

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

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER  
AND SH. KUL BHARAT, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCING)

ITA No.2535/Del/2018  
(Assessment Year : 2013-14)

ACIT Circle - 4(1) New Delhi  PAN : AABCB 3877 E	Vs.	Bauch & Lomb India Pvt. Ltd., 4 <sup>th</sup> Floor, Tower – B, Unitech Business Park, South City-1, Gurgaon Haryana – 122 001
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Assessee by	Sh. Salil Kapoor, Adv. Ms. Ananya Kapoor, Adv.
Revenue by	Sh. Mrinal Kumar Das, Sr. D.R

Date of hearing:	24.11.2021
Date of Pronouncement:	02.12.2021

**ORDER**

**PER ANIL CHATURVEDI, AM :**

This appeal filed by the Revenue is directed against the order dated 26.12.2017 of the Commissioner of Income Tax, (Appeals) - 44, New Delhi for Assessment Year 2013-14.

2. The relevant facts as culled from the material on records are as under :

3. Assesse is a wholly owned subsidiary of Bausch & Lomb South Asia Inc. USA and is stated to be engaged in the business of manufacturing lense care solutions and trading of contact lenses and protein removal enzyme tablets. The company is also stated to be engaged in the trading of ophthalmic intra ocular lenses and surgical equipments. Assessee filed its return of income for A.Y. 2013-14 on 30.11.2013 declaring loss of Rs.5,27,20,017/- under the normal provisions of the I.T. Act and book loss of Rs.6,09,08,105/-. The case was selected for scrutiny and notices u/s 142(1) & 143(2) were issued and served upon the assessee.

4. On perusing the details furnished by the assessee, AO noticed that assessee had entered into International Transactions with 'Associated Enterprises' (AEs) within the meaning of Section 92B of the Act. AO accordingly referred the case to TPO under section 92CA(1) of the Act for computation of Arm's Length Price in relation to the International Transactions. TPO thereafter in the order passed u/s 92CA(3) of the Act dated 30.06.2016 proposed adjustment of Rs.4,59,55,893/- and protective addition of Rs.16,80,94,373/- attributable to difference in Arm's Length Price of International Transactions entered by the assessee with Associated Enterprises. Thereafter AO vide Draft Assessment order dated 17.11.2016 passed u/s 144C r.w.s 143(3) of the Act determined the loss under the Income Tax Act at Rs.67,64,124/- and loss under Section 115JB of the Act at Rs.1,49,52,210/-. It is noted by the AO that assessee decided not to file objection before

DRP against the draft assessment order. Accordingly final order was passed on 31.03.2017 u/s 143(3) r.w.s. 144C of the Act determining the total income at Rs.11,53,74,360/- and book profit at Rs.10,71,86,270/- by considering the protective addition as part of cumulative adjustment u/s 92CA of the Act.

5. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who vide order dated 26.12.2017 in Appeal No.87/2017-18/CIT(A)-44 granted substantial relief to the assessee. Aggrieved by the order of CIT(A), Revenue is now in appeal and has raised the following grounds:

1. *“Whether under the facts and circumstances of the case and in law the Ld. CIT(A) was justified in not appreciating that the AMP function and its related international transaction was not disclosed by the assessee and that omission gave TPO the jurisdiction to benchmark that international transaction himself and accordingly determine its ALP?”*
2. *Whether under the facts and circumstances of the case and in law the Ld. CIT(A) was justified in deleting the entire adjustment of Rs. 4,59,55,893/- made by the TPO on account of AMP expenditure done by the Taxpayer?*
3. *Whether under the facts and circumstances of the case and in law the Ld. CIT(A) was justified in not appreciating that the decision of Delhi ITAT in the case of Maruti Suzuki stands valid and its findings relevant as the Hon'ble Supreme Court has not quashed it or set it aside?*
4. *Whether in the facts and circumstances of the case and in law the Ld. CIT(A) was justified in holding that "AMP spending" does not constitute part of the transactions narrated in the Explanation under clauses (i) (a) to (e) to Section 92B?*
5. *Whether in the facts and circumstances of the case and in law the Ld. CIT(A) was justified in holding that every expenditure forming part of the function cannot be construed as a 'transaction'?*

