

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI**

Before Ms. Suchitra Kamble, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 1594/Del/2016 : Asstt. Year: 2011-12

Income Tax Officer, Ward-11(1), New Delhi	Vs	M/s Haier Appliances (India) Pvt. Ltd., Building No. 1, Okhla Phase- III, Near Modi Mill, New Delhi
(APPELLANTT)		(RESPONDENT)
PAN No. AABCH3162L		

ITA No. 2968/Del/2016 : Asstt. Year: 2011-12

M/s Haier Appliances (India) Pvt. Ltd., Building No. 1, Okhla Phase- III, Near Modi Mill, New Delhi	Vs	Income Tax Officer, Ward-11(1), New Delhi
(APPELLANTT)		(RESPONDENT)
PAN No. AABCH3162L		

**Assessee by : Sh. Ajay Vohra, Sr. Adv.
Revenue by : Sh. Surenderpal, CIT DR**

Date of Hearing: 11.08.2021	Date of Pronouncement: 16.08.2021
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee and the revenue against the orders dated 28.01.2016 passed by the AO u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961.

2. In ITA No. 1594/Del/2016, following grounds have been raised by the revenue:

"(1) Whether Ld. DRP was justified in not appreciating the fact that bright line is a mere step [of the most appropriate method for benchmarking the AMP service] carried out to estimate and bifurcate expenditure pertaining to the taxpayer for its own routine distribution function and the expenditure incurred on AMP service provided to the AE in a situation where the assessee has not reported the international transaction pertaining to marketing function?"

(2) Whether in the facts and circumstances of the case and in law the DRP was justified in stating that routine selling and distribution expenses would not form part of AMP expenses (disregarding the fact that these expenses contribute to creation of marketing intangible) even while the same is a factor for comparability analysis as different entities account for such expenditure under different heads?"

(3) Whether under the fact and circumstances of the case and in law the Hon'ble DRP was correct in holding that PLR cannot be basis for computing mark up on AMP expenses without appreciating the revenue's case wherein the PLR of banks has been used as an uncontrolled comparable to benchmark the opportunity cost of money involved and locked up in AMP expense?"

3. In ITA No. 2968/Del/2016, following grounds have been raised by the assessee:

"1. That the DRP/TPO erred on facts and in law in completing assessment under section 143(3) read with section 144C of the Income-tax Act (the Act) after making transfer pricing adjustment amounting to Rs. 11,19,14,589 in relation to the advertisement, marketing and sales promotion expenses ('the AMP expenses') incurred by the appellant.

1.1 That the DRP/TPO erred on facts and in law in not appreciating that the AMP expenses, etc., unilaterally incurred by the appellant in India could not be characterized as an international transaction as per

section 92B, in the absence of any proved understanding / arrangement between the appellant and the associated enterprise, so as to invoke the provisions of section 92 of the Act.

1.2 That the DRP/TPO erred on facts and in law in not appreciating that the only Transfer Pricing adjustment permitted by Chapter X of the Act was in respect of the difference between the arm's length price (ALP) and the contract or declared price, but the said provision could not be invoked to determine the 'quantum' / extent of business expenditure.

1.3 That the DRP/TPO erred on facts and in law in holding that expenditure incurred by the appellant which incidentally resulted in brand building for the foreign AE, was a transaction of creating and improving marketing intangibles for and on behalf of its foreign AE and further that such a transaction was in the nature of provision of a service by the appellant to the AE.

1.4 Without prejudice, the DRP/TPO erred on facts and in law, in not appreciating that the AMP expenses incurred by the appellant was appropriately established to be at arm's length applying RPM and TNMM.

1.5 Without prejudice, the DRP/TPO erred on facts and in law in not appreciating that markup, if at all, had to be restricted to the value added expenses incurred by the appellant for providing the alleged service in the nature of brand promotion.

2. That the assessing officer erred on facts and in law in initiating penalty proceedings under Section 271(1)(c) of the Act."

