ITAT orders fresh adjudication as DRP had made TP addition on AMP expenses without considering contentions of assessee

Summary – The Delhi ITAT in a recent case of Zimmer India (P.) Ltd., (the Assessee) held that where DRP had made adjustments on account of advertising, marketing and promotional expenses, without considering contentions raised by assessee-company, matter was to be readjudicated.

Facts

- The assessee was a subsidiary of Zimmer Holdings Inc. USA. The company was primarily engaged in business of importing, marketing and distributing orthopaedic implant and instruments to customers in India through direct sales and also through a dealer network.
- The assessee-company had undertaken several international transactions in Transfer Pricing documentation for the relevant assessment year.
- The TPO considered some of the comparables selected by the assessee and rejected the others.
- On appeal, the Dispute Resolution Panel in its order noted the decision of the Special Bench of the Tribunal in the case of *L.G. Electronics India (P.) Ltd*. v. *Asstt. CIT* [2013] 29 taxmann.com 300/140 ITD 41 (Delhi) on the issue, but rejected all the contentions of the assessee.
- On appeal:

Held

- The sole issue that arises is the transfer pricing adjustment on account of advertising, marketing and promotional expenses. The contention of the assessee are summarised as follows. The adjustment made by TPO/DRP is erroneous because:
  - (a) computation of the AMP expenses of the appellant: sales commission and discount allowed may be excluded.
  - (b) Sponsorship and sales promotion has not been appropriately considered - these do not lead to brand promotion and may be excluded.
  - (c) AMP expenses incurred by Zimmer India for its own benefits and profits earned by Zimmer India from its distribution function takes into account any alleged excessive AMP.
  - (d) AMP is not an international transaction.
  - (e) Misinterpretation or placing incorrect reliance on the international guidance on marketing intangibles - OECD transfer pricing guidelines 2010 UN Manual and the Australian Tax Office (ATO) Guidelines.
  - (f) No adverse inference in previous years.
  - (g) Erroneous ad hoc markup of 12.75 per cent on alleged excessive AMP expenditure.
  - (h) Bright Line is a tool not a method.

- Both the parties admit that the DRP has in a very cursory manner passed its order. While nothing that the facts in this case are similar to the case of *L.G. Electronics India (P.) Ltd*. (*supra*), it had not applied any of the propositions laid down by the Special Bench. Many contentions raised by the assessee have not been considered. There is force in the arguments raised by the assessee. In any event as the claims of the assessee have to be examined based on the facts of the case, it will be proper to restore the issue to the file of the TPO for fresh adjudication in accordance with law, after affording the assessee opportunity of being heard. The TPO is directed to apply the ratio laid down by the Delhi Special Bench of the Tribunal in the case of *L.G. Electronics India (P.) Ltd*. (*supra*) and to adjudicate each and every argument raised by the assessee.
- In the result, the appeal of the assessee is allowed.