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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA 795/2019

PR. CIT-9, NEW DELHI

..... Appellant

Through: Mr. Ajit Sharma, Senior Standing
Counsel with Ms. Adeeba Mujahid,
Advocate.

versus

M/S TIMEX GROUP INDIA LTD. FIRST FLOOR, TOWER B,

..... Respondent

Through: Mr. Neeraj Jain, Advocate with Mr.
Aniket D. Agrawal, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% 03.09.2019

**CM APPL. 39462/2019 (application for condonation of delay of 42 days
in re-filing the appeal)**

1. By this application, the applicant seeks condonation of delay of 42 days in re-filing the appeal. For the reasons stated in the application, the delay is condoned.

2. The application stands disposed of in the aforesaid terms.

**CM APPL. 39463/2019 (application for condonation of delay of 57 days
in filing the appeal)**

3. By this application, the applicant seeks condonation of delay of 57 days in

filing the appeal. For the reasons stated in the application, the delay is condoned.

4. The application stands disposed of in the aforesaid terms.

ITA 795/2019

5. The Revenue has preferred the present appeal to assail the order dated 20.12.2018 passed by the learned Income Tax Appellate Tribunal (hereinafter referred to as 'ITAT') in ITA No. 845/Del/2016 and CO No. 95/Del/2016 in relation to the Assessment Year 2011-12.

6. The short issue that arises for consideration lies in the narrow compass.

7. In respect of Information Technology Enabled Services (ITES) rendered by the Respondent/Assessee to its associated enterprise, the TPO drew a list of 10 service providers to apply Transactional Net Margin Method. The Assessee was aggrieved that some of the service providers identified by the TPO for the purpose of comparison were actually engaged in Knowledge Process Outsourcing (KPO) and were, therefore, not comparable in terms of the services rendered by the Assessee.

8. The DRP-II vide its order dated 16.11.2015 found merit in the said grievance of the Assessee, and the direction issued by it reads as follows:-

“DRP Directions:

The DRP has considered the submissions as also the TP Study and the Order of the TPO. The contention of the assessee is found to be correct. The TPO erred in characterizing the provision of

Information Technology ('IT') support services involving payroll processing, accounts processing etc. services as that of software development services.

It has also been contended in para 4.2.2. (PB page 610) that IT Support services are primarily payroll processing etc. Accordingly, the contention of the assessee shall be accepted. TPO may carry out fresh search for comparables if required, to get appropriate ALP by also giving due opportunity to the assessee.”

9. It appears that the TPO again made a list of service providers and computed the operating profit to total cost ratio at 24.34%.

10. The Assessee being aggrieved by the said assessment, in its appeal before the Tribunal raised the issue that the TPO had included in the list of comparables, Knowledge Processing Output Companies (KPO) Service Providers, whereas the Assessee was engaged in providing ITES services and the two were not comparable.

11. The ITAT in the impugned order undertook the exercise of examining the status of the 10 companies picked up for the purpose of comparison and found, as a matter of fact, that 6 of the said service providers/Companies namely Accentia Technologies Ltd, Acropetal Technologies Ltd, Eclerx Services Ltd., ICRA Techno Analytics Ltd. and TCSE Serve Ltd were not comparable, since they were not providing ITES services and were also engaged in providing KPO Services.

12. Consequently, ITAT deleted the said 6 out of 10 Companies taken into consideration for the purpose of assessing the operating profit to total cost ratio at 24.34%.

13. The submission of learned counsel for the Appellant is that since the Assessee had raised the said issue before the ITAT, the ITAT should have remanded the matter back to the TPO, if it found that 6 out of the 10 service providers were not comparable on account of the fact that they were engaged in providing KPO services. The other issue raised by the Appellant relates to adjustment of AMP expenses.

14. We have considered the submission of learned senior standing counsel for the department and learned counsel for the Respondent. It is not disputed that, as a matter of fact, the 6 companies taken note of hereinabove are indeed providing KPO Services alone, and they are not engaged in providing ITES services like the Respondent assessee.

15. The aforesaid being the position, and considering the fact that the TPO had already had two opportunities of drawing up the comparable list of service providers, as also the fact that the Tribunal is also a fact finding body, we are not inclined to interfere with the impugned order. The Tribunal had the jurisdiction to proceed to examine for itself the issue relating to Transfer Pricing. Thus, we find no merit in the Appellant's aforesaid submissions.

16. The issue relating to adjustment of AMP is covered by the decision of the Court in ***Sony Ericsson Indio Pvt. Ltd. v. LIT (2015) 374 ITR liS (Del.)*** and ***Maruti Suzuki India Ltd. v. CIT (2016) 381 ITR 117 .***

17. The Tribunal while dealing with said issue held as under:-

“20. Bare perusal of the order under challenge passed by the Id. TPO particularly at pages 67, 73 and 75 goes to prove that the entire adjustment qua AMP expenses has been made by the TPO on the basis of bright line method and no material whatsoever has been brought on record to show that if the taxpayer and AE have acted in concert and that they have entered into any agreement to enter into international transactions qua AMP expenses.

