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

+ **ITA 814/2017**

CASIO INDIA COMPANY PRIVATE LIMITED.....Appellant

Through: **Mr. Nageswar Rao, Mr. Parth,
Mr. Pratik Rath and Ms.
Anshika Agarwal, Advs.**

versus

DEPUTY COMMISISONER OF INCOME TAX ...Respondent

Through: **Mr. Siddhartha Sinha, SSC
along with Ms. Anu Priya
Nisha Minz, Adv.**

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN

SHANKAR

ORDER

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10.02.2025

1. This appeal which is directed against the order of the **Income Tax Appellate Tribunal¹** dated 03 April 2017 had come to be admitted by us on 15 May 2024 on the following questions of law:-

“(a) Whether remand by the ITAT to Transfer Pricing Officer is not justified in law and whether, in facts and circumstances of the case, Appellant is entitled to final and conclusive determination by the ITAT in respect of validity of Transfer Pricing adjustment towards AMP expenditure?

(b) Whether in facts and circumstances of present case, impugned order is unjust and bad in law in so far as it does not finally and conclusively delete Transfer Pricing adjustment made towards AMP expenditure?”

2. The issue itself arose in the context of whether the **Advertisement, Marketing and Promotion²** expenses that were incurred would qualify as an international transaction. While dealing

¹ Tribunal



with this aspect, the Tribunal has observed that since the judgment of our Court in **Maruti Suzuki India Ltd. vs. Commissioner of Income Tax**³ had not been taken into consideration, the matter would merit being remanded to the **Transfer Pricing Officer**⁴ to determine whether AMP would qualify as an international transaction.

3. This becomes evident from a reading of the following conclusions of the Tribunal:-

“8. In view of our discussion above and since the Id. 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 Id. 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.”

4. Mr. Rao, learned counsel representing the appellant, however has drawn our attention to the following subsequent orders which have been passed by the Tribunal as well as this Court. Drawing our attention firstly to the order passed by the Tribunal for **Assessment Year**⁵ 2010-11 in ITA 1764/Del/2010, Mr. Rao has alluded to the following observations as appearing in that order dated 22 April 2019:-

“24. The Id. CIT DR has also referred to the decision of Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India Pvt. Ltd. to contend that mere incurrence of

² AMP

³ 2015 SCC OnLine Del 13940

⁴ TPO

⁵ AY



AMP expenditure in respect of brand not owned by the assessee has to be treated as international transaction. Ultimately the case of the department is that, such an international transaction has to be benchmarked as per BLT to arrive at ALP. Both the inferences by the department is not tenable in view of the Hon'ble Delhi High Court in the judgment in the case of Maruti Suzuki India Pvt. Ltd. wherein the ratio of Sony Ericsson judgement has been explained in the following manner: -

"41. Having considered the above submissions, the Court proceeds to analyse the decision in Sony Ericsson Mobile Communications India (P) Ltd. (supra) to determine if it conclusively answers the issue concerning the existence of an international transaction as a result of incurring of AMP expenditures by an Assessee.

42 As already noticed, the judgment in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) does not seek to cover all the cases which may have been argued before the Division Bench. In particular, as far as the present appeal ITA No. 110 of 2014 is concerned, although it was heard along with the batch of appeals, including those disposed of by the Sony Ericsson Mobile Communications India (P.) Ltd. (supra) judgment, at one stage of the proceedings on 30th October 2014 the appeal was delinked to be heard separately.

43. Secondly, the cases which were disposed of by the Sony Ericsson Mobile Communications India (P.) Ltd. (supra) judgment, i.e. of the three Assesseees Canon, Reebok and Sony Ericsson were all of distributors of products manufactured by foreign AEs. The said Assesseees were themselves not manufacturers. In any event, none of them appeared to have questioned the existence of an international transaction involving the concerned foreign AE. It was also not disputed that the said international transaction of incurring of AMP expenses could be made subject matter of transfer pricing adjustment in terms of Section 92 of the Act.

44. However, in the present appeals, the very existence of an international transaction is in issue. The specific case of MSIL is that the Revenue has failed to show the existence of any agreement, understanding or arrangement between MSIL and SMC regarding the AMP spend of MSIL. It is pointed out that the BLT has been applied to the AMP spend by MSIL to (a) deduce the existence of an international transaction involving SMC and (b) to make a quantitative 'adjustment' to the ALP to the extent that the expenditure exceeds the expenditure by comparable entities. It is submitted that with the decision in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) having disapproved



of BLT as a legitimate means of determining the ALP of an international transaction involving AMP expenses, the very basis of the Revenue's case is negated.”

“68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild goose chase of what can at best be described as a 'mirage. First of all, there has to be a clear statutory mandate for such an exercise. The Court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions". Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it emphasizes that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. **The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negated by the Court in Sony Ericsson Mobile Communications India (P.) Ltd. (supra). Therefore, the existence of an international transaction will have to be established de hors the BLT.**

69. There is nothing in the Act which indicates how, in the absence of the BLT, one can discern the existence of an international transaction as far as AMP expenditure is concerned. The Court finds considerable merit in the contention of the Assessee that the only TP adjustment authorised and permitted by Chapter X is the substitution of the ALP for the transaction price or the contract price. It bears repetition that each of the methods specified in S.92C (1) is a price discovery method. S.92C (1) thus is explicit that the only manner of effecting a TP adjustment is to substitute the transaction price with the ALP so determined. The second proviso to Section 92C (2) provides a 'gateway' by stipulating that if the variation between the ALP and the transaction price does not exceed the specified percentage, no TP adjustment can at all be made. Both Section 92CA, which provides for making a reference to the TPO for computation of the ALP and the manner of the determination of the ALP by the TPO, and Section 92CB which provides for the "safe harbour" rules for determination of the ALP, can be applied only if the TP adjustment involves substitution of the transaction price with the ALP. Rules 10B, 10C and the new Rule 10AB only deal with the determination of the ALP. Thus, for the



purposes of Chapter X of the Act, what is envisaged is not a quantitative adjustment but only a substitution of the transaction price with the ALP.

70. What is clear is that it is the 'price' of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed price cannot form the reason for making an ALP adjustment.

71. Since a quantitative adjustment is not permissible for the purposes of a TP adjustment under Chapter X, equally it cannot be permitted in respect of AMP expenses either. As already noticed hereinbefore, what the Revenue has sought to do in the present case is to resort to a quantitative adjustment by first determining whether the AMP spend of the Assessee on application of the BLT, is excessive, thereby evidencing the existence of an international transaction involving the AE. The quantitative determination forms the very basis for the entire TP exercise in the present case.

72. As rightly pointed out by the Assessee, while such quantitative adjustment involved in respect of AMP expenses may be contemplated in the taxing statutes of certain foreign countries like U.S.A., Australia and New Zealand, no provision in Chapter X of the Act contemplates such an adjustment. **An AMP TP adjustment to which none of the substantive or procedural provisions of Chapter X of the Act apply, cannot be held to be permitted by Chapter X. In other words, with neither the substantive nor the machinery provisions of Chapter X of the Act being applicable to an AMP TP adjustment, the inevitable conclusion is that Chapter X as a whole, does not permit such an adjustment.**

(Emphasis in bold is ours)

25. Further in the judgment of Sony Ericsson Mobile Communication Pvt. Ltd. (supra), the High Court itself has distinguished the cases before it wherein there were cases which already themselves had accepted that there exists international transaction and there were other set of cases where the assessee has



disputed the international transaction. This is clear from the following passage of the judgment: -

"120. Notwithstanding the above position, the argument of the Revenue goes beyond adequate and fair compensation and the ratio of the majority decision mandates that in each case where an Indian subsidiary of a foreign AE incurs AMP expenditure should be subjected to the 'bright line test' on the basis of comparables mentioned in paragraph 17.4. Any excess expenditure beyond the bright line should be regarded as a separate international transaction of brand building. **Such a broadband universal approach is unwarranted and would amount to judicial legislation. During the course of arguments, it was accepted by the Revenue that the TPOs/Assessing Officers have universally applied 'bright line test' to decipher and compute value of international transaction and thereafter applied 'Cost Plus Method' or 'Cost Method' to compute the arm's length price. The said approach is not mandated and stipulated in the Act or the Rules. The list of parameters for ascertaining the comparables for applying bright line test in paragraph 17.4 and, thereafter, the assertion in paragraph 17.6 that comparison can be only made by choosing comparable of domestic cases not using any foreign brand, is contrary to the Rules. It amounts to writing and prescribing a mandatory procedure or test which is not stipulated in the Act or the Rules. This is beyond what the statute in Chapter X postulates. Rules also do not so stipulate. The argument and reasoning in paragraph 17.6 in a way loses focus on the main issue and controversy; whether the arm's length price fixed between the two AEs is adequate and justified and would have been paid if the transaction was between two independent enterprises. The two independent enterprises must be two unrelated parties having no connection.** It does not matter whether the comparables are domestic enterprises or not. However, and it is manifest that the comparable should have similar rights, if any, as the tested party in the brand name, trademark, etc.

121. During the course of hearing before us, counsel for the Revenue had submitted that paragraph 17.4 should be treated as illustrations and not as binding comparables. We would prefer to observe, that an Assessing Officer/ TPO can go and must examine the question whether the assessee is performing functions of a pure distributor or performing distribution and marketing functions, in the latter case, he must examine and ascertain whether the



transfer price takes into consideration the marketing function, which would include AMP functions. This would ensure adequate transaction price and hence assure no loss of revenue. When the distribution and marketing functions are interconnected and reliable comparables are available, arm's length price could be computed as a package, if required and necessary by making adequate adjustments. When the Assessing Officer/TPO comes to the conclusion that it is not possible to compute arm's length price without segregating and dividing distribution and marketing or AMP functions, he can so proceed after giving justification and adequate reasons. At that stage, he would have apportioned the price received or the compensation paid by the foreign AE towards distribution and marketing or AMP functions. The TPO can then apply an appropriate method and compute the arm's length price of the two independently and even by applying separate methods. This will be in terms of the provisions of the Act and the Rules and also as per the general principles of international taxation accepted and applied universally. **On the other hand, as recorded by us above, applying 'bright line test' on the basis of parameters prescribed in paragraphs 17.4 and 17.6 would be adding and writing words in the statute and the Rules and introducing a new concept which has not been recognised and accepted in any of the international commentaries or as per the general principles of international taxation accepted and applied universally. There is nothing in the Act or the Rules to hold that it is obligatory that the AMP expenses must and necessarily should be subjected to 'bright line test' and the non-routine AMP expenses as a separate transaction to be computed in the manner as stipulated."**

(Emphasis in bold is ours)

26. Thus, from the plain reading of the aforesaid principles laid down by the Hon'ble Jurisdictional High Court, the key sequitur is that:

- i) International transaction cannot be identified or held to be existing simply because excess AMP expenditure has been incurred by the Indian entity.
- ii) International transactions cannot be found to exist after applying the BLT to decipher and compute value of international transaction.
- (iii) There is no provision either in the Act or in the Rules to justify the application of BLT for computing the Arm's Length Price and there is nothing in the Act which indicate how in the absence of BLT one can discern the existence of an international transaction as far as



AMP expenditure is concerned.

(iv) Revenue cannot resort to a quantify the adjustment by determining the AMP expenses spent by the assessee after applying BLT to hold it to be excessive and thereby evidencing the existence of the international transaction involving the AE.”

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29. The entire finding and approach of the TPO and DRP has been purely based on hypothesis and one of the agreement entered in the earlier year for a limited period of six months and this has been stated to be a material so as to determine that there was an international transaction qua AMP expenditure in this year. Such a presumption based on said agreement cannot be inferred in this year at all as, firstly, it was for a very limited period in one of the earlier year as stated above; and secondly, each year has to be seen independently and if no such material act is permeating then presumption cannot be drawn for perpetuity. Thus, Revenue has failed to bring on record any material or any kind of arrangement existing between the AE and Assessee Company that there was separate international transaction with regard to AMP expenditure. Thus, on the facts and circumstances of the case, we hold that AMP expenditure cannot be treated as separate international transaction which needs separate benchmarking and accordingly we delete the entire AMP adjustment made by the Assessing Officer.”

5. A similar view came to be expressed by the Tribunal while dealing with the appeal pertaining to AYs 2011-12, 2012-13 and 2013-14, which came to be disposed of by, and in terms of, an order dated 24 February 2020. After noticing the order of the Tribunal for AY 2010-11, it was observed as follows:-

“6. No distinguishing feature has been brought on record before us that the aforesaid finding of the Tribunal would not apply in these years, because once he found that AMP expenditure is not an international transaction at all, then there is no question of any separate fact or transfer pricing adjustment. Accordingly, the adjustment on account of AMP expenditure in all the years is directed to be deleted.”

6. A similar view has been expressed by the Tribunal while disposing of appeals pertaining to AY 2014-15 in ITA No. 8060/Del/2018. This becomes manifest from the following observations which were rendered:-



“4. We have perused submissions advanced by both sides in the light of the records placed before us. In present facts of the case, substantive as well as protective assessment both has been made in the hands of same assessee for same year under consideration on AMP expenditure by learnt TPO. On objection being raised by assessee before DRP against the adjustment proposed, a direction was issued to Ld.AO/TPO to make adjustment to in respect of AMP expenditure by following intensity method, being the plausible method.

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8. In our considered opinion, DRP has followed view of Hon’ble Delhi High Court in case of CIT vs. Sony Ericson Mobile Communication India Pvt.Ltd., (supra), to reject BLT method for proposing adjustment for AMP expenditure. Thus respectfully following Hon’ble Delhi High Court, we hold that adjustment made on protective basis by following bright line test is not sustainable.