6. *Whether in the facts and circumstances of the case and in law the Ld. CIT(A) was justified in holding that where the existence of an international transaction involving AMP expense with an ascertainable price is unable to be shown to exist, even if such price is nil, Chapter X provisions cannot be invoked to undertake a TP adjustment exercise?*
7. *Whether under the facts and circumstances of the case and in law the Ld. CIT(A) was justified in not appreciating that throughout Chapter X the emphasis is on determination of ALP of "an international transaction" taking into account its nature, class and functions performed and not that of aggregating all International Transactions?*
8. *Whether under the facts and circumstances of the case and in law the Ld. CIT(A) was justified in examining the appropriateness of AMP expenditure only from the view point of its role in creation/building of brand/brand awareness and not examining its role from the view point of creation of marketing intangibles as a whole?*
9. *Whether under the facts and circumstances of the case and in law the Ld. CIT(A) has misconstrued Revenue's assertion by holding that AMP expense is a measure brand valuation whereas the assertion of Revenue was that an increased level of AMP expense led to the creation of a marketing intangible in India, in favor of the overseas AE?*
10. *Whether in the facts and circumstances of the case and in law the Ld. CIT(A) was justified in holding that merely because there is an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of its foreign AE?*
11. *Whether under the facts and circumstances of the case and in law the Ld. CIT(A) was justified in holding that the tax payer is economic owner of the brand for which AMP expenses are being incurred when such concept is not enunciated or recognized in Indian law?"*

6. Before us, at the outset, it was submitted that though Revenue has raised various grounds but the sole controversy is with respect to the addition made on account of AMP expenses which was deleted by CIT(A).

7. During the assessment proceedings, TPO noticed that assessee had incurred AMP and selling distribution expenses the details of which are as under:

<i>Advertisement</i>	<i>15,52,05,340</i>
<i>Channel Discount</i>	<i>22,49,439</i>
<i>Training &amp; Recruitment</i>	<i>1,81,09,365</i>
<i>Total</i>	<i>17,55,64,144</i>

8. TPO noticed that during the course of proceedings for earlier years, Revenue had taken a stand that Bright Line Test should be applied and any AMP expenditure incurred by the taxpayer in excess of the expenditure incurred by the comparable should be considered as the expenditure incurred by the taxpayer for the benefit of the parent AE and corresponding adjustment should be made. TPO also noted that though Hon'ble High Court in the case of Sony Mobile Communication (India) Pvt. Ltd. had rejected the contention of Revenue on the applicability of Bright Line Test and corresponding calculations but however, Department had filed an appeal against the order of the Hon'ble High Court and contested the judgment before the Hon'ble Supreme Court. It was also noted that Department was in the process of filing appeal against the order of Hon'ble Delhi High Court before the Supreme Court in assessee's own case for A.Y. 2006-07 to 2010-11. TPO thereafter after considering the submissions of the assessee, TP report and the other details *inter alia* came to the conclusion that AMP expenditure incurred by the assessee was higher than the expense made by a set of companies in the same industries, the

expense incurred by the assessee was at the behest and under the control of the AE and primarily for the benefit of the AE, AE was the final beneficiary of the valuable marketing intangible created by incurring of the expenditure. TPO thereafter applied the CUP Method to determine the Arm's Length Price and thereafter computed the adjustment of Rs.4,59,55,893/- u/s 92CA of the Act on substantive basis. He also proposed protective addition amounting to Rs.12,21,38,480/- and thus proposed a total addition of Rs.16,80,94,373/-. When the matter was carried by the assessee before CIT(A), CIT(A) while deciding the issue in favour of the assessee noted that identical issue has been decided in favour of the assessee in A.Y. 2006-07 to 2010-11 by Hon'ble Delhi High Court in its judgment in ITA 643,675-677/2014 & 165, 166/2015 dated 23.12.2015. She thereafter noted that Hon'ble Tribunal in A.Y. 2012-13 in ITA No.1399/Del/2017 dated 25.08.2017 has also decided the issue in favour of the assessee by relying on the order of Delhi High Court in A.Y. 2006-07 to 2010-11. The relevant observation of CIT(A) are as under:

*6.3 The Hon'ble Tribunal in AY 2012-13 in ITA No 1399/Del/2017 dated 25.08.2017 has also given relief to the appellant based on the order of the Delhi High Court for AY 2006-07 to 2010-11 referred to above where it has held as follows:-*

