

## Selling expenses to be kept out of scope of AMP expenses to ascertain TP adjustment; ITAT follows LG's case

**Summary – The Delhi ITAT in a recent case of Ray Ban Sun Optics India Ltd., (the Assessee) held that sales specific expenses such as commission and discount etc. not to be included within overall AMP expenses for processing them under section 92C.**

### ORDER

This appeal by the assessee is directed against the order passed by the Assessing Officer u/s 143(3) r.w.s 144C(13) on 30.12.2013 relating to the assessment year 2009-10.

The first issue pressed in this appeal is against the Transfer Pricing Adjustment on account of AMP expenses.

We have heard the rival submissions and perused the relevant material on record. It is noticed that the Special Bench of the Tribunal in *LG Electronics India (P.) Ltd. v. Asstt. CIT* [\[2013\] 140 ITD 41/29 taxmann.com 300 \(Delhi-Trib\)](#), by majority decision, has decided this very issue by inter alia holding that incurring of AMP expenses towards promotion of brand, legally owned by the foreign AE, firstly constitutes a 'transaction' and then an 'international transaction'. The contention that no disallowance can be made out of AMP expenses by benchmarking them separately when the overall net profit rate declared by the assessee is higher than other comparable cases came to be specifically jettisoned by the special bench. Resultantly, the transfer pricing adjustment in relation to such AMP expenses has been held to be sustainable in principle. In the eventual order, the Special Bench restored the matter to the file of the AO/TPO for fresh determination of Transfer Pricing Adjustment in relation to AMP expenses. In order to enable the determination of correct ALP of AMP expenses, the Tribunal listed out 14 parameters at Para 17.4 of its order which should be examined by the AO/TPO before reaching the final conclusion about the warrant for a TP Adjustment on this score. It is relevant to note that there were 22 interveners in this case, some of which were distributors, while others were licensed manufacturers. While setting out 14 parameters, the Special Bench has held vide first parameter that the AO/TPO should ascertain as to whether the Indian AE is simply a distributor or is holding a manufacturing license from its Foreign AE. The second parameter talks of examining as to whether or not the Indian AE is a full-fledged manufacturer and whether it is selling the goods purchased from the Foreign AE as such or is making some value addition to the goods purchased from its foreign AE before selling it to customers. Thus there is not even a slightest doubt that the special bench order not only applies to a 'Manufacturer', but also extends to a distributor, whether he is bearing a full risk or least risk. Thus, such tests are applicable with full vigour to the extent applicable, to the distributors. There is nothing in the

special bench order which restricts its operation only to the 'Manufacturers'. Though there is a specific ground for the relief in the light of the order by the Delhi Tribunal in the case of *BMW India (P.) Ltd. v. Addl. CIT [2014] 146 ITD 165/[2013] 37 taxmann.com 319* but the Id. AR was fair enough not to press this ground by admitting the matter be decided as per the mandate of the special bench order in the case of *LG Electronics India (P.) Ltd. (supra)*.

The Id. AR argued that the authorities below erred in including selling commission and discount etc. within the ambit of AMP expenses. It was submitted that such expenses should be excluded at the very outset from consideration under the broader scope of AMP expenses. The Id. DR relied upon on the impugned order.

After considering the rival submissions and perused the relevant material on record, we find that there is a merit in the contention of the Id. AR that the selling commission and discount etc. should be excluded from AMP expenses for working out the TP adjustment, if any. The Special Bench in *LG Electronics India (P.) Ltd. (supra)* has specifically dealt with this issue in para 18 of its order and held that the sales specific expenses such as commission and discount etc. should not be included within the overall AMP expenses for processing them u/s 92 of the Act. Following the Special Bench decision, we hold that the selling expenses and discount paid by the assessee should be excluded from the total of AMP expenses and thereafter a fresh determination should be made for ascertaining the extent of TP adjustment, if any, in accordance with the directions given by the Special Bench in the case of *LG Electronics India (P.) Ltd. (supra)*.

We therefore, set aside the impugned order and remit the matter to the file of the AO / TPO to decide this issue afresh in conformity with the Special Bench decision in the case of *LG Electronics India (P.) Ltd. (supra)*. Needless to say, the assessee will be allowed a reasonable opportunity of being heard by the AO/TPO in such fresh proceedings.

The only other issue is against the addition of Rs.9,52,719. Briefly stated the facts of this issue are that the AO, on the basis of AIR information about the 'City Bank Transactions' amounting to Rs.9,52,719 required the assessee to show cause as to why such transaction was not recorded in the books of account. The assessee explained that the PAN of the assessee company got reported against this expenditure incurred by Mr. I. Rahumathullah, who was earlier working for the assessee and after leaving the assessee, joined M.J. India. It was stated that after resignation from the assessee company he incurred expenses for his new employer and used the Credit card bearing the PAN of the assessee. Copies of e-mail sent to the assessee by the said Mr. I. Rahumathullah accepting the use of such credit card for his current employer were also produced before the authorities below by which he admitted that the amount spent by him was reimbursed to him by his employer. Not convinced, the addition was made.

After considering the rival submissions and perusing the relevant material on record we find that the said Mr. I. Rahumathullah categorically admitted the version stated by the assessee. There is further corroboration of this version from Citi Bank, a copy of which has been reproduced in the direction of the DRP. These facts amply prove that the credit card with the PAN of the assessee was actually used by its former employee, who admitted this fact. Further in view of the fact that the bank has also supported the version of the assessee, we are unable to see as to how any addition can be made in the hands of the assessee. This addition is directed to be deleted.

The other ground about the charging of interest is consequential.

In the result, the appeal is allowed for statistical purposes.

*STAY NO. 94/Delhi/2014*

The present Stay Application has become infructuous in view of our decision on the appeal filed by the assessee.

In the result, the Stay application is dismissed as having become infructuous.