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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 158/2016**

VALVOLINE CUMMINS PRIVATE LTD. ..... Appellant
Through: Mr. Ajay Vohra, Senior Advocate with Mr. Neeraj Jain & Mr. Aniket D. Agrawal, Advocates.

versus

DY. COMMISSIONER OFINCOME-TAX ..... Respondent
Through: Mr. Sanjay Kumar & Mr. Rahul Chaudhary, Senior Standing Counsel.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 31.07.2017

Dr. S. Muralidhar, J.:

1. This is an appeal filed by the Assessee under Section 260A of the Income Tax Act, 1961 ('Act') challenging the order dated 31st March, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.608/Del/2015 for the Assessment Year ('AY') 2010-11.

2. While admitting the appeal on 19th February 2016, the following question was framed for determination by this Court:

> "Whether in light of the decision in *Maruti Suzuki Ltd. v. CIT (2016) 381 ITR 117 (Del)* the ITAT was justified in holding that

there was an international transaction between the Assessee and its Associated Enterprise with regard toadvertising, marketing and publicity (AMP) expenses and in remanding the matter to the Assessing Officer/Transfer Pricing Officer for determining the arms length price of such transaction for the purposes of transfer pricing adjustment?"

3. This Court has heard the submissions of Mr. Ajay Vohra, learned Senior Advocate for the Assessee and Mr. Sanjay Kumar, learned Senior Standing Counsel for the Revenue.

4. The facts in brief are that the Assessee is a wholly owned subsidiary of Valvoline International inc. USA and Cummins India Ltd. (CIL) The Assessee is engaged in the manufacturing and marketing of automotive lubricants, transmission fluids, gear oils, hydraulic lubricants, automotive filters, specialty products, greases and cooling system products. It also offers Car Brite, Car Care products for automotive cleaning and maintenance.

5. For the AY in question, the Assessee filed its return of income on 1st October, 2010 declaring an income of Rs.1,34,82,35,760. The return was picked up for scrutiny. Noticing that there were international transactions undertaken by the Assessee viz. import of trading goods, export of finished goods, provision of support services and payment of royalty, the Assessing Officer ('AO') made a reference to the Transfer Pricing Officer ('TPO') for determination of the Arm's Length Price ('ALP') of the aforementioned international transactions undertaken by the Assessee with its associated enterprises ("AEs").

6. The TPO passed an order on 30th January, 2014 determining the ALP of the Assessee's international transactions with its AEs, thereby, proposing an aggregate adjustment of Rs.31.95 crores to the returned income of the Assessee. Of this proposed aggregate adjustment, an amount of Rs. 23.98 crores was towards advertising, marketing and brand promotion ('AMP') expenses for which the TPO imputed a notional arm's length compensation by the AE to the Assessee towards AMP expenses. The remaining adjustment of Rs. 7.97 crores was towards the payment of royalty, which came to be deleted by the Dispute Resolution Panel ('DRP') by order dated 14th November, 2014.

7. The TPO applied the 'Bright Line Test' ('BLT') by comparing the proportion of AMP expenses, as a percentage of the total turnover incurred by the Assessee with that of the comparables. The TPO held that the AMP expenses as a percentage of the total turnover in case of the Appellant was 4.20% whereas for the comparables it worked out to an average of 0.51%. It was held by the TPO that the AMP expenses in excess of the BLT incurred by for enhancing the brand name 'Valvoline' owned by the AE had to be compensated by the AE. The conclusion of the TPO in this regard reads as under:

> "11. Computation of percentage AMP to sales and determination of bright line limit; Thus, The amount which represents the bright line and the amount that should have been compensated to the assessee company are computed hereunder:

Advertisement, marketing and sales promotion	24,29,34,070
Sales of assessee	5,78,49,05,402

AMP % of assessee	4.20
Arm's length level of AMP %	0.51
Arm's length level of AMP expenses	2,95,03,018
Amount spent in excess of 'bright line' and on creation of marketing intangible	21,34,31,052
Mark-up	12.36%
The amount by which the assessee company should have been reimbursed by AE	23,98,11,130

8. After the DRP upheld the above order as regards AMP expenses, the Assessee went before the ITAT. In para 4 of the impugned order passed by the ITAT, the submission of the Assessee was noted as follows:

> "It would be appreciated that the appellant, being a full fledged manufacturer and not a distributor, most of the AMP expense is incurred at its own discretion and for its own benefit for sale of 'Valvoline' products in India. In such circumstances, there does not result an international transaction and the appellant cannot be expected to seek compensation for the allegedly excess AMP expenditure incurred by it."

9. The Assessee drew the attention of the ITAT to the decision of this Court in ***Sony Ericsson India Pvt. Ltd. v. CIT (2015) 374 ITR 118 (Del)*** whereby the Court had declared that the BLT had no statutory mandate and considering the excess expenditure beyond the bright line as an international transaction was 'unwarranted'.

10. In para 5 of the impugned order, the ITAT noted as under:

> "5. On enquiry from the Bench, Ld. Counsel of the assessee submitted that the facts and figures required for coming to the conclusion pleaded by him were not available on record and an opportunity may be given to him to present the same before the TPO. He further submitted that the Revenue is also required to verify the fresh data to be submitted by the assessee."

11. Ultimately, the ITAT stated that it had, in view of the submissions of the counsel of both sides, "no other option, but to set aside the issuein dispute to the file of the AO/TPO on the above issue." Further, the AO/TPO was directed to follow the binding judgment of this Court.

12. It is the submission of Mr. Vohra that, as explained by this Court in ***Sony Ericsson India Pvt. Ltd.*** (*supra*) and later in ***Maruti Suzuki India Limited v. CIT (2016) 328 ITR 210 (Del)***, a basic requirement had to be fulfilled prior to commencing the exercise of determining the ALP of an international transaction. The Revenue had to discharge its onus of showing that there was an international transaction involving the Assessee and its AE with regard to the AMP expenses. If the Revenue failed to discharge this onus then the question of the further step of determining the ALP of such AMP expenses does not arise.

13. Mr Vohra submitted that there was in fact no concession made by the Assessee on this score. He submitted that the ITAT ought not to have remanded the matter to the TPO as the material on record before the ITAT was sufficient to arrive at a conclusion on this issue.

14. Mr. Sanjay Kumar, on the other hand, submitted that it was the Assessee's own case before the ITAT that in the absence of facts and figures the matter should be sent back to the TPO for a fresh determination. He further submitted that when the TPO decided the issue in the present case, he did not have the benefit of the decision of this Court in ***Sony Ericsson India Pvt. Ltd.*** (*supra*). He also submitted that if the matter went back to the TPO he would have to examine the

issue afresh, *de hors* the BLT, and this was the reason why the entire matter, and not just the issue regarding determination of ALP, ought to be sent back to the TPO. Mr. Sanjay Kumar also placed reliance on this decision of this Court in ***Le Passage to India Tour & Travels (P) Ltd. v. The Deputy Commissioner of Income Tax (2017) 391 ITR 207***.

15. The decision in ***Le Passage to India Tour & Travels (P) Ltd.*** (*supra*) turned on the fact that there was no determination by the TPO in the first place whether there was an international transaction. In the present case, however, the TPO did apply his mind to the existence of an international transaction involving AMP expense. The only ground on which the conclusion was reached by the TPO was that the AMP expenditure incurred by the Assessee was in excess of that incurred by the comparables. His conclusion was not based on any other factor. In other words, it was not as if the conclusion arrived by the TPO was based on two or three grounds, one of which was the BLT.

16. This Court in ***Sony Ericsson India Pvt. Ltd.*** (*supra*) categorically found that the BLT was not an appropriate yardstick for determining the existence of an international transaction or for that matter for calculating the ALP of such transaction. The decision of the Full Bench of the ITAT in ***L.G. Electronics India Pvt. Ltd. v. ACIT (2013) 22 ITR (Trib.) 1*** which sought to make BLT the basis was set aside by this Court.

17. Once the BLT has been declared by this Court in ***Sony Ericsson India Pvt. Ltd.*** (*supra*) to no longer be a valid basis for determining the

existence of or the ALP of an international transaction involving AMP expenses, the order of the TPO was unsustainable in law. The mere fact that the Assessee was permitted to use the brand name 'Valvoline' will not automatically lead to an inference that any expense that the Assessee incurred towards AMP was only to enhance the brand 'Valvoline'. The onus was on the Revenue to show the existence of any arrangement or agreement on the basis of which it could be inferred that the AMP expense incurred by the Assessee was not for its own benefit but for the benefit of its AE. That factual foundation has been unable to be laid by the Revenue in the present case. On the basis of the existing record, the TPO has found no basis other than by applying the BLT, to discern the existence of international transaction. Therefore, no purpose will be served if the matter is remanded to the TPO, or even the ITAT, for this purpose.

18. This Court has in similar circumstances in a series of decisions including ***Maruti Suzuki Ltd.*** (*supra*); ***Bausch & Lomb Eye care (India) Pvt. Ltd. v. Additional CIT (2016) 381 ITR 227 (Del)*** and ***Honda Siel Power Products Ltd. v. Dy. CIT (2016) 237 Taxman 304*** emphasized the importance of the Revenue having to first discharge the initial burden upon it with regard to showing the existence of an international transaction between the Assessee and the AE.

19. For the aforementioned reasons, this Court is of the view that the ITAT was not justified in remanding the matter to the AO/TPO for determining the ALP of the alleged international transaction involving

AMP expenses, when in fact, the Revenue was unable to show that there existed an international transaction between the Assessee and its AE in the first place.

20. The question framed by this Court is, accordingly, answered in the negative, i.e., in favour of the Assessee and against the Revenue. The appeal is, accordingly, allowed.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

JULY 31, 2017
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