4. The issue in both the appeals relate to benchmarking of AMP services and hence there being dealt together.

5. The relevant facts of the case are that the assessee is a wholly owned subsidiary company of Haier Electrical Appliances Corp. Ltd., China and is engaged in the business of manufacturing and distribution of consumer durables, e.g., air-conditioner, refrigerator, washing machine, television etc. In terms of Trade Mark License Agreement entered with Haier China, the assessee has exclusive right for use of the trade mark 'HAIER' in India. During the relevant previous year, the assessee has undertaken international transaction amounting to Rs.2,24,55,12,538/- with its associated enterprise.

6. In the Transfer Pricing Document, the international transaction relating to trading segment were benchmarked applying Resale Price Method ("RPM") and manufacturing segment applying Transaction Net Margin Method ('TNMM') as the most appropriate method. The TPO has proceeded to undertake benchmarking analysis of the advertisement, marketing and sales promotion ('AMP') expenses incurred by the assessee for the products having brand name 'HAIER', applying Bright Line Test ('BLT'), made an adjustment of Rs.25,17,20,341/- being the purported difference on account of advertisement and sales promotion expenses incurred by the assessee.

7. The Id. DRP following the decision of Hon'ble High Court in the case of Sony Erickson Mobile Communication India Pvt. Ltd. 374 ITR 118 rejected the application of BLT and directed the computation by considering Cost Plus Method (CPM) as the most appropriate method leading to adjustment of Rs.11,19,14,589/-.

8. Further, we find that the similar issue has been adjudicated in the case of the assessee for the earlier years i.e. assessment year 2008-09 vide order dated 21.09.2020 in ITA No.2279/Del/2018 and for the assessment year 2009-10 vide order dated 03.12.2018 in ITA No. 1515/Del/2014.

9. For the sake of ready reference and convenience, the operative part of the order for the assessment year 2009-10 is reproduced herewith:

"6. We have carefully considered the arguments of both the sides and perused the material placed before us. The TPO in the order passed u/s 92CA(3) of the Act proposed an adjustment of Rs.13,59,01,632/- on account of the alleged difference in advertisement and promotion expenditure incurred by the assessee and the arm's length price of subsidy received from the associated enterprises (AEs) as follows:-

<i>Total revenue of the appellant</i>	<i>Rs.2,91,67,11,067</i>
<i>Arm's length price of AMP expenses</i>	<i>3.87%</i>
<i>Arm's length AMP expenses</i>	<i>Rs.11,28,76,718 (A)</i>
<i>AMP expenses incurred of appellant</i>	<i>Rs.46,78,74,750 (B)</i>
<i>Expenses incurred on creation of intangibles (B-A)</i>	<i>Rs.35,49,98,032</i>
<i>Mark up @ 15%</i>	<i>Rs.5,32,49,705</i>
<i>Arm's length value of capital grant</i>	<i>Rs.40,82,47,736</i>
<i>Actual grant received</i>	<i>Rs.27,23,46,104</i>
<i>Difference</i>	<i>Rs.13,59,01,632</i>

7. The DRP, however, directed the TPO to reduce the mark up on the provision of services from 15% to 9%. Giving effect to the order of the DRP, the TPO, vide order dated 24th February, 2014, recomputed the transfer pricing adjustment on account of AMP at Rs.11,46,01,751/-. The assessee has claimed that in the above working, the TPO has considered the rebate and discount of Rs.22,64,61,618/- which is evident from paragraph 4 of the TPO's

order. Hon'ble Jurisdictional High Court in the case of Sony Ericsson Mobile Communications (*supra*) held as under:-

"176. The aforesaid argument, when AMP expenses are segregated from the composite transaction including distribution and marketing function, is flawed and has to be rejected. The respondent-appellants are engaged in distribution and marketing of consumer goods. Distribution and marketing exercise in case of tangibles requires transfer/sale of goods to third parties, be it sub-distributors or retailers. The said transaction is in the nature of sale of goods for consideration. The marketing or selling expenses like trade discounts, volume discounts, etc. offered to sub-distributors or retailers are not in the nature and character of 'brand promotion'. They are not directly or immediately related to 'brand building' exercise, but have a live link and direct connect with marketing and increased volume of sales or turnover. The brand building connect is too remote and faint. To include and treat the direct marketing expenses like trade or volume discount of incentive as 'brand building' exercise would be contrary to common sense and would be highly exaggerated. These reduce the net profit margin. It would lead to abnormal financial results defying accountancy practices and commercial and business sense. The expenses being in nature of selling expenses have an immediate connect with price/consideration payable for the goods sold. They are not incurred for publicity or advertisement. Direct marketing and sale related expenses or discounts/concessions would not form part of the AMP expenses."

