IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-1' : NEW DELHI)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCE)

ITA No.1727/Del./2016
(ASSESSMENT YEAR : 2007-08)

M/s. RayBan Sun Optics India Ltd., SP 810 – 811, RIICO Industrial Area, Phase – II, Bhiwadi – 301 019 District Alwar, Rajasthan. **(PAN : AABCR8209G)**	vs.	ACIT, Circle 2(1), New Delhi.

ITA No.1619/Del./2016
(ASSESSMENT YEAR : 2007-08)

ACIT, Circle 2(1), New Delhi.	vs.	M/s. RayBan Sun Optics India Ltd., SP 810 – 811, RIICO Industrial Area, Phase – II, Bhiwadi – 301 019 District Alwar, Rajasthan. **(PAN : AABCR8209G)**
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Nageshwar Rao, Advocate Shri Purushottam Anand, Advocate
REVENUE BY : Shri Anupam Kant Garg, CIT DR

Date of Hearing : 22.12.2020
Date of Order : 22.01.2021

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Present cross appeals filed by the assessee as well as by the revenue are being disposed off by way of composite order to avoid repetition of discussion.

2. Appellant, M/s. RayBan Sun Optics India Limited (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 29.01.2016 passed by the Assessing Officer (AO) in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C / 92CA(4) of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2007-08 on the grounds inter alia that :-

"Re: General Grounds

1. That on the facts and circumstances of the case and in law, Assessing Officer ("Ld. AO") erred in assessing the income of the Appellant at INR 195,817,1401- as against the returned income of INR 192,663,625/-.

2. That on the facts and circumstances of the case and in law, the impugned order passed by Ld. AO in pursuance to the directions of the Hon'ble Dispute Resolution Panel - II (Hon'ble DRP"), under section 143(3) read with section 144C of the Income-tax Act, 1961 (the Act"), is bad in law and void ab-initio.

Re: Transfer Pricing Adjustment in respect of Advertisement, Marketing and Promotion Expenses ("AMP Expenses")

3. That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. Transfer Pricing Officer (Ld. TPO") erred in enhancing the income of the Appellant by INR 315,3519/- by making a Transfer Pricing ("TP") adjustment on account of AMP expenses incurred by the Appellant in the regular course of its business on the ground that it was excessive and should be reimbursed by the Associated Enterprises ("AE").

Re : No Transaction much less than an International Transaction

3.1 That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO erred in assuming that the AMP expenditure incurred by the Appellant is an "international transaction" within the meaning of the term as contained in section 92B of the Act. In doing so, the Hon'ble DRP/Ld. AO/Ld. TPO failed to appreciate that there are no machinery provisions under the Indian TP regulations for determination of AMP expenditure as an international transaction.

3.2 That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO erred in holding that the AMP expenditure incurred by the Appellant is an international transaction by merely relying upon the decision of the Sony Ericsson Mobile Communications India Pvt Ltd vs. CIT ([2015] 374 ITR 118) and without appreciating that unlike the facts of the case in Sony Ericsson Mobile Communications India Pvt. Ltd. (supra), the Appellant had -(a) neither received any subsidy I grant in connection with AMP expenses from its AE; and (b) nor the Appellant had admitted to the existence of an international transaction.

3.3 That on the facts and circumstances of the case and in law, the Ld. AO/ Ld. TPO/ Hon'ble DRP has erred in not appreciating that the AE of the Appellant did not derive any benefit from the AMP expenditure incurred by the Appellant. That on the facts and circumstances of the case and in law, the Ld. AO/ Ld. TPO/ Hon'ble DRP erred in not appreciating that the AMP expenses were incurred by the Appellant as a part of its role and responsibility as a manufacturer cum distributer and not for the purpose of providing any benefit to its AE and thus could not be considered to be a transaction under section 92F(v) of the Act, in the absence of any understanding or arrangement or action in concert for any provision of service.

Re : No arrangement / Agreement / Understanding / Contract with AE's

3.4 The Hon'ble DRP/Ld. AO/Ld. TPO grossly erred on facts and in law in not appreciating that AMP expenditure incurred by the Applicant at its own behest could not be regarded as a 'transaction', much less than an international transaction under section 92B of the Act, in the absence of any understanding arrangement! agreement between the Appellant and its AEs (which own the trademarks) for incurrence of extraordinary/excessive AMP expenditure by the Appellant for developing marketing intangibles for the AE.

