

Delhi ITAT rejects 'bright line test' for adjustment of AMP exp. by following ratio of 'Sony Ericsson' case

Summary – The Delhi ITAT in a recent case of Bausch & Lomb India (P.) Ltd., (the Assessee) held that where TPO considered concept of bright line test for determining excessive AMP expenditure incurred by assessee for brand building, in view of fact that Delhi High Court in case of Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT [\[2015\] 374 ITR 118/55 taxmann.com 240/231 Taxman 113](#) had rejected applicability of bright line test, matter required readjudication

Facts

- The assessee was a wholly owned subsidiary of Bausch & Lomb, USA. During the relevant assessment year the assessee was engaged in the manufacturing of lense care solutions and trading of contact lenses and protein removal enzyme tablets as well as trading of ophthalmic intraocular lenses and surgical equipments.
- The Assessing Officer noticed that assessee had entered into international transactions with its AE's and in its transfer pricing study had divided the entire business in two categories which were (i) Vision care; (ii) Surgical equipment.
- As per transfer pricing study, the assessee had identified various international transactions but the same did not consider the AMP expenditure as an international transaction. Admittedly, the said transactions were benchmarked adopting TNM method and it was demonstrated that the PLI of the Vision care segment was 21.23 per cent as against 6.19 per cent of the comparables and in the case of Surgical equipment segment the PLI of the assessee was 13.81 per cent as against 5.97 per cent of the comparables. The TPO had, accordingly, not made any adjustment in regard to the companies, *inter alia*, transactions reported by assessee.
- However, keeping in view the amount of expenditure incurred by assessee on AMP, TPO was of the opinion that the assessee was promoting the Bausch & Lomb brand in India and developing marketing intangible 'Bausch & Lomb' in India by incurring expenditure on advertisement, marketing and promotional activities. He applied bright line test for determining the adjustment required on account of excessive AMP expenditure incurred for brand building of 'Bausch & Lomb'.
- The TPO considered two comparables *viz.* Aditya Medisales Ltd. and Abbott India Ltd. out of the list of comparables furnished by assessee for benchmarking various international transactions, for benchmarking the AMP expenditure. The TPO held that AMP expenditure was an international transaction and applied the CUP method for computing the ALP of AMP expenses.
- On appeal, the DRP held that the TPO was justified in invoking the concept of bright line for benchmarking of the expenditure to be considered excessive and, accordingly, was justified in making adjustment.
- On further appeal to Tribunal:

Held

- The Delhi High Court in the case of *Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT* [2015] 374 ITR 118/55 taxmann.com 240/231 Taxman 113 (Delhi) has observed that the aggregation and disaggregation of transactions in the TNM method or even in other methods is sought to be applied, must have reference to the strength and weakness of the TNM method or the applicable method. It was observed that aggregation of transactions is desirable and not merely permissible, if the nature of transaction(s) taken as a whole is so interrelated that it will be more reliable means of determining the arm's length consideration for the controlled transactions. It was further observed that there are often situations where separate transactions are inter twined and linked or are continuous that they cannot be evaluated adequately on separate basis. Secondly, the controlled transaction should ordinarily be based on the transaction actually undertaken by the AEs as has been struck by them. The High Court cautioned that it was not advocating the broad-brush approach but, a detailed scrutinized ascertainment and determination whether or not the aggregation or segregation of transactions would be appropriate and proper while applying the particular method.
- Thus, before the PLI determined at entity level is to be taken as the determining factor of benchmarking various international transactions along with the AMP expenditure, it is to be clearly demonstrated how the transactions of the advertisement expenditure is closely linked to the other transactions in the distribution segment. The TPO has observed that assessee company has not been able to demonstrate that there was any prior understanding, design or commercial logic or rational for aggregation of the transactions. He has observed that the assessee-company has not been able to demonstrate that there was any logic or rationale for aggregation or that the transactions of the advertisement expenditure and the other transactions in the distribution activity are interdependent. Therefore, the contention of assessee that since PLI at entity level is much more than that of the comparables, therefore, no separate benchmarking of the functions is to be carried out, is devoid of any merit. However, at the same time it is found that the Delhi High Court in the case of *Sony Ericsson Mobile Communications India (P.) Ltd. (supra)* has rejected the applicability of bright line test and as noted earlier, the TPO and the DRP have not pointed out the AMP functions being carried out by the assessee, *vis-a-vis* the comparables and applied the bright line test. Therefore, in view of the observations of the Delhi High Court, it would be proper to restore this issue to the file of the TPO for benchmarking the AMP functions, keeping in view the decision of the Delhi High Court in the case of *Sony Ericsson Mobile Communications India (P.) Ltd. (supra)*.
- In the light of above discussion the assessment order is set aside and the matter is restored to the file of the Assessing Officer/TPO for fresh consideration.