21. Hon'ble Delhi High Court in *Sony Ericsson India Pvt. Ltd. v. LIT (2015) 374 ITR IIS (Del.)* and subsequently in *Maruti Suzuki India Ltd. v. CIT (2016) 32S ITR 210 (Del.)* has categorically held that BET is not a valid basis for determining the existence of international transaction or for that matter for computing the ALP of such international transaction involving AMP expenses. So, in these circumstances, the order of TPO passed by making BIT as basis of the ALP adjustment is not sustainable in the eyes of law.

22. Furthermore, Hon'ble Delhi High Court in subsequent decisions viz. *Bausch & Lomb Eye Care (India) Pvt. Ltd. viz Additional CIT (2016) 3S11TR 227 (Del.)* and *Honda Siel Power Products Ltd. v. Dy. CIT (2016) 237 Taxman 304* held that it is for the Revenue to firstly discharge the onus to prove the existence of an international transaction between the taxpayer and its AE and only thereafter ALP of international transactions involving AMP can be computed.

23. It is further contended by the Id. AR for the taxpayer that quantitative adjustment made by the TPO on account of AMP expenses is not permissible within the framework of Chapter-X as has been held by the Hon'ble Delhi High Court in *Maruti Suzuki India Ltd. v. CIT -ITA No.110/2014 & 710/2015*). Hon'ble High Court has categorically held that none of the substantive or procedural provisions of Chapter-X permits adjustment on account of AMP expenses.

24. The taxpayer has contested before Id. DRP that incurring of AMP expenses are not international transactions and BET method has no statutory basis to infer the existence of international transactions qua AMP expenses, however, the Id. DRP has proceeded to hold inter alia that incurring of AMP expenses is an international transaction and directed to exclude the routine selling and distribution expenses and directed the TPO to use the cost plus

method and further directed to apply the markup on excess AMP expenses as per sub-clause (ii) of Rule 108(I)(c).

25. However, we are of the considered view that following the decision rendered by Hon'ble Delhi High Court *in Maruti Suzuki India Ltd. v. CIT* (supra), the first step for the Revenue to benchmark the AMP expenses is to establish the existence of international transaction; if it is proved, then to proceed for benchmarking the transactions qua AMP expenses. Now, it is the settled principle of law that existence of international transaction qua AMP expenses requires to be established de hors the "bright line test", particularly when the taxpayer has categorically denied the existence of international transaction and 81% of its turnover is from the sale of its manufacturing in India. Moreover, without prejudice, it is the case of the taxpayer that despite the directions issued by the Id. DRP, the TPO has wrongfully proceeded to consider selling and distribution expenses as part of the AMP expenses for the purposes of applying the bright line test.

26. In view of what has been discussed above, we are of the considered view that since the taxpayer is a full-fledged manufacturer as 81% of its turnover is from the sale of its manufactured goods in India and the entire AMP expenses have been incurred by it to enhance its sale in India and not for promoting the brand of its AH and for creating intangibles for its AH, the alleged excess AMP expenditure does not fall in the category of international transactions. Moreover, the Revenue has not brought on record any cogent evidence to prove these facts. So, following the law laid down by the Hon'ble Delhi High Court in case cited as (supra), we are of the considered view that adjustment made by the Revenue on account of incurrence of AMP expenses are not sustainable in the eyes of law.

27. Learned DR for the Revenue, although admitted the legal position enunciated in the preceding paragraphs, but he contended that since all the aforesaid decisions are lying challenged before the Hon'ble Apex Court, the matter may be kept pending till the decision by Hon'ble Apex Court. However, we are of the considered view that since it is a stay granted matter and the proceedings before the second appellate authority have not been stayed by any higher forum, the same cannot be kept pending.

28. After considering the legal position as discussed in the preceding paragraphs, we are of the considered opinion that the A.I.P of an international transaction involving AMP expenses, the adjustment made by the TPO/DRP/AO is not sustainable in the eyes of law. At the same time, we cannot ignore the submission made by the learned DR that the matter is pending before Hon'ble Apex Court and the decision of Hon'ble Apex Court would be binding upon all the authorities. In view of the above, we set aside the orders of authorities below and restore the matter to the file of the Assessing Officer. We hold that as per the facts of the case and the legal position as of now and discussed above in this order, the adjustment made by the TPO/DRP/AO in respect of AMP expenses is not sustainable. However, if the above decisions of Hon'ble Jurisdictional High Court which is under consideration before the Hon'ble Apex Court is modified or reversed by the Hon'ble Apex Court, then the Assessing Officer would pass the order afresh considering the decision of Hon'ble Apex Court. In those circumstances, he will also allow opportunity of being heard to the assessee.”

18. Since the aforesaid issues stand covered by the earlier decisions of this Court, no question of law arises for our consideration.

19. The appeal is accordingly dismissed.

VIPIN SANGHI, J

SANJEEV NARULA, J

SEPTEMBER 03, 2019

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