8. No contrary decision is brought to our knowledge and therefore, respectfully following the above decision of Hon'ble Jurisdictional High Court, we hold that direct marketing and sales related expenses or discounts/concessions would not form part of AMP expenses. Admittedly, the TPO has considered the rebate and discount of

Rs.22.64 crores as part of AMP expenses which is to be excluded from AMP expenses as per the above decision of Hon'ble Jurisdictional High Court. After excluding the same, the net AMP expenses work out to Rs.24.14 crores as under:-

<i>Particulars</i>	<i>Amount (Rs.)</i>
<i>Total AMP expenses determined by the TPO</i>	<i>46,78,74,750</i>
<i>Less: Rebate & Discount</i>	<i>22,64,61,618</i>
<i>Net AMP expense incurred by the appellant</i>	<i>24,14,13,132</i>

9. When, on the above figure, the mark up of 9% as upheld by the DRP is applied, then the arm's length price of AMP would be worked out to Rs.26,31,40,313/-. The grant received by the assessee from its AE is Rs.27,23,46,104/-, which is more than the arm's length price of AMP expenses. Since the grant received by the assessee exceeded the arm's length price of AMP, no TP adjustment in respect of AMP expenses is called for. Accordingly, we direct that the addition of Rs.11,46,01,751/- in respect of AMP expenses made by the Assessing Officer be deleted."

10. The facts in the instant year are akin to the facts of the earlier year. No differential points have been brought to our notice.

11. During the year, the assessee incurred total advertisement and publicity expenses of Rs.45,51,10,196/- which included selling and distribution expenses of Rs. 24,86,68,459. After excluding the selling and distribution expenses, the advertisement expenses of Rs.20,64,41,737/- was considered by the TPO in the final order. The same is allocated between trading & manufacturing segment as under:

AMP Expenses [As per TPO]	20,64,41,737
AMP expenses allocated to the Manufacturing segment [As per TP Study considering total expense of Rs.45,51,10,1196]	17,24,02,889
Proportionate AMP expenses allocable to the Manufacturing segment [Considering AMP expense of Rs.20,64,41,737]	7,82,03,371
Remaining expenditure not benchmarked/ relatable to trading segment of AMP expense of Rs. 20,64,41,737	12,82,38,365

12. Applying the principles laid down by the Hon'ble High Court in the assessee's own case, the benchmarking is undertaken by comparing the gross profit earned by the assessee net of AMP expense with similar adjusted gross profit margin earned in undertaking uncontrolled transactions:

Particulars		Trading AE	Trading Non AE
Sale		1,050,027,873	1,856,821,011
Service Income		16,218,717	2,097,007
Total Revenue	A	1,066,246,591	1,858,918,018
Opening Stock -FG		109,636,499	144,855,566
Purchase & Direct Expenses		1,101,541,914	1,699,044,802
Less: Closing Stock -FG		350,359,681	218,759,982
Total Cost of Goods Sold	B	860,818,732	1,625,140,386
Gross Margin	A-B	205,427,859	233,777,631
Gross Margin %	A-B/A	19.56%	12.59%
Advertisement & Publicity <i>[Net of selling and distribution expenses as taken by the TPO in order passed after DRP]</i>		46,322,965	81,915,401
Adjusted post	B+C	907,141,697	1,707,055,787
Adjusted Gross Profit	A-[B+C]	159,104,894	151,862,231
Adjusted Gross Margin %		14.92%	8.17%

13. Since, the adjusted gross profit margin earned by the assessee from international transaction at 14.92% is higher than the adjusted gross profit margin earned on similar transactions with unrelated third party at 8.17%, the entire adjustment made by the TPO is liable to be deleted.

14. In the result, the appeal of the revenue is dismissed and the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 16/08/2021.

Sd/-

(Suchitra Kamble)
Judicial Member

Dated: 16/08/2021

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR