

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'I', NEW DELHI)**

**BEFORE SHRI N. K. SAINI, ACCOUNTANT MEMBER  
AND SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

I.T.A. No.1818/Del/2015

(Assessment Year 2010-11)

L G Life sciences India P. Ltd., Vs. ACIT, Circle 15(1),  
S-48, 2<sup>nd</sup> Floor, New Delhi

Janta Market,  
Rajouri Garden,  
New Delhi-110 027

GIR / PAN :AAACL8019R

(Appellant)

(Respondent)

Appellant by :Shri Himanshu S. Sinha, Adv.  
Shri Yeeshu Arora, CA  
Ms. Vrinda Tulsian, Adv.

Respondent by :Shri Amrendra Kumar, CIT DR

Date of hearing: 18.07.2016

Date of Pronouncement: 02.08.2016

**ORDER**

**PER BEENA A. PILLAI, JM:**

The present appeal has been filed by the assessee against the order dated 05.02.2015 passed by Ld. ACIT, Circle 15(1), New Delhi for the Assessment Year 2010-11 on the following grounds of appeal:

*"1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("AO") is bad in law and void ab-initio.*

*2. That on facts and circumstances of the case and in law, the Ld. AO/ Ld. Transfer Pricing Officer ("TPO")/ Ld. Dispute Resolution Panel ("DRP") erred on facts and circumstances of the case in determining the*

*arm's length adjustment to the Appellant's alleged international transaction with Associated Enterprises ("AEs"), thereby resulting in the enhancement of returned income of the Appellant by Rs.54,166,567/- on account of transfer pricing adjustment, Rs.62,724/- on account of disallowance of miscellaneous expenses written off and Rs. 2,794,824 (which is already part of the transfer pricing adjustment) on account of disallowance as per explanation to Section 37(1) read with Medical Council of India Regulations ("MCI Regulations").*

*3. That on the facts and circumstances of the case and in law, the reference made by the Ld. AO suffers from jurisdictional error as the Ld. AO has not recorded any reasons in the assessment order based on which he reached the conclusion that it was "expedient and necessary" to refer the matter to the Ld. TPO for computation of the arm's length price, as is required under section 92CA (1) of the Income Tax Act, 1961 ("Act").*

*4. That the Ld. AO/ Ld. TPO/ Ld. DRP erred on facts and in law in enhancing the income of the Appellant by Rs.54,166,567 by making a Transfer Pricing ("TP") adjustment on account of "alleged excessive" advertising, marketing and promotion ("AMP") expenses (including selling expenses of INR 56,400,906) incurred by the Appellant and in doing so have grossly erred in:*

*4.1 disregarding that the AMP expenses incurred by the Appellant represent purely domestic transaction(s) undertaken towards third parties, not covered under the purview of Section 92 of the Act and that the analysis of "domestic" transactions undertaken with third parties, in respect of which no TP reference has been made by the Ld. AQ to the Ld. TPQ, is beyond the powers vested with the TPQ under Section 92CA of the Act;*

4.2 *disregarding submissions made by the Appellant on the functional and risk characterization of its marketing function to demonstrate that the AMP expenses incurred by the Appellant were in respect of its own business requirements/ considerations/ purposes as an independent decision maker and that all benefit resulting from such expenditure are to its own account;*

4.3 *disregarding selling expenses of INR 56,400,906 incurred by the Appellant which had no nexus with brand promotion; and incorrectly holding that such expenses result in developing marketing intangibles for the AEs;*

4.4 *incorrectly computing the AMP expenses/ sales of the Appellant by treating selling expenditure which are purely linked with actual sales made by the Appellant and thus contradicting the principles laid down by Hon'ble High Court (in case of M/s Sony India Limited, Reebok India Company Ltd, Canon India Pvt. Ltd. and various others) and Special Bench of the Hon'ble ITAT in the case of LG Electronics India Private Limited regarding the exclusion of selling expenses;*

4.5 *ignoring the fact that 'bright line test' is simply a tool and not a method prescribed under the Act read with the Income-tax Rules, 1962 ("the Rules") and hence the arithmetic mean of the AMP expenses of comparable companies should not be considered for computing the impugned TP adjustment;*

4.6 *ignoring the fact that once the Appellant's international transactions are accepted to be at arm's length under Transactional Net Margin Method ("TNMM") as the primary method, challenging! analyzing individual elements of*

*costs (like the AMP expenses) is inconsistent with the tenets of the application of TNMM;*

*4.7 erroneously rejecting Solumiks Herbaceuticals Limited as a comparable company even though it is functionally comparable to the Appellant;*

*4.8 erroneously accepting comparables in the final set even though these were not comparable to the Appellant in terms of their functions, assets and risks;*

*4.9 incorrectly computing the AMP expenses/sales of the comparable companies;*

*4.10 erroneously holding that the Appellant has rendered services to the AEs by incurring 'excessive' AMP expenses and by holding that a mark-up has to be earned by the Appellant in respect of the "alleged excessive" AMP expenses;*

*4.11 erroneously applying an ad-hoc mark-up of 14.88% in respect of Appellant's "alleged excessive" AMP expenses, without any basis for the same whatsoever.*

*5. That on the facts and circumstance of the case and in law, the Ld. AO erred in disallowing sales promotion expenses of Rs 2,794,824 in terms of Explanation 1 to Section 37(1), V alleging the same to be in violation of MCI Regulations.*

*5.1.1 Without prejudice to the above, Ld. AO failed to appreciate that MCI regulations only governs the professional conduct of medical practitioners and they do not govern the conduct or expenditure of pharmaceutical/allied health sector companies;*

*5.1.2 Without prejudice to the above, Ld. AO erred in disregarding the fact that MCI regulation is applicable from 14 December 2009, and hence expenditure incurred prior to that date is clearly not unlawful; at most, out of the aforesaid expenditure of Rs 2,794,824, only the expenditure incurred by LGLSI during the period 14 December 2009 to 31 March 2010 ought to be regarded as inadmissible under the Regulation;*

*5.1.3 Without prejudice, the Ld. AO erred in not realizing that the said sales promotion expenses alleged covered by the explanation to section 37(1) forms part of the alleged excessive AMP expenses and forming part of transfer pricing adjustment.*

*6. That the Ld. AO erred in facts and in law in charging interest under section 234B and 234D of the Act*

*7. That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings u/s 271(1)(c) of the Act mechanically and without recording any adequate satisfaction for such initiation.*

*The above grounds of appeal are mutually exclusive and without prejudice to each other.”*

2. The assessee had filed return of income on 30.09.2010 declaring total income of Rs.6,76,89,420/-. The case was selected for scrutiny and notice u/s 143(2) was issued. In response to the notice, assessee furnished the details called for. As there were international transactions involved during the year under consideration, the case was referred to the TPO for assessing correct ALP of international transaction. Before

the Ld. TPO, the assessee filed necessary details in form 10(3)CB. The Ld. TPO observed that the assessee is a part of LG group and is 100% subsidiary of L G Life sciences Ltd. It had commenced its business operation in the year 2001-02. The assessee is engaged in the distribution of pharmaceuticals, biological and diagnostic kits. The products include human growth hormones, leukocytes production stimulants and diagnostic kits, interferon's EPO, Hepatitis B vaccines and medicines for arthritis.

2.1 During the relevant year, the assessee was primarily involved in the import of finished products from its AE and earned net margin of 9.28% on sale of these goods in India. The assessee in TP study report selected Transactional Net Margin Method (TNMM) as Most Appropriate Method with Net Operating Margin on sale (OP/Sale) as the Profit Level Indicator (PLI). The assessee used independent company engaged in the business of distribution and medical product for benchmarking its international transaction. Ld. TPO treated expenditure incurred amounting to Rs.5,88,86,857/- on AMP as International Transaction. Ld. TPO using the bright line test, worked out an adjustment at Rs,4,71,50,563/- and an adjustment of Rs.5,41,66,567/- was made after adding the mark up of 14.88% on the expenditure in excess of bright line.

2.2 Aggrieved by the order of Ld. TPO, the assessee raised objection before the DRP. The DRP upheld the

adjustment so made by the Ld. TPO. Ld. Assessing Officer, thereafter gave effect to the order of DRP under Section 143(3) read with Section 144C(1) of the Act

2.3 Aggrieved by the final order passed by the Ld. Assessing Officer, assessee is in appeal before us on the grounds of appeal given in para 1 above.

3. Ld. A.R. at the outset submitted that the Grounds No.1 & 2 raised in the grounds of appeal are general in nature; therefore, do not require any specific adjudication. He submitted that Grounds No.3, 4 & 5 are not pressed. Ground No.6 is consequential in nature and ground No.7 being penalty initiated, is premature. He thus, submitted that the only issue that requires adjudication is in respect of Ground No.4.

4. The Ld. A.R. contended that the incurring of AMP expenses is not an international transaction at all and hence, there can be no question of determining the arm's length price of this transaction or making any addition thereon.

5. On the contrary, Ld. D.R. submitted that there is no blanket rule of the AMP expense as non-international transaction. He contended that issue be restored to the file of TPO to be decided afresh in the light of the judgement of the Hon'ble Delhi High Court in Sony Ericson Mobile Communications (India) Pvt. Ltd. Vs CIT (2015) 374 IR 118 (Del.). He also relied on a later judgement of the Hon'ble Jurisdictional High Court in

Yum Restaurants (India) P. Ltd. Vs ITO (2016) 380 ITR 637 (Del.) and still another judgement dated 28.01.2016 of the Hon'ble Delhi High Court in Sony Ericson Mobile Communications (India) Pvt. Ltd. (for the A Y 20 1 0-] I) in which the question as to whether AMP expenses is an international transaction has been restored for a fresh determination. The ld. DR argued that the Hon'ble Delhi High Court 'in its earlier decision In Sony Ericson Mobile Communications (India) Pvt. Ltd. vs. CIT (2015) 374 ITR 118 (Del) has held AMP expenses to be an international transaction. It was argued that the judgements in the case of Yum Restaurants and Sony Ericson (for A.Y. 2010-11) delivered in January, 2016 are posterior in time to the earlier judgment in the case of Maruti Sujuki and Whirlpool, etc., and, hence, the matter should be restored for a fresh determination. He relied on a host of orders passed by the Tribunal in case of Fuji Film India Pvt. Ltd. Vs DCIT (I.T.A. No. 6916 & 2535/Del/2015 dated 29.04.2016, Toshiba India Pvt. Ltd. Vs DCIT (I.T.A. No. 944/Del/2016 and Nikon India Pvt. Ltd. Vs DCIT (I.T.A. No. 6314/Del/2015, order dated 15.07.2016), restoring the matter to the file of TPO for a fresh determination of the question of the existence or otherwise of the international transaction or AMP expenses. ‘

5. Having perused the decisions passed by Hon'ble High Court and the arguments advanced by both the parties, respectfully following the orders passed by this



Tribunal and the decisions of Jurisdictional High Court, we are of the considered opinion that it would be fit to set aside the issue to Ld. A.O. for a fresh determination of the question as to whether there exists an international transaction of AMP expenses.

5.1 Ld. A.R. submitted that a direction may be given in the event of AMP expenses is treated to be international transaction by Ld. A.O. in the year under consideration, the same directions may be given as were given by DRP for the Assessment Year 2011-12. He has placed on record, the order giving effect to the DRPs order for the Assessment Year 2011-12 by the TPO.

6. Ld. D.R. does not have any objection if the issue be sent back to the Assessing Officer for de-novo verification.

7. We accordingly direct the Assessing Officer to carry on de-novo verification of the issue whether in the nature of international transaction or not in the light of ratio / directions laid down by the Hon'ble Jurisdictional High Court in the case of Sony Ericson Mobile Communication India Pvt. Ltd. and the other above said cases and to compute the ALP accordingly. We further direct the Ld. TPO to exclude the selling expenses directly incurred in connection with sales, not leading to brand promotion, within the ambit of AMP expenses. The contention of Ld. D.R. was that SLP was filed on the issue relating to the selling expenses directly incurred in connection with sales not leading to brand promotion, should not be brought

within the ambit of AMP expenses and the issue is pending before Hon'ble Supreme Court where the SLP has been admitted. Therefore, Ld. A.O. may issue notice to the assessee for adjudicating the issue after verification.

7. In the result, appeal filed by the assessee stands allowed for statistical purposes.

Order pronounced in the open court on 02<sup>nd</sup> Aug., 2016.

Sd./-  
(N. K. SAINI)  
ACCOUNTANT MEMBER  
Date: 02.08.2016  
Sp.

Sd./-  
(BEENA A. PILLAI)  
JUDICIAL MEMBER

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order

(ITAT, New Delhi)

S.No.	Details	Date	Initials	Designation
1	Draft dictated on			Sr. PS/PS
2	Draft placed before author			Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	2/8/16		Sr. PS/PS
6	Kept for pronouncement	2/8		Sr. PS/PS
7	File sent to Bench Clerk	2/8		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			