

ITAT remanded matter to determine whether AMP exp. incurred for brand promotion was international transaction

Summary – The Delhi ITAT in a recent case of Perfetti Van Melle India (P.) Ltd., (the Assessee) held that Matter should be readjudicated to determine whether AMP expenses amounted to international transaction or not

Facts

- The assessee-company was engaged in manufacturing of confectionary product under the brands owned by the associated enterprises (AE) of the assessee.
- Considering the agreement between assessee and its AE, the TPO noticed that assessee provided extensive support in marketing activity through its specialized teams. He held that the assessee incurred AMP expenses for promoting the brand/trade name which was owned by its AE and, hence, the same constituted an international transaction. Applying the bright line test, the TPO determined the amount of routine advertising, marketing and promotional expenses and proposed transfer pricing adjustment.
- The DRP directed to carry out AMP intensity adjustment to the financials of the comparables for determining the overall application of the TNMM.
- The TPO, giving effect to the directions issued by the DRP, worked out transfer pricing adjustment on protective basis, by applying the bright line test and opined that no adjustment was required by using AMP intensity as directed by the DRP in view of the fact that the operating margin earned by the assessee was higher than the average margin of comparables, after using AMP intensity.
- On appeal:

Held

- When the TPO held AMP expenses to be an international transaction, he had the benefit of only some of judgments of the High Court. Now, several other judgments on the issue, including those which have been delivered after the passing of the order by the TPO, are available for consideration. As the entirety of the judicial position as laid down by the High Court is now required to be applied to the factual position prevailing in this case, a fresh determination of the ALP of AMP expense be done at the end of the TPO/AO.
- It has been brought to notice that similar issue came up for consideration before the Tribunal in assessee's own case and the Tribunal has restored such matter to the file of TPO/Assessing Officer for a fresh consideration.
- Despite the above consistent position settled by the Tribunal in assessee's own case for the immediately preceding three assessment years restoring the matter to the TPO/AO for a fresh

determination, the assessee argued that the matter be decided by the Tribunal itself as, in his opinion, there were certain distinguishing features prevalent for this year *vis-a-vis* the preceding years.

- The first such issue is the view canvassed by the DRP on AMP intensity adjustment. The assessee argued that in none of the earlier years, the DRP directed to carry out AMP intensity adjustment to the financials of the comparables for determining the overall application of the TNMM.
- It is true that the issue of AMP intensity adjustment has been considered by the DRP, as an alternate, for the first time in the proceedings for the instant year which was not there in earlier years. However, the pertinent fact to be noted is that the TPO, while giving effect to the DRP's direction, came to hold that even after applying AMP intensity adjustment as directed by DRP, the operating profit margin earned by the assessee during the year is higher than the average margin of comparable companies, and, thus, no adjustment on account of AMP intensity is called for. In this view of the matter, it becomes obvious that no addition by applying AMP intensity adjustment has been eventually made in the impugned order. Without going into the merits of the decision of the DRP on this issue, the same has no impact in the proceedings for the year under consideration. This contention of the assessee, ergo, fails.
- It is seen that though the TPO has referred to certain rulings of the High Court on the point in coming to the conclusion that there was a separate international transaction, yet, there are certain other important judgments of the Hon'ble High Court, delivered after the passing of the order by the TPO, which could not be considered, as those were not in existence at that point of time. The contention of the assessee, claiming departure from the earlier years on this score, is not tenable.
- In the light of the non-sustainability of the objections taken by the assessee and following the consistent view taken by the Tribunal in the preceding three years of the assessee, the impugned order is set aside and the matter remitted to the file of TPO/Assessing Officer for a fresh determination of the question as to whether there exists an international transaction of AMP expenses.