases of Fixed Assets	Transactional Net Margin Method	49,14,626
3	Service Support Income		1,59,95,179
4	Commission Income		23,41,67,614
5	Purchase of Fixed Assets	Comparable Uncontrolled Price Method	28,94,378
6	Cost Reimbursements Received		4,61,95,300
7	Cost Reimbursements Paid		37,99,998

These transactions were accepted to be at arm's length price (ALP) by the Transfer Pricing Officer ("TPO") / Assessing Officer. The TPO, vide order dated 06.01.2015 observed that the assessee company was incurring excessive Advertisement, Marketing and Promotion Expenditure (AMP) for development

of the brand owned by its foreign AE, therefore such excessive AMP expenditure would amount to 'international transaction'. Consequently, adjustment of Rs. 68,50,65,162/- was made by the TPO by applying Bright Line Test (BLT). Further, the TPO had included direct selling and distribution expenditure within the ambit of AMP expenditure. The Assessing Officer passed a draft assessment order dated 20.02.2015 in conformity with the order of the TPO and determined the total income of the assessee company at Rs. 80,85,90,910/- as against the returned income of Rs. 12,35,25,748/-. The assessee company filed objections dated 26.03.2015 against the said draft order before the Dispute Resolution Panel (DRP). The DRP vide order dated 30.09.2015 rejected the objections of the assessee company and upheld the adjustment proposed in relation to AMP expenditure. Pursuant to the directions of the DRP, the TPO passed order giving effect to the directions of DRP on 04.11.2015 without excluding direct selling / distribution expenditure from the ambit of AMP. Thus, the TPO enhanced transfer pricing adjustment from Rs. 68,50,65,162/- to Rs. 75,02,87,734/-. The final assessment order was passed by the Assessing Officer on 13.11.2015, determining income as under:

Particulars	Amount (INR)
Returned income under the normal provisions of the Act	12,35,25,748
Add: TP Adjustment pursuant to directions of DRP	75,02,87,734

Aggrieved by the assessment order, the assessee company preferred an appeal before the Tribunal. The Tribunal, vide order dated 15.07.2016 set aside the assessment order/transfer pricing order and remanded the issue back to the AO/TPO for afresh determination of existence of an international transaction of AMP expenditure and determination of ALP of the international transaction in case the same exists. Further, the Tribunal directed to exclude direct selling / marketing expenses from the ambit of AMP expenditure. Being aggrieved, both

the assessee company as well as Revenue authorities have filed appeals before the Hon'ble Punjab & Haryana High Court which are duly admitted. Pursuant to directions of the Tribunal, the TPO issued a notice dated 03.10.2016 thereby seeking reply to detailed questionnaire in relation to AMP expenditure of the assessee company. The assessee company, vide, submissions dated 08.11.2016, filed a detailed reply highlighting following points:

- AMP expenditure incurred by the assessee company is solely for its own benefit and any benefit arising/accruing to AEs on its account is purely co-incidental in nature;
- The AEs have no role/ decision-making powers in respect of the assessee company;
- Marketing function of the assessee company is independent, and the AEs does not exercise any control over the same;
- There is no written/oral arrangement between the assessee and its AEs, under which it is required to incur a minimum marketing expenditure.

The TPO, after considering the said submissions and following the Tribunal directions, passed an order dated 10.11.2016, wherein, TPO deleted the TP adjustment stating the following:

Order Giving Effect to the Directions of the Hon'ble ITAT, New Delhi

The Hon'ble ITAT, New Delhi vide his order dated 15.07.2016 has set aside the case and the matter is restored to the file of TPO/AO for fresh determination of question as to whether there exists an international transaction of AMP expenses. The selling expenses directly incurred in connection with sales not leading to brand promotion, should not be brought within the ambit of AMP.

Therefore, in view of the direction of the Hon'ble the ITAT, the earlier adjustment of Rs. 75,02,87,734/- is being revised to Nil.

Thereafter, the TPO issued a notice dated 15.03.2017, stating that the order of

the TPO has encountered certain discrepancies and accordingly, the assessee company was requested to show-cause why the earlier order dated 10.11.2016, be not amended as per the TP order for Assessment Year 2010-11. A response was filed by the assessee company in this regard vide submissions dated 30.03.2017 and it was elaborately submitted that the said order could not be rectified under Section 154 of the Act. Notwithstanding it was also submitted that even if an intensity adjustment is carried out, then also, the ALP of the international transaction of the assessee company are at arm's length. The TPO passed another order dated 16.05.2017 under Section 92CA(3) read with Section 254 of the Act. The TPO vide above stated subsequent order dated 16.05.2017 re-determined the adjustment relating to AMP expenditure on substantive as well as protective basis, as under:

Basis	Method for benchmarking	Adjustment u/s 92CA read with Section 254 of the Act (in INR)
Substantive	AMP intensity adjustment (without granting benefit of +/- 5% as per proviso of Section 92C(2) of the Act)	4,30,85,529 (which falls within 5% range)
Protective	BLT (already discarded by Hon'ble Delhi High)	30,99,61,631Court

Pursuant to the above, the Assessing Officer passed the final order dated July 10, 2017 under Section 143(3) read with Section 144C and Section 254 of the Act.

4. Being aggrieved by the assessment order, the assessee company has filed this appeal before us.

5. The Ld. AR submitted that Ground No. 3 is a legal ground that the latter order dated May 6, 2017 passed by the Transfer Pricing Officer ("TPO") is *non-*

est and invalid. The TPO has rectified its earlier order dated November 10, 2016, which was passed to give effect to the directions of the Tribunal vide order dated July 15, 2016, arising out of ITA No. 6314/ Del/ 2015, without specifying the mistake apparent from record. The Ld. AR submitted that the Tribunal vide order dated July 15, 2016 had restored the matter regarding alleged excessive incurrence of AMP expenditure is whether an international transaction and benchmarking the same if it is at first place held it to be an international transaction, for de-novo adjudication / benchmarking in light of the recent jurisprudence of the Hon'ble Delhi High Court and various decisions of the Hon'ble Benches of the Tribunal. In line with the same the TPO vide order dated November 10, 2016 deleted the adjustment on account of Advertisement, Marketing and Promotion Expenditure ("AMP") as alleged international transaction. Before passing of the appeal effect order dated November 10, 2016, the TPO had issued a show cause notice dated September 26, 2016 (received on October 10, 2016); calling for the details as to why AMP expenditure should not be treated as an international transaction and the economic analysis for benchmarking the said alleged international transaction. The assessee vide submissions dated November 8, 2016 filed detailed objections in respect to the above-mentioned questionnaire. The TPO after taking into consideration, the submissions filed and also the earlier submissions / documents on record, passed an appeal effect order dated November 10, 2016 determining the ALP of the alleged incurrence of excessive AMP expenditure as an international transaction Nil. In other words, no adjustment was proposed on account of the said alleged international transaction. Thereafter, the TPO issued a show-cause notice dated March 15, 2016. In the said notice, the TPO stated that there are certain discrepancies in the order dated November 10, 2016 and therefore, why the said order should not be rectified in terms of the transfer pricing order passed for AY 2010-11. Meaning thereby, the TPO intended to make transfer pricing adjustment on account of alleged excessive AMP expenditure as an international transaction on substantive basis using intensity method and bright line method on

protective basis, as was done in AY 2010-11 in the second round of proceedings (i.e., post remand by the Tribunal). The Ld. AR pointed out that nowhere in the above-mentioned rectification notice, proposing rectification of the earlier order the TPO has given reasons as to what were the mistakes apparent from record which form the basis for rectifying that earlier order; besides summarily stated that there are certain discrepancies. At the outset, it may be pointed out that from the perusal of the impugned rectification notice, it is apparent that the TPO has used the term "certain discrepancies", which clearly shows that even if there were any mistakes, termed as "discrepancies" the same were debatable and were beyond the purview of section 154 of the Act. As per section 154 of the Act, only mistakes apparent from records can be rectified and not debatable mistakes or discrepancies. The Ld. AR submitted that law is *no longer res integra* on rectification of mistakes apparent from record and its only the mistakes which are non-debatable can be rectified under section 154 of the Act. The Appellant in response to the said rectification show-cause notice, filed submissions dated March 30, 2017. The Ld. AR pointed out that the TPO does not have any jurisdiction to rectify the order dated November 10, 2016. The Ld. AR further pointed out that on the facts and circumstances of the case and in law there was no mistake apparent from record and as to why the order of the AY 2010-11 (passed in second round) should not be followed. The assessee, in summary stated before the TPO that (i) AY 2010-11, being the first year of adjustment on account of AMP expenditure, the Tribunal based on the jurisprudence available at that point of time, i.e., LG Electronics, Special Bench LG Electronics India Pvt. Ltd. vs. ACIT (2013) 152 TTJ (Del) 273 (SB), which had upheld incurrence of alleged excessive AMP expenditure as an international transaction and it was only for the purposes of computing the transfer pricing of the alleged international transaction that the matter was remanded back to the AO / TPO. In the instant AY, however, the legal challenge is to whether alleged excessive incurrence of AMP Expenditure is an international transaction and the computation of transfer pricing of alleged international transaction was

remanded back to the file of the AO / TPO. In other words, in AY 2010-11, it was limited remand to benchmark, whereas in AY 2011-12, the whole issue has been remanded back. The TPO before passing of the subsequent order dated May 16, 2017 making transfer pricing adjustment on account of alleged excessive AMP expenditure as an international transaction, neither independently dispose the objections filed by the assessee to the above-mentioned rectification show-cause notice, nor were they considered while passing the later transfer pricing order and also nowhere, in the later TP order it has been mentioned that the earlier order stands rectified for the reasons as may have been considered / culled out by the TPO. In other words, TPO being aware of the position that debatable claims/ additions/ disallowances do not come within the purview of section 154 of the Act, chose to remain silent and passed a non-speaking TP order dated May 16, 2017. The Ld. AR submitted that when the earlier order has not been rectified or reversed in the subsequent TP order passed by the TPO, two transfer pricing orders for the same assessment year cannot co-exist. The same is undisputed from the subsequent order dated May 16, 2017, passed by the TPO that not only the TPO has ignored the submissions of the assessee filed against rectification notice issued section 154, but was also not diligent enough to mention the earlier TP order dated November 10, 2016 stands modified/ rectified. Nowhere in the of the order, an averment/ reference has been made to the earlier TP order, making it apparent that the lower authorities were well aware that rectification of the earlier TP order would not stand the test of assumption of jurisdiction under section 154 of the Act, as the mistake (if any, though there was none on the facts and circumstances of the instant case) sought to be rectified was debatable chose to conveniently ignore the earlier TP order. In view of the above, the Ld. AR submitted that; (a) the subsequent TP order dated May 16, 2017 is bad in law and void ab-initio and (b) in any case as per the admittance of the lower authority vide order dated November 10, 2016, which still exists as on date, no transfer pricing adjustment on account of alleged incurrence of excessive AMP expenditure as international transaction is

warranted.

6. On merit, as regards to Ground No. 4 relating to whether AMP is an international transaction, the Ld. AR submitted that the AO / TPO have gravely erred in interpreting that the AMP expenditure incurred by Nikon India towards third parties in India, accounts for brand building activities in India and that Nikon India should be remunerated for carrying out such brand building activities for its AEs. The assessee company strongly contests that the marketing activities performed by Nikon were for the need and benefit of Nikon India and not for the purpose of benefit/ on behalf of its AEs. Nikon India has incurred expenditure on AMP to cater to local market needs. Such AMP was neither incurred at the instance of overseas AE nor was there any mutual agreement or understanding or arrangement as to the allocation or contribution by the AE towards reimbursement of expenses incurred by the domestic company for its business purposes. Further, onus to prove the existence of a mutual agreement between the AEs for incurring AMP expenditure has been placed on the revenue by Maruti Suzuki India Ltd vs. CIT [2016] 381 ITR 117 (Delhi). The TPO has not brought, on record, any iota of evidence to substantiate that there has been an understanding between the domestic company and its AE to:

- incur AMP expenditure on behalf of AE and its reimbursement thereof;
- develop (if any created) / transfer of marketing intangibles, in the course of incurrence of such expenditure; and
- make payment for rendering marketing development services or other allied activities.

AMP expenditure can, at best, be termed as unilateral endeavour by the domestic company for achieving higher sales / retaining market share and any alleged benefit to AE would be merely incidental which cannot at all be brought under the umbrella of 'international transaction' as referred to in section 92B of the Act. The TPO in its order could not prove any such separate arrangement/ agreement existed, hence the domestic transactions does not fall

under the ambit of Section 92B(2) of the Act. The TPO has simply placed reliance on the decision of the Delhi High Court in the case of Sony Ericsson Mobile Communications India P. Ltd. vs. CIT: [2015] 374 ITR 118 (Delhi) and stated that the expenditure incurred by the assessee company is excessive, thus, is an international transaction. There is no understanding, what so ever in the agreement to depict that Nikon India is incurring excessive expenditure owing to any arrangement between Nikon India and its AE with the intention to promote the brand of foreign AE in India. The expenses incurred by the assessee company are required in the routine course of business to increase the sale of its products within India. It is clear that assessee company's marketing efforts only cater for promoting the products that it deals in, solely with an intention to boost its sales in India. The marketing decisions taken by Nikon India are independent and not controlled or driven by the AEs. The Ld. AR, in this regard, draws attention of the Bench to the following judgments of the Hon'ble High Court and Tribunal wherein, it was held that AMP is not an International transaction under the purview of Section 92 the Act:

- Maruti Suzuki India Ltd vs CIT(A)[2016] 381 ITR 117(Delhi)
- Honda Siel Power Products (ITA No. 346/2015)
- Baush & Lomb Eyecare (India)(P) Ltd. Vs. ACIT(2016) 381 ITR 227 (Delhi)
- Whirlpool of India Vs. DCIT (TS-622-HC-2015(Del)-TP)
- Moet Hennessy India Pvt. Ltd Vs. ACIT 2018 173 ITD 55 (Delhi-Trib)
- Sennheiser Electronics India (P) Ltd Vs ACIT [2019] 101 taxmann.com 326 (Delh-Trib)
- Goodyear India Ltd. Vs. DCIT (ITA No. 5650/Del/2011, 6240/del/2012 and 916/Del/2014)
- PepsiCo India Holdings Pvt. Ltd (ITA No. 1334/Chandi/2010, 1203/Chandi/2011, 2511/Del/2013, 1044/del/2014 & 4516/del/2016 Ays 2006-07 to 2010-11
- Honda Siel Power Products Ltd. Vs. DCIT ITA No. 1579/Del/2017 Assessment Year 2012-13
- Widex India P. Ltd (TS_60-ITAT-2017 (CHANDI)-TP)

- Loreal India Pvt. Ltd. Vs. DCIT(ITA 7714/Mum/2012)
- Heinz India Pvt. Ltd. ITA No. 7732/MUM/2010
- Thomas Cook India Ltd. (ITA No. 1261 & 1238/Mum/2015)

In light of the above decisions, it is clear that since, TPO / AO has not brought any evidence on record to show that there exists an arrangement, the AMP expenditure of the assessee company cannot be considered as an international transaction. There is no shred of evidence that justifies the TPO's argument that Nikon India is incurring AMP expenses at the behest of its AE on the basis of some mutual arrangement. In view of the above, the said AMP expenses incurred by the assessee company cannot be held to be an international transaction. The Ld. AR submitted that without considering the submissions of the assessee company and without pointing out what mistakes (which are apparent from records) have crept-in the said order, the TPO rectified the earlier order which is against. The Ld. AR further pointed out that the said order was passed solely on the basis of change in opinion and not based on any mistake apparent. Further, it was passed without the mention of the previous order dated 10.11.2016.

7. The Ld. DR submitted that the order passed under Section 154 of the Act is valid and there was a mistake apparent in respect of order giving effect to the directions of the Tribunal in order dated 10.11.2016 passed by the TPO. The Ld. DR further submitted that the assessee has incurred huge AMP expenditure to develop marketing intangible to promote the trademark/Brand name owned by its AE. The AE has received benefit in the form of enhanced brand value in India and increased sales of their products. The Ld. DR relied upon the order of the TPO and submitted that the AMP expenditure constitutes an "International Transaction" within the meaning of Section 92B(1) of the Act. The Ld. DR pointed out the amendments made by Finance Act, 2012 to Section 92B of the Act which added an explanation, wherein it was stated that the international transaction shall include the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision

of use of licenses, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature. The explanation further described intangible property as marketing related intangible assets, such as, trademarks, trade names, brand names, logos. Thus, the legislative intention has been clarified by these amendments. The transfer pricing regulations also require that it is not only the form but the overall arrangement/substance of the transactions that must be kept in mind. Thus, the TPO righty held that AMP expenditure are international transaction within the meaning of Section 92B(1) of the Act. The Ld. DR relied upon the decision of the Tribunal in case of M/s Olympus Medical Systems India Pvt. Ltd. vs. DCIT being ITA No. 7414/Del/2018 order dated 27.03.2019.

8. We have heard both the parties and perused all the relevant material available on record. The Tribunal vide order dated 15.07.2016 held as under:

"19. We have heard the rival submissions and perused the relevant material on record. The ld. 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 that 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 view now available for consideration. Respectfully following the Tribunal orders of co-ordinate benches, placed on record by the ld. 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 ld. 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."

As per the directions of the Tribunal, the TPO vide order dated 10.11.2016 passed the following order:

"Order Giving Effect to the Directions of the Hon'ble ITAT, New Delhi

The Hon'ble ITAT, New Delhi vide his order dated 15.07.2016 has set aside the case and the matter is restored to the file of TPO/AO for fresh determination of question as to whether there exists an international transaction of AMP expenses. The selling expenses directly incurred in connection with sales not leading to brand promotion, should not be brought within the ambit of AMP.

Therefore, in view of the direction of the Hon'ble the ITAT, the earlier adjustment of Rs. 75,02,87,734/- is being revised to Nil."

But on 15/3/2017, the TPO issued Show Cause Notice relating to rectification of order dated 10/11/2016 thereby asking why earlier order passed for Assessment Year 2011-2 be not amended as per order passed for Assessment Year 2010-11. It is pertinent to note that while remanding back the question as to whether there exists an international transaction of AMP expenses, the

Tribunal in Assessment Year 2011-12 categorically held that if the existence of such an international transaction is not proved, the mater will end there and then, calling for no transfer pricing addition. Firstly, we must looked into the relevant Section for rectification of order passed by the Assessing Officer/TPO. Section 154(1A) of the Income Tax Act, categorically reads as under:-

> *"Section 154*
> *.....*
> *(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub- section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub- section in relation to any matter other than the matter which has been so considered and decided.*
> *....."*

Thus, Section 154(1A) lays down that rectification can be done for any matter other than the matter considered and decided in appeal/revision. Thus, whene any matter had been considered and decided in any proceeding by way of appeal or revision, rectification of such matter cannot be done by TPO/Assessing Officer under Section 154 of the Income Tax Act, 1961. The said position is clear in terms of Section 154(1A) of the Act wherein it has been laid that where any matter has been considered and decided in any proceedings by way of appeal or revision relating to an order referred to in sub section (1), the authority passing such order, may notwithstanding anything contained in any law for the time being in force, amend the order under that sub section in relation to any matter other than the matter which has been so considered and decided. The order of the Appellate Tribunal having become final and after the final decision of the Appellate Tribunal, the Revenue could not initiate fresh assessment proceedings, as the order of the Tribunal was binding on the Revenue. It was noted that various High Court had expressed a similar view. Thus, the questions which are expressly raised before or decided by the appellate or revisional authority cannot be re-agitated and no rectification proceedings will be maintainable in respect thereof, under section

154 of the Income Tax Act, 1961, before the TPO/Assessing Officer in the garb of amending his/her own order. Thus, the assumption of jurisdiction by the TPO/AO u/s 154 is bad in law and void ab intio. Therefore, the assessment order passed by the Assessing Officer on 10.07.2017 is also bad in law and void ab initio, thus, the Assessment order is set-aside. Hence, Ground No. 3 is allowed. Since the legal ground raised in Ground No. 3 itself goes to the root of the legality of assessment order, there is no need to entertain the grounds raised in consonance with the merit of the case. Hence, appeal of the assessee is allowed.

9. In result, appeal of the assessee is allowed.

Order pronounced in open court on this 14th Day of December, 2020.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 14/12/2020
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	14.12.2020
Date on which the typed draft is placed before the dictating Member	14.12.2020
Date on which the typed draft is placed before the Other Member	14.12.2020
Date on which the approved draft comes to the Sr. PS/PS	14.12.2020
Date on which the fair order is placed before the Dictating Member for pronouncement	14.12.2020
Date on which the fair order comes back to the Sr. PS/PS	14.12.2020
Date on which the final order is uploaded on the website of ITAT	14.12.2020
Date on which the file goes to the Bench Clerk	14.12.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	