9. Accordingly we allow Grounds 8-12 raised by assessee.”

7. Further, in AY 2015-16, the Tribunal in ITA No. 9312/Del/2019 again followed the decision of its Coordinate Bench in AY 2010-11 and held that when there is no international transaction, no separate benchmarking qua AMP expenditure can be made.

8. Our attention has also been invited to the order passed in **Pr. Commissioner of Income Tax-1 vs. Casio India Company Pvt. Ltd.**⁶ and **Pr. Commissioner of Income Tax-1, Delhi vs. Casio India Company Pvt. Ltd.**⁷ and where while dealing with an identical question pertaining to AMP, we had disposed of those appeals in the following terms:-

“1. These appeals have been preferred challenging the decision of the **Income Tax Appellate Tribunal** dated 24 February 2020 [ITA 211/2022] and 18 May 2020 [ITA 67/2022] and which had placed reliance upon the respondent-assessee’s own case in **Assessment Year 2010-11** while arriving at the finding that **Advertisement, Marketing and Promotion** expenses did not constitute international transaction and could thus not be separately benchmarked and as a

⁶ ITA 211/2022 decided on 11 December 2024

⁷ ITA 67/2022 decided on 11 December 2024



result of which the adjustment of AMP was direct to be deleted.

2. For the purposes of convenience, we propose to take note of the facts as they emanate from ITA 211/2022 which pertains to AY 2011- 12. The **Transfer Pricing Officer** had proposed adjustments to the tune of INR 5,92,56,798/- on the issue of AMP expenses using the 'Bright Line Test'. The **Assessing Officer** had thereafter come to frame an assessment order in accordance with the directions framed by the **Dispute Resolution** Panel directing an upward adjustment of INR 7,65,16,936/-.

3. The respondent-assessee, being aggrieved by the order of the AO, had approached the Tribunal which had come to pass orders in its favour and directed the deletion of adjustment of AMP.

4. Identical issues were being considered in ITA 67/2022 pertaining to AY 2015-16. These appeals came to be admitted on 15 May 2024 on the following questions of law:-

“(a) Whether the Income Tax Appellate Tribunal ["ITAT"] was justified on facts and in law in deleting addition on account of expenses incurred by the assessee for advertisement, marketing and promotion ["AMP"] for brand-building for brand owned by the associated enterprise?

(b) Whether the ITAT was justified on facts and in law in holding that the Revenue needs to establish on the basis of tangible material or evidence that there exists an international transaction regarding brand building by way of AMP expenses despite the fact that it was held by the Delhi High Court in the case of Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT [374 ITR 118] that transaction of excess AMP is an international transaction?”

5. We have been informed by learned counsels for parties that the issues forming subject matter of consideration in these appeals have already been considered and disposed of by this Court in the case of the respondent-assessee itself in **Deputy Commissioner of Income Tax-5(2) v. Casio India Company** and where we had held as follows:-

“The Revenue has preferred the present appeal to assail the order dated 24.01.2019 passed by the Income Tax Appellate Tribunal (ITAT) in ITA No. 8060/Del/2018 preferred by the respondent for the assessment year 2014-15.

A perusal of the impugned order shows that the same proceeds on the basis of the decision of this Court in **CIT Vs. Sony Ericson Mobile Communication India Pvt. Ltd.**, [2015] 55 taxmann.com 240. In that decision, this Court rejected the adoption of the bright line test method for



making the protective adjustment by the Assessing Officer. In the present case as well, the Assessing Officer had adopted the bright line test method and the Tribunal by following the decision of this Court in **Sony Ericson Mobile Communication India Pvt. Ltd.** (supra) has rejected the said method. In view of the fact that this Court has already rendered its decision on the same issue, we dismiss this appeal.”

6. Bearing in mind the aforesaid, we find that no substantial questions of law survive for consideration in these appeals. The same shall stand dismissed.”

9. In light of the above and since the Tribunal appears to have consistently followed and adopted the principle enunciated in **Sony Ericson Mobile Communication India P. Ltd. vs. Commissioner of Income Tax**⁸, we find that absent AMP being liable to be treated as an international transaction, the remit was clearly unwarranted.

10. We, accordingly, allow the instant appeal and set aside the direction of remand as contained in paragraph 8 of the order impugned before us.

YASHWANT VARMA, J

HARISH VAIDYANATHAN SHANKAR, J
FEBRUARY 10, 2025/RW

⁸ 2015 SCC OnLin Del 8083