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

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Date of Decision: 20.11.2024

+ **ITA 928/2017**

LUXOTTICA INDIA EYEWEAR PVT LTD.

.....Appellant

Through: Mr. Nageshwar Rao, Mr. Parth & Ms.
Anshika Agrwal, Advs.

Versus

ASSISTANT COMMISSIONER OF INCOME TAX.....Respondent

Through: Mr. Siddharth Sinha, Adv.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (Oral)

1. The appellant (hereafter **Assessee**) has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter the **Act**) impugning an order dated 26.05.2017 (hereafter the **impugned order**) passed by the learned Income Tax Appellate Tribunal (hereafter **ITAT**) in ITA No.1492/Del/2015 in respect of assessment year (**AY**) 2010-11.

2. The impugned order is a common order passed in respect of four appeals being ITA Nos.1492/Del/2015, 1205/Del/2016, 344/Del/2017 preferred by the Assessee, and ITA No.1117/Del/2015 preferred by the Revenue. However, the present appeal is confined to the impugned order so far as it rejects the Assessee's appeal in respect of AY 2010-11.

3. The Assessee is an Indian company incorporated under the Companies Act, 1956 on 15.11.2007. It is a subsidiary of M/s Luxottica Holland B.V. The Assessee is primarily engaged in the business of trading of sunglasses. The Assessee filed its return of income for the previous year relevant to the AY 2010-11 on 13.10.2010 declaring a loss of ₹1,91,90,414/-. The Assessee's



return was picked up for scrutiny. Since the transactions entered into by the Assessee included international transactions with its associated enterprises (AE). The Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) for determination of the arm's length price (ALP) under Section 92C of the Act.

4. The learned TPO passed an order dated 30.01.2014 proposing a total adjustment of ₹13,19,05,725/-, which included an adjustment of ₹10,05,85,356/- in relation to purchase of finished goods and a sum of ₹3,13,20,369/- on account of advertisement, marketing and promotion (AMP) expenses. The AMP expenses were considered as a separate international transaction and benchmarked by applying the Bright Line Test (BLT).

5. Based on the aforesaid TPO's order, the AO passed a draft assessment order dated 11.03.2014.

6. The Assessee filed its objections before the Dispute Resolution Panel (DRP), which was partly allowed. Based on the directions issued by the DRP, the TPO passed an order dated 28.01.2015 and the AO passed the final assessment order dated 30.01.2015 reducing the total adjustment on account of ALP to ₹10,41,94,007/-, which comprised of adjustment on account of purchase of goods at ₹7,33,50,253/- and the excess AMP expenses at ₹3,08,43,754/-.

7. The Assessee appealed the said decision before the learned ITAT (ITA No.1492/Del/2015) which was disposed of by the impugned order.

8. In terms of the impugned order, the learned ITAT remanded the matter to TPO to decide afresh as this Court had disapproved the application of the BLT in *Sony Ericsson Mobile Communications India Pvt. Ltd. v. Commissioner of Income Tax-III: (2015) 374 ITR 118 (Del)*. In Assessee's



own case for subsequent AY, the ALP was determined without applying the BLT. In the aforesaid context, the Department Representative (**DR**) appearing before the learned ITAT had submitted that the matter be restored before the TPO for adjudication afresh. which was accepted by the learned ITAT. Paragraph no. 10 of the impugned order is set out below:

“10. The Id. DR candidly submitted that if the matter is restored for a fresh adjudication in the light of the order passed by the Tribunal for the immediately preceding assessment year, then there will be no need for a separate adjudication of the grounds taken in its appeal as the same relate to some aspects of the determination of ALP of AMP expenses. We accept this contention.

11. To sum up, since the facts and circumstances of the instant appeals are *mutatis mutandis* similar to the immediately preceding year, respectfully following the precedent, we set aside the impugned order and send the matter back to the A.O./TPO for deciding this issue afresh in light of the foregoing discussion and the directions given by the Tribunal in its order for the immediately preceding year in the second round. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in the resulting fresh proceedings.

12. In the result, all the three appeals are allowed for statistical purposes.”

9. It is the Assessee’s grievance that whilst the matter was remanded to the TPO for a decision afresh, the said learned ITAT’s directions are being construed to mean that only the adjustment on account of AMP expenditure are required to be adjudicated afresh and not the ALP adjustment in respect of the international transactions of purchase of finished goods.

10. It is in the aforesaid context that the Assessee has projected the following questions of law for consideration of this Court:

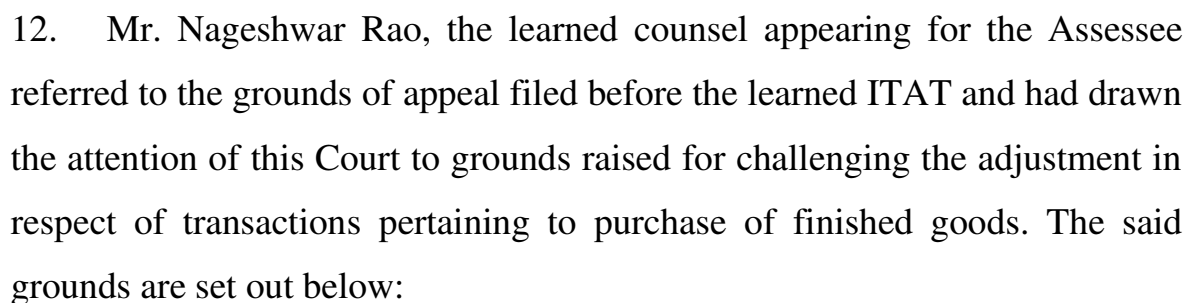
“a) Whether direction at para 11 of common impugned order remanding case to TPO/ AO in relation to AY 10-11 is illegal, unlawful and unjust in the face of TPO’s acceptance for AY 12-13 involving identical facts and law that AMP is ‘function’ in larger transaction of trading



or import of goods and not separate 'international transaction' requiring separate adjustment?

- b) Without prejudice to above, having rejected Appellant's prayer to adopt common approach for all 3 years involving same facts and law, whether Tribunal erred in unjustly and unlawfully ignoring to separately adjudicate grounds of Appeal Nos. 4 to 4.8 relating to transfer pricing adjustment made to transaction of import of finished goods by application of Transactional Net Margin Method ('TNM') as Most Appropriate Method ('MAM'), especially after noting and following coordinate bench decision upholding Resale Price Method ('RPM') as Most Appropriate Method ('MAM') for AY 2012-13?
- c) Without prejudice, whether Tribunal erred in issuing vague and general remand directions unjustly and completely ignoring detailed working of arm's length price submitted adopting RPM and applying intensity adjustment (on similar lines as in AY 12- 13)?
- d) Whether direction of open remand of all issues to TPO on the pretext of following earlier order dated 06.06.2016 for AY 2009-10, is bad in law, unjust and illegal as such earlier Tribunal order did not consider corrected understanding of TPO reached in AY 2012-13 that AMP expenditure is a 'function' and not 'transaction', after taking into consideration various decisions of Hon'ble High Court on AMP?
- e) Whether impugned order is bad in law and unsustainable as it reached inconsistent and varying conclusions in the same set of facts and applicable law and further whether Tribunal failed in not directing verification and application of ALP working adopting RPM with intensity adjustment for AMP expenditure submitted during the appeal hearing?"

11. It is also material to note that subsequent to the passing of the impugned order, the learned TPO has considered the question of adjustment for AMP expenses but has not considered the Assessee's contentions regarding transactions for purchase of finished goods.



- “4.1 That the action of Hon'ble DRP/Ld. AO/Ld. TPO of rejecting the Resale Price Method (“RPM”) applying Transaction Net Margin Method (“TNMM”) as the Most appropriate Method (“MAM”) under section 92C of the Act to determine ALP of impugned international transaction is completely arbitrary and calls for being reversed.
- 4.2 That the Ld. AO / Ld. TPO / Hon'ble DRP while rejecting RPM as the MAM, erred in ignoring the fact that the Appellant had earned sufficient gross margins vis-a-vis the comparable companies and hence, there was no occasion for the Ld. AO / Ld. TPO to reject the same as the MAM.
- 4.3 That the Ld. AO/ Hon'ble DRP / Ld. TPO erred on facts and in law in rejecting the RPM and applying TNMM as the MAM in complete ignorance of the fact that the Hon'ble Tribunal had upheld the applicability of RPM as the MAM in respect of the impugned transaction in the order passed in Appellant's own case for the immediately preceding year, i.e., AY 2009-10.
- 4.4 That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO erred in disregarding the commercial reality and re-computing the ALP of the impugned international transaction without making appropriate adjustments so as to take into account the fact that the Appellant is in its initial years of operation.
- 4.5 That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO erred in using single year updated data to determine the ALP of the impugned international transaction.
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- 4.8 That on facts and in law, the Hon'ble DRP/Ld. AO/Ld. TPO have erred in selection of functionally non comparable companies for application of TNMM without appreciating that (a) such companies are manufactures/ retailers; (b)



business profile of the comparable company is significantly different from that of the Appellant which operates as a full-fledged distributor; and (c) Comparable companies do not meet the quantitative filters applied by the Ld. TPO.”

13. We find no discussion in respect of the said grounds. This Court is also unable to accept that adjudication of the issue regarding the determination of ALP on account of AMP expenses would necessarily entail determination of transfer pricing adjustments on the ground of purchase of finished goods.

14. Concededly, the impugned order does not reflect that learned ITAT had adjudicated any of the aforesaid grounds. It is apparent that the learned ITAT had proceeded on the basis that since the matter is remanded to the TPO, the petitioner’s challenge to the adjustment on account of purchase of finished goods would also be considered afresh.

15. In view of the above, we consider it apposite to remand the matter to the learned ITAT to consider the grounds raised by the Assessee regarding transfer pricing adjustment in respect of transactions pertaining to purchase of the finished goods.

16. We also clarify that we have not expressed any opinion on the merits of the transfer pricing adjustment and the learned ITAT shall consider the same and pass a reasoned order.

17. The appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

NOVEMBER 20, 2024

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Click here to check corrigendum, if any

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