*"Briefly stated, the facts of the case as recorded in the assessment order are that the assessee is engaged in the manufacturing and trading of soft contact lenses, eyecare solution and protein removing enzyme tablets. The assessee is also involved in the trading of surgical equipments, such as, Excimer Laser System and Cataract Machines and Intra Ocular lenses. The assessee reported certain international transactions in Form No.3CEB. The Assessing Officer made a reference to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) of these*

transactions. The TPO proposed transfer pricing adjustment amounting to Rs. 13.69 crore in respect of AMP expenses primarily under bright line approach on protective basis and an addition ITA No.1399/Del/2017 of Rs.33,11,21,660/- on substantive basis by considering total advertisement, marketing and promotion expenses incurred by the assessee as contributing to the brand promotion of the AE plus gross profit margin rate earned by the assessee. The assessee remained unsuccessful before the DRP. That is how, the Assessing Officer made an addition of Rs.33.11 crore on account of AMP expenses on substantive basis against which the assessee has come up in appeal before us.

4. We have heard the rival submissions and perused the relevant material on record. It is noticed that similar issue cropped up in the assessee's appeals for preceding years. The Hon'ble jurisdictional High Court in the assessee's own case for the assessment years 2006-07 to 2010-11 has held that there is no international transaction of AMP expenses and the resultant additions were deleted. The immediately preceding assessment year, namely. 2011-12 came up for consideration before the Tribunal. Vide its order dated 23.09.2016, the Tribunal in ITA No.1399/Del/2017 ITA No.6778/Del/2015, ordered for the deletion of addition on account of AMP expenses by following the judgment of the Hon'ble High Court.

5. The Ld. DR contended that the facts and circumstances of the instant year are different inasmuch as the assessee did only 'distribution' activity in the year under consideration as against the 'manufacturing and distribution' activities done for earlier years. This contention does not appear to be correct. It is apparent from the first page of the TPO's order wherein he has recorded that: 'the assessee is engaged in manufacturing and trading of soft contact lenses '.....'. Similarly, the AO in the impugned order has also recorded in para 2 that the assessee is : 'engaged in the business of manufacturing lense care solutions and trading of contact lenses and ophthalmic intra ocular lenses and surgical equipments.' It is, therefore, palpable that the nature of activity carried out by the assessee during the instant year is similar to that done in the earlier years, being that of manufacturing and trading as well. In the absence of any difference in the factual position prevailing in the year ITA No.1399/Del/2017 under appeal vis-a-vis the earlier years and respectfully following the precedents, we order for the deletion of the addition.”

9 She thus following the order of Hon'ble Delhi High Court in assessee's own case for A.Y. 2006-07 to 2010-11 as well as orders of the Tribunal in A.Y. 2011-12 & 2012-13 deleted the addition. Aggrieved by the order of CIT(A), Revenue is now before us.

10. Before us, Learned DR supported the order of lower authorities.

11. Learned AR on the other hand reiterated the submissions made before the lower authorities and further submitted that CIT(A) by following the decision of Hon'ble Delhi High Court in assessee's own case for A.Y. 2006-07 to 2010-11 has decided the issue in favour of the assessee. He submitted that since the facts for the year under consideration are identical to that of earlier years, no interference with the order of CIT(A) is called for.

12. We have heard the rival submissions and perused the materials available on record. The issue in the present ground is with respect to the addition made on account of AMP expenses. We find that CIT(A) while deciding the issue in favour of the assessee had followed the order of Hon'ble Delhi High Court in assessee's own case for A.Y. 2006-07 to 2010-11. The relevant observation of CIT(A) are reproduced hereinabove. We further find that the Co-ordinate Bench of Tribunal while deciding the identical issue in assessee's own case in A.Y. 2012-13, by following the decision of Hon'ble Delhi High Court in assessee's own case has deleted the addition.



13. Before us, Revenue has not pointed to any distinguishing features in the fact of the case for the year under consideration and that of earlier years nor has placed any material on record to demonstrate that the order of Delhi High Court in assessee's own case for A.Y. 2006-07 to 2010-11 has been set aside/ stayed or overruled by higher judicial forum. In view of the aforesaid, we find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue are dismissed.**

11. In the result, **appeal of the Revenue is dismissed.**

**Order pronounced in the open court on 02.12.2021**

**Sd/-**

**(KUL BHARAT)  
JUDICIAL MEMBER**

*Date:- 02.12.2021*  
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**Sd/-**

**(ANIL CHATURVEDI)  
ACCOUNTANT MEMBER**

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI