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

\+ ITA 133/2022 & CM APPLs. 20326-27/2022

THE PR. COMMISSIONER OF INCOME TAX -6 ..... Appellant

Through: Mr. Ruchir Bhatia, Senior Standing Counsel for Revenue.

versus

MOET HENNESSY INDIA PVT. LTD. ..... Respondent

Through: Mr. Sumit Mangal, Mr. Mayank Aggarwal & Ms. Radhika Sharma, Advocates.

\+ ITA 892/2019 & CM APPL. 44787/2019

THE PR. COMMISSIONER OF INCOME TAX -6 ..... Appellant

Through: Mr. Sunil Agarwal, Sr. Standing Counsel for Revenue with Mr. Tushar Gupta, Jr. Standing Counsel & Mr. Utkarsh Tiwari, Advocates.

versus

MOET HENNESSY INDIA PVT. LTD. ..... Respondent

Through: Mr. Sumit Mangal, Mr. Mayank Aggarwal & Ms. Radhika Sharma, Advocates.

% Date of Decision: 02nd November, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

CM APPLs. 20326-27/2022 in ITA 133/2022 (for condonation of delay in filing and re-filing the appeal)
CM APPL. 44787/2019 in ITA 892/2019 (for condonation of delay in re-filing the appeal)

Keeping in view the averments in the application, the delay in filing and re-filing the appeal is condoned.

Accordingly, the present applications stand disposed of.

ITA 133/2022
ITA 892/2019

1. The Appellant, Revenue, has impugned order dated 23rd August, 2018, passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 1906/Del/2014 for the Assessment Year ('AY') 2009-10, in ITA No. 892/2019.

1.1. The Revenue, has impugned order dated 9th April, 2019, passed by the ITAT in ITA No. 85/Del/2015 for the AY 2010-11 in ITA No. 133/2022.

2. The Assessee filed its Return of Income ('ROI') for AY 2009-10, on 30th September, 2009, declaring loss of Rs. 8,70,19,143/-. The Assessee's return was processed under Section 143(1) of the Income Tax Act, 1961 ('the Act'), and its case was selected for scrutiny assessment, wherein the Assessing Officer ('AO') observed that the Assessee Company had entered into international transactions with its Associated Enterprises (AEs). The AO consequently, made a reference to the Transfer Pricing Officer ('TPO')

for determining the Arms's Length Price ('ALP') of the international transactions under Section 92CA(3) of the Act.

2.1. The TPO in its order dated 29th January, 2013, observed that the Assessee has incurred huge Advertising, Marketing and Promotion ('AMP') expenditure with the objective of expanding the reach of the AE's brand in India, who is the legal owner of the brand. The TPO then proceeded to apply the Bright Line Test ('BLT') method and made an adjustment of Rs. 6,64,70,841/- on account of AMP expenditure incurred by the Assessee, and held it to be an international transaction. Pursuant to the aforesaid, the AO passed its draft assessment order under Section 144C of the Act.

2.2. Being aggrieved by the aforesaid adjustment made by the TPO on account of AMP expenditure, the Assessee filed its objection before the Dispute Resolution Panel ('DRP'). The DRP vide its order dated 26th December, 2013, disposed of the Assessee's objection and confirmed the adjustment made by the TPO on account of AMP expenditure, by relying on the decision rendered by the special bench of the ITAT in ***LG Electronics India Pvt. Ltd. v. ACIT, (2013) 140 ITD 41 (Del)*.**

2.3. Pursuant, to the DRP directions, the AO passed its final assessment order dated 29th January, 2014, under Section 143(3) read with 144C(1) of the Act, determining the total loss at Rs. 2,05,48,300/- after making an adjustment of Rs. 6,64,70,841/- on account of AMP expenditure incurred by the Assessee.

2.4. Being aggrieved by the aforesaid, the Assessee preferred an appeal before the ITAT, wherein the ITAT vide its order dated 23rd August, 2018, allowed the Assessee's appeal and deleted the ALP adjustment of Rs.

6,64,70,841/- made on account of AMP expenditure incurred by the Assessee. The ITAT concluded that there is no material on the record to suggest there was 'an arrangement, understanding or action in concert' between the Assessee and its AE, with respect to the expenditure incurred by the Assessee and was of the opinion that the said expenditure was in nature of bonafide business expenditure in furtherance of its legitimate business interest. The ITAT further held that there was no legally sustainable basis or material brought on record for the TPO to arrive at the conclusion that there was an international transaction, other than the fact that the TPO has applied BLT method to reach the aforesaid conclusion. Further, the ITAT held that since the BLT method has already been negatived by this Court in ***Sony Ericsson Mobile Communications India (P.) Ltd. v. Commissioner of Income Tax – III, (2015) 374 ITR 118 (Del),*** there is no reason to remit the matter back to the TPO, as prayed for by the Revenue.

3. The facts giving rise to the controversy in the AY 2010-11 are similar to that of AY 2009-10 with respect to the ALP adjustment of AMP expenditure. The ITAT in AY 2010-11, held that the issue of absence of international transaction already stands decided in favour of the Assessee by its predecessor bench in AY 2009-10. The ITAT relied on the decision of this Court in ***Sony Ericsson*** (Supra) and ***Maruti Suzuki vs. CIT, [2016] 381 ITR 117,*** to hold that the Revenue has failed to discharge the onus to prove the existence of an international transaction between the Assessee and its AE and held that there doesn't exist any cogent material to treat the AMP expenditure as international transaction. ITAT vide its impugned order dated 9th April, 2019, allowed the appeal filed by the Assessee and deleted

the adjustment of Rs. 712,19,145/- made on account of AMP expenditure incurred by the Assessee.

4. The learned senior standing counsel for the Revenue states that the ITAT erred in holding that the AMP expenses is not an international transaction and in doing so it ignored the nature and purpose of such expenses which are meant to create intangible asset for its AE in India. He states that the ITAT erred in holding that the AMP expenses incurred by the Assessee is not a separate international transaction.

5. He states that ITAT failed to appreciate that in the case of ***Sony Ericsson*** (Supra) this Court has held that there exists an international transaction between the assessee therein, who was a 'distributor', and its AE. He states that the facts of this case are similar since the Assesee herein as well is a 'distributor' for its AE.

6. He states that the ITAT erred in not following the decision of this Court in the case of ***Sony Ericsson*** (Supra) with respect to remand to the TPO for fresh determination of the ALP.

7. He further states that since the Respondent, Assessee, is admittedly not the 'manufacturer' of the goods and is merely a 'distributor' for its AE, the judgements in the case of ***Bausch & Lomb Eyecare Pvt. Ltd. vs. Additional Commissioner of Income Tax, [2016] 381 ITR 227*** **and** ***Maruti Suzuki*** (Supra), cannot be relied upon. He states that since in the case of ***Maruti Suzuki*** (Supra) and ***Bausch & Lomb*** (Supra), the Assessee therein was a manufacturer as well as the seller of the goods and it was in these specific facts that the Court held that the expenditure incurred by the Assessee therein for advertisement and promotion was for its own benefit.

8. We have heard the learned counsel for the parties. It is admitted on record that the contention of the Revenue that there exists an international transaction between the Assessee and its AE, is not based on any agreement executed between the said parties. The sole basis for making this adjustment was a presumption drawn by the TPO that huge AMP expenditure was incurred by the Assessee to expand the reach of its AE's brand in India. The relevant finding of the TPO in its order for AY 2009-10 read as under:

> *"4.1 It is seen that the assessee has incurred an extremely high level of advertising and market promotion (AMP) expenditure. In such cases* ***there is a possibility*** *that the objective of the heightened level of AMP expenditure is to expand the reach of the AE's brand in India. The AE is the legal owner of the brand. Therefore the beneficiary of the efforts of the assessee is the AE as the brand value increases significantly given the efforts of the assessee. The assessee is thereby creating marketing intangible in favour of the AE…"*
>
> **(Emphasis Supplied)**

It is evident from the aforesaid that the TPO has determined the existence of an international transaction on a matter of a presumption, which runs counter to the decision of this Court in ***Maruti Suzuki*** (*supra*).

9. The ITAT while allowing the Assessee's appeal for AY 2009-10 has after considering the material on record held that there was no international transaction between the Assessee and its AE. The relevant findings of the ITAT are as under: -

> *"9. On a careful consideration of all these factors, including the inconsistency in the approach of the AO/TPO with respect to the AMP expenditure being in the nature of an international*

transaction as expenditure incurred on behalf of the assessee, including the quantum and nature of expenditure and including lack of any material to suggest that there was "an arrangement, understanding or action in concert" with respect of the expenditure incurred by the assessee and including the fact that, in our considered view, the expenditure incurred by the assessee was in nature of bonafide business expenditure in furtherance of its legitimate business interests, we are of the considered view that there is no legally sustainable basis for the TPO coming to the conclusion that there was an international transaction, under section 92B, on the facts of this case. It was only on the basis of bright line test that the impugned ALP adjustment was made but that approach has already been negatived by Hon'ble Courts above. We see no reasons to remit the matter to the file of the TPO, as is prayed for by the learned Departmental Representative. A remand to the assessment stage cannot be a matter of routine; it has to be so done only when there is anything in the facts and circumstances to so warrant or justify. In any case, there are direct judicial precedents from Hon'ble jurisdictional High Court which clearly suggest that the matter regarding existence of international transaction under section 92B, as far as possible, should be decided at the level of Tribunal itself…

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10. In the present case, no new facts have emerged and all the facts brought to record, during the course of the assessment proceedings, do not indicate legally sustainable basis for coming to the conclusion that there was an internal transaction in respect of AMP expenses incurred by the assessee. We are, therefore, of the considered view that the plea of the assessee, on the peculiar facts of this case, does indeed deserve to be upheld that there is no material on record to hold that there was an international transactions, in terms of the provisions of Section 92B, nor any material has been brought on record to even remotely suggest so and, therefore, that there is no good reason to remit the matter to the assessment stage for building a case afresh. Respectfully following the binding judicial precedents, we delete the impugned

ALP adjustment which was made solely on the basis of bright line test. The plea of the learned counsel was indeed well taken and merits acceptance. The impugned ALP adjustment of Rs 6,64,70,841, accordingly, stands deleted."

10. The Revenue has not brought on record any material to assail the aforesaid finding of the ITAT as regards the absence of any international transaction.

11. In similar facts, the Court in ***Maruti Suzuki*** (supra) set aside the order of the TPO/AO, which had determined the AMP expenditure as an international transaction, without any evidence on record and only on the basis of BLT. The relevant findings of this Court are as under:

*"**65.** The transfer pricing adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE. And, yet, that is what appears to have been done by the Revenue in the present case. It first arrived at the 'bright line' by comparing the AMP expenses incurred by MSIL with the average percentage of the AMP expenses incurred by the comparable entities. Since on applying the BLT, the AMP spend of MSIL was found 'excessive' the Revenue deduced the existence of an international transaction. It then added back the excess expenditure as the transfer pricing 'adjustment'. This runs counter to legal position explained in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Del), which required a TPO "to examine the 'international transaction' as he actually finds the same." In other words the very existence of an international transaction cannot be a matter for inference or surmise.*

***66.** As already noticed, the decision in Sony Ericsson has done away with the BLT as means for determining the ALP of an*

international transaction involving AMP expenses.…"

(Emphasis Supplied)

12. We are unable to agree with the contention of the learned counsel for the Revenue that in the facts of the present appeal(s), the matter should be remanded to TPO in terms of *Sony Ericsson* (Supra). He states that in the said decision this Court held that there exists an international transaction between the Assessee therein, who was a 'distributor', and its AE. We are unable to accept the said contention of the learned counsel for the Revenue that since the Assessee herein is a 'distributor' for its AE, the corollary of this fact is that there exists an international transaction with respect to AMP expenditure, incurred by the Assessee. In the case of *Sony Ericsson* (Supra), the finding of this Court that the Assessee(s) therein may have an international transaction with their AE(s) for AMP expenditure was based on the terms of the agreement between the Assessee(s) and their AE(s) in the said case. The relevant paragraph of the judgment read as follows:

> ***"52**. The contention that AMP expenses are not international transactions has to be rejected. There seems to be an incongruity in the submission of the assessee on the said aspect for the simple reason that in most cases the assessed have submitted that the international transactions between them and the AE, resident abroad included the cost/value of the AMP expenses, which the assessee had incurred in India. In other words, when the assessed raise the aforesaid argument, they accept that the declared price of the international transaction included the said element or function of AMP expenses, for which they stand duly compensated in their margins or the arm's length price as computed."*

(Emphasis Supplied)

The aforesaid finding of the Court is not premised on the status of the assessee(s) being that of a distributor.

13. We are also unable to agree with submission of the learned counsel for the Revenue that in the judgment of ***Maruti Suzuki*** (Supra) and ***Bausch & Lomb*** (Supra), the findings of this Court with respect to absence of international transaction emanated from the fact that the assessee(s) therein were a manufacturer in addition to being a seller.

14. The issue with respect to deletion of transfer pricing adjustment on account of AMP expenses, determined on BLT method, by the ITAT is squarely covered by the decisions of this Court in the case of ***Maruti Suzuki*** (Supra) and ***Bausch & Lomb*** (Supra). We are, therefore, not inclined to frame any substantial question of law on this issue. The facts and law have been correctly assessed by the ITAT and we therefore, do not find any merits in the appeal and the accordingly, the same are dismissed.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

NOVEMBER 02, 2022/hp