Re: "Bright Line" Method has been rejected by the Delhi High Court in the case of Sony Ericsson Mobile Communication India Pvt. Ltd. Vs. CIT -III. (ITA No.16/2014) and other appellants in the High Court of Delhi.

3.5 That on the facts and circumstances of the case and in law, Hon'ble DRP has erred in comparing the AMP/GP ratio of the Appellant with that of the comparable companies for the purpose of determining the value of the international transaction of AMP. In

doing so, the Hon'ble DRP has applied a bright line test and failed to consider the findings of Sony He order according to which bright line test has no statutory mandate.

Re: Disallowance of Selling Expenses

3.6 That the Hon'ble DRP/Ld. AO/Ld. TPO grossly erred in facts and in law in by not appreciating that the AMP expense considered by the Hon'ble DRP/Ld. AO/Ld. TPO for AMP adjustment are primarily in the nature of at "point of sale expenditure" and thus are in the nature of selling expenses.

3.7 That on the facts and circumstances of the case and in law, the Hon'ble DRP/Ld. AO/Ld. TPO failed to appreciate that ambit of "selling expenses" is not only limited to trade discount/ volume discount, rather, any expense(s) which have been incurred for the purposes of enhancing sales will fall under the purview of "selling expenses".

Re: De-Bundling of Transaction(s) not appropriate in the instant case

3.8 The learned Hon'ble DRP/Ld. AO/Ld. TPO have erred in not appreciating that since the entity-level operating margin earned by Appellant under transactional net margin method (TNMM') is higher than the comparable companies as duly accepted by learned TPO, no adjustment is warranted on account of any excessive/ non routine AMP expenses.

3.9 That the Hon'ble DRP erred in alleging that benchmarking of AMP expenses cannot be undertaken using aggregated approach along with other international transactions due to non-availability of comparable companies with similar functional profile and AMP intensity.

3.10 Without prejudice to the above, even if a segregated approach was to be followed, the Hon'ble DRP/Ld. AO/Ld. TPO erred by no attributing any revenue to the alleged transaction of AMP expenditure as required by the Hon'ble High Court in the case of Sony Ericsson Mobile Telecommunications India Private Limited (supra).

3.11 That the Hon'ble DRPI Ld. TPO/Ld. AO erred in not allowing the benefit of "set off' to the Appellant by adjusting the excessive margin earned by the Appellant in the other business segments against the cost incurred on account of AMP expenditure treated as segregated transaction. This is in contradiction to the decision of the Hon'ble High Court in the case of Sony Ericsson Mobile Telecommunications India Private Limited (supra) wherein it was held that TPO can segregate AMP expense as international transaction only after giving benefit of "set off',

3.12 That the Hon'ble DRP/Ld. AO/Ld. TPO erred in facts and in law, in concluding that the non-routine functions (being the alleged excessive AMP expenditure) amounted to a 'service' being rendered

by the Appellant to its AE and that a mark-up was required to be charged in respect of such services.

3.13 That the Hon'ble DRP/Ld. AO/Ld. TPO erred in facts and in law, in applying the gross profit ratio earned by the comparable companies as a mark-up on AMP expenses for the purposes of computing the adjustment.

Re: Consequential Grounds

4. That on the facts and circumstances of the case, Ld. AO erred in initiating penalty proceedings under section 271 (1)(c) of the Act.."

3. Appellant, ACIT, Circle 21 (1), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal sought to set aside the impugned order dated 29.01.2016 passed by the Assessing Officer (AO) in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C / 92CA(4) of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2007-08 on the grounds inter alia that :-

"1. Whether the DRP was justified in not appreciating the fact that bright line is a mere step (of the most appropriate method for benchmarking the AMP services) carried out to estimate and bifurcate expenditure pertaining to the taxpayer for its own routine distribution function and the expenditure incurred on AMP service provided to the AE in the situation where the assessee has not reported the international transaction pertaining to marketing function?

2. Whether under the facts and circumstances of the case and in law the Hon'ble DRP was correct in holding that PLR cannot be the basis for computing markup on AMP expenses without appreciating the Revenue's case wherein the PLR of banks has been used as an uncontrolled comparable to benchmark the opportunity cost of money involved and locked up in AMP expense?

3. Whether in the facts and circumstances of the case and in law the DRP was justified in expenses (disregarding the fact that these expenses would not form part of AMP intangible) even while the same is a factor for comparability analysis as different entities account for such expenditure under different heads?"

4. At the very outset, the ld. CIT DR for the Revenue submitted that there is a delay of 38 days in filing the appeal before the Tribunal and sought to condone the delay. Keeping in view the reasonable cause given in the application, the delay of 38 days in filing the present appeal is hereby condoned.

5. This is second round of litigation as the issue concerning transfer pricing of Advertising, Marketing & Promotional (AMP) expenses was set aside to the file of AO for deciding afresh by the coordinate Bench of the Tribunal in ITA No.5282/Del/2011 vide order dated 09.08.2012 by determining following findings :-

> **"5. We have heard rival contentions and gone through the relevant material available on record. The assessee has raised a legal plea that the issue of AMP expenses is not covered by Section 92B(1) explanation (d) as they do not amount to provision of services and are actually arrangement of expenses. As the assessee and other enterprises are claimed to have separate agreements about the arrangements of advertisement and sales promotion expenses. It will be desirable that this aspect is taken into consideration. In view of these facts, we set aside this issue back to the file of the Assessing Officer for decision afresh in accordance with law."**

6. Briefly stated the facts necessary for adjudication of the controversy at hand are : The taxpayer was engaged in manufacturing and distribution of RAYBAN brand sunglasses and prescription frames in India and to carry out manufacturing operation, the taxpayer imported certain raw material and components from Luxottica Group entities for manufacturing of

finished sunglasses in India. In addition and for the distribution operation, the taxpayer also imported finished Rayban branded sunglasses and other luxury brand sunglasses from Luxottica Group entities for sale to independent third party dealers/ distributors in India. Ld. TPO while examining the Transfer Pricing (TP) study made by the taxpayer noticed that huge expenditure has been made by the taxpayer towards AMP in brand building and marketing of Rayban products in India for which it sought to be compensated with minimum certain amount. In the earlier order dated 27.10.2010, ld. TPO noticed from the annual report of the Associated Enterprises (AE) that sales, gross profit and operating income of AE has been increasing over the past 5 years i.e. from 2003 to 2007 and the benefit of this expenditure incurred on AMP is flowing from the Luxottica Group and thereby held that AMP expenditure of Rs.8.38 crores as an international transaction under section 92B(1) read with clause (v) of section 92F of the Act.

7. Ld. TPO after examining the documents pertaining to trade and channel discount amounting to Rs.3.90 crores and sale of licence of brand of sunglasses amounting to Rs.40.80 lacs considered the AMP expenditure to Rs.4.07 crores and taken this amount for benchmarking its Arm's Length Price (ALP). Ld. TPO

discussed the concept of marketing intangibles in the light of the OECD Guidelines. After dealing with the contentions raised by the taxpayer, ld. TPO reached the conclusion that :-

> **"since no independent company operating in completely uncontrolled situation would have agreed to incur such excessive AMP expenditure i.e 15% of the total sales for a brand not owned by it without either earning supernormal profits or getting compensated by the brand owner, the AE has apparently benefited in terms of the enhanced value of the intangibles i.e. brand owned by it."**

8. Consequently, ld. TPO proceeded to determine bright line for benchmarking the expenditure on AMP taken 4 comparables and computed the bright line limit of 0.22% in terms AMP expenditure/sales as under :-

Value of Gross Sales	**70.83 crs.**
AMP/Sales of the comparables	**0.22%**
Amount that represent bright line	**0.16 crs.**
Expenditure on AMP by assessee	**4.07 crs.**
Expenditure in excess of bright line	**3.91 crs.**

9. Ld. TPO also proposed to apply a mark-up of 13.04% based on independent search by taking companies engaged in advertisement, publicity and allied services and computed the average mean of 13.04% as under :-

S.No.	Company Name	OP/Cost
1	Rockman Advertising & Mktg. (India) Ltd.	35.13%
2	Cybermedia India Online Ltd.	22.70%
3	Gokimine Advertising Ltd.	3.56%
4	Marketing Consultants & Agencies Ltd.	14.96%
5	Needwise Advertising Pvt. Ltd.	1.59%
6	Adbur Pvt. Ltd.	0.30%
	Mean	13.04%

10. Ld. TPO accordingly determined the ALP of receipt of reimbursement as under :-

Particulars	Formula	Amount in Rs. in Crores
Total Revenue of the assessee	A	70.83
Arm's length % of AMP Expenditure	B	0.22%
Arm's length AMP expenditure	C=(A*B)	0.16
Expenditure incurred by the assessee on AMP	D	4.07
Expenditure incurred for developing the intangibles	E=D-C	3.91
Add Markup © 13.04%	F	0.51
Arm's length price of the reimbursement	G=E+F	4.42
Reimbursement on AMP expenses received	H	0
The amount of reimbursement on AMP in be upwardly adjusted	G-H	4.42

11.2 An upward adjustment of Rs.4.42 Crs is to be made to the income of the assessee, being the difference between the arm's length price of reimbursement of AMP expenses and the reimbursement of AMP expenses received by the assessee from its AEs i.e. the Assessing Officer shall enhance the income of the assessee by an amount of Rs.4.42 crs. While computing its total income, the Assessing Officer may examine feasibility of initiating penalty proceedings u/s 271(1)(c) of the Act in accordance with Explanation 7 of the same."

11. Pursuant to the directions issued by the coordinate Bench of the Tribunal, ld. TPO examined the Agreement dated 22.04.2008.

The taxpayer intimated that the taxpayer has not entered into any specific agreement with its AE for undertaking AMP expenses for brands owned by the AEs and the AMP expenditure amounting to Rs.44,733,369 incurred by the taxpayer for AY 2007-08 were incurred for its own business promotion and sale of eyewear products manufactured and imported by it from AEs. The taxpayer further stated that it has only entered into licence distribution agreement with its AE on 22.04.2008.

12. Ld. TPO proceeded to conclude that since the taxpayer has not been able to produce any agreement for the relevant previous year as claimed for before the Tribunal, there is no change in the facts and law regarding the issue and ratified upward adjustment of Rs.4.21 crores made by the ld. TPO vide order dated 22.01.2016 to the income of the taxpayer.

13. The taxpayer carried the matter before the ld. DRP by way of filing the objections who has partly allowed the objections. Ld. TPO passed order dated 22.01.2016 giving effect to the directions of the ld. DRP and computed the AMP adjustment to Rs.31,53,519/- as against Rs.4,21,00,000/- proposed by the TPO in the order passed u/s 92CA (3) of the Act. The Assessing Officer (AO) accordingly framed the assessment at an income of Rs.19,58,17,140/- u/s 143(3)/144C/92CA (4) of the Act. Feeling

aggrieved, both the taxpayer as well as the Revenue has come up before the Tribunal by way of filing the present cross appeals.

14. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the Revenue authorities below in the light of the facts and circumstances of the case.

15. Undisputedly, ld. TPO has made upward adjustment qua AMP expenses incurred by the taxpayer by using Bright Line Test (BLT) by comparing alleged excessive AMP expenses with that of the comparables. However, ld. DRP has overruled this issue taken by the TPO in the light of the judgment of the **Hon'ble Delhi High Court rendered in Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT (2015) 374 ITR 118 (Del.)** and directed the TPO to exclude routine selling and distribution expenses in view of the findings returned by the Hon'ble Delhi High Court in **Sony Ericsson Mobile Communications India Pvt. Ltd.** (supra).

16. Ld. DRP however taken the view that since the taxpayer could not propose suitable comparables for using aggregated approach, ld. DRP proceeded to apply segregation approach of the routine selling expenses from the AMP expenses would be required so as to make reasonable assessment of the benefits to the AE on account of such expenses. The factum of setting aside the BLT

method by the ld. DRP adopted by the TPO has been challenged by the Revenue by filing cross appeal.

17. Ld. TPO in compliance to the directions issued by the ld. DRP and after entertaining the submissions made by the AO considered the expenses being part of the AMP as under :-

Particulars	Amount (in INR)	Amount (in INR)
	FY 2010-11 as per TP order	FY 2010-11 considered as AMP by the TPO post DRP's directions
Advertisement	4,06,53,036	4,06,53,036

18. Ld. TPO proceeded to compute the gross margins and detail of AMP expenditure in case of the taxpayer and comparables as under :-

S. No.	Comparable company	Gross profit to sales	AMP to sales	AMP to GP	GP to COGS
1	A C I Infocom Ltd.	4.61	0.00	0.00	4.83
2	Compuage Infocom Ltd.	12.03	0.00	0.00	13.67
3	C C S Infotech Ltd. – Trading segment	3.61	1.47	40.76	3.74
4	Priya Ltd. – Electronics segment	14.08	0.03	0.22	16.01
	Average	8.58%	0.38%	10.24%	9.56%
	Tested party	52.06%	5.74%	11.02%	

6. Since the ratio of AMP/Sale and AMP /GP is more than the comparables in the case of the assessee, an adjustment is required to be carried out The difference of AMP /GP ratio in the case of the assessee and the comparables comes to 0.78% (being the difference between 11.02% and 10.24%). In the case of the assessee, the quantum of gross profit, of the assessee is Rs.36,90,19,139/-. Considering this value the excess AMP comes to Rs.28,78,349/- (being 0.78% of Rs.36,90,19,139/-). Accordingly as per the directions of Hon'ble DRP, the excess AMP cost is calculated as Rs. 28,78,349/-.

7. For the purpose of determination of the markup on the AMP cost, it is directed by the Panel that the GP ratio of the comparables should be considered. The average GP/COGS ratio of the comparables as shown above is 9.56%."

19. Ld. TPO accordingly proceeded to compute the adjustment on account of AMP as under :-

Excess AMP (A)	**28,78,349**
Mark up (B) @ 9.56%	**2,75,170**
AMP Adjustment (C=A+B)	**31,53,519**

20. So far as question of overruling BLT method by the ld. DRP as applied by the ld. TPO is concerned, Hon'ble Delhi High Court in ***Sony Ericsson India Pvt. Ltd. v. CIT (2015) 374 ITR 118 (Del.)*** and subsequently in ***Maruti Suzuki India Ltd. v. CIT (2016) 328 ITR 210 (Del.)*** has categorically held that BLT is not a valid basis for determining the existence of international transaction or for that matter for computing the ALP of such international transaction involving AMP expenses, the order of TPO passed by making BLT as basis of the ALP adjustment is not sustainable in the eyes of law.

21. Furthermore, Hon'ble Delhi High Court in subsequent decisions viz. ***Bausch & Lomb Eye Care (India) Pvt. Ltd. v. Additional CIT (2016) 381 ITR 227 (Del.)*** and ***Honda Siel Power Products Ltd. v. Dy. CIT (2016) 237 Taxman 304*** held that it is for

the Revenue to firstly discharge the onus to prove the existence of an international transaction between the taxpayer and its AE and only thereafter ALP of international transactions involving AMP can be computed.

22. So, we are of the considered view that merely by applying the BLT, the existence of international transactions cannot be proved and as such, adjustment made by the TPO in the aggregate of any excessive/non-routine expenses is not in consonance with the ratio laid down in **Sony Ericsson Mobile Communications India Pvt. Ltd.** (supra).

23. We are further of the considered view that ld. DRP has erred in comparing the AMP / GP ratio of the taxpayer vis-à-vis comparable company for the purpose of determining the value of the international transactions of AMP is nothing but applying the BLT which has no statutory mandate, as has been held by Hon'ble Delhi High Court in **Sony Ericsson Mobile Communications India Pvt. Ltd.** (supra) and ***Maruti Suzuki India Ltd. v. CIT*** (supra).

24. So, we are of the considered view that by merely relying upon **Sony Ericsson Mobile Communications India Pvt. Ltd.** (supra), ld. DRP/AO/TPO cannot presume the existence of international transactions qua AMP expenditure as the taxpayer has

denied the existence of international transactions and has not received any subsidy/grant in connection with international transactions with its AE.

25. Hon'ble Delhi High Court in the cases of **Bausch & Lomb Eye Care (India) Pvt. Ltd. vs. Addl.CIT (2016) 381 ITR 227 (Del.) and Honda Siel Power Products Ltd. vs. DCIT (2016) 327 Taxman 304** held that it is for the Revenue to firstly discharge the onus to prove the existence of international transactions between the taxpayer and its AEs and thereafter the ALP of international transactions only can be computed. In the instant case, there is not an iota of material on the file apart from applying BLT and by taking the view that the taxpayer has incurred huge and excessive expenditure on AMP and sales to the tune of 15% of the total sales, no cogent material is there to treat the incurring of AMP expenses as international transactions.

26. So far as question of applying mark-up of excessive expenses as per sub-clause (ii) to Rule 10B(1)(c) by the ld. DRP/TPO/A0 is concernedly, Hon'ble Delhi High Court in para 178 of **Sony Ericsson Mobile Communications India Pvt. Ltd.** (supra) held that, *"the Revenue's stand in some cases applying the prime lending rate fixed by the Reserve Bank of India with a further mark-up, is mistaken and unfounded, and as such is not*

sustainable." Ld. DRP however erred in directing the TPO to determine the mark up on the ALP by taking the GP/AMP ratio as laid down by Hon'ble Delhi High Court in **Sony Ericsson Mobile Communications India Pvt. Ltd.** (supra) because the first step is to determine the existence of international transactions by the Revenue and if the existence of international transactions qua AMP expenditure is established only then ALP of the same is to be determined.

27. Ld. AR for the taxpayer contended that DRP/TPO/AO have erred in appreciating that "selling expenses" is not only to trade discount/volume discount rather any expenses which have been incurred for purpose of enhancing sales would fall under the purview of selling expenses and cannot relied upon **Sony Ericsson Mobile Communications India Pvt. Ltd.** (supra). We agree with the contention raised by the ld. AR for the taxpayer because Hon'ble Delhi High Court in **Sony Ericsson Mobile Communications India Pvt. Ltd.** (supra) held that *"direct marketing and selling related expenses or discount concessions would not form part of the advertising, marketing and promotion expenses.*"

28. Even otherwise, the Revenue has failed to prove any specific arrangement or agreement between the taxpayer and its AE leading

to the conclusion that AMP expenses incurred by the taxpayer was not for its own benefit or benefit of its AE.

29. Learned DR for the Revenue, although admitted the legal position enunciated in the preceding paragraphs, but he contended that since all the aforesaid decisions are lying challenged before the Hon'ble Apex Court, the matter may be kept pending till the decision by Hon'ble Apex Court. However, we are of the considered view that since it is a stay granted matter and the proceedings before the second appellate authority have not been stayed by any higher forum, the same cannot be kept pending.

30. After considering the legal position as discussed in the preceding paragraphs, we are of the considered opinion that the ALP of an international transaction involving AMP expenses, the adjustment made by the TPO/DRP/AO is not sustainable in the eyes of law. At the same time, we cannot ignore the submission of the learned DR that the matter is pending before Hon'ble Apex Court and the decision of Hon'ble Apex Court would be binding upon all the authorities. In view of the above, we set aside the orders of authorities below and restore the matter to the file of the Assessing Officer. We hold that as per the facts of the case and the legal position as of now and discussed above in this order, the adjustment made by the TPO/DRP/AO in respect of AMP expenses

is not sustainable. However, if the above decisions of Hon'ble Jurisdictional High Court which is under consideration before the Hon'ble Apex Court is modified or reversed by the Hon'ble Apex Court, then the Assessing Officer would pass the order afresh considering the decision of Hon'ble Apex Court. In those circumstances, he will also allow opportunity of being heard to the assessee.

31. In view of what has been discussed above, we are of the considered view that following the law laid down by Hon'ble Delhi High Court in **Sony Ericsson Mobile Communications India Pvt. Ltd.** (supra), adjustment made by the TPO/DRP/AO on account of ALP of AMP expenses is not sustainable in the eyes of law, hence deleted. So, the appeal filed by the taxpayer is allowed and the appeal filed by the Revenue is dismissed.

Order pronounced in open court on this 22nd day of January, 2021.

Sd/-	**sd/-**
(R.K. PANDA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 22nd day of January, 2021
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.DRP
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.