# Alcon Laboratories (India) Private ... vs Assistant Commissioner Of Income Tax, ... on 12 July, 2023

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

IT(TP)A No.1018/Bang/2022
Assessment year : 2018-19

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| Alcon Laboratories (India) Private Limited, 11th Floor, RMZ Azure, Bellary Road, Hebbal, Bangalore - 560 092. PAN: AACCA 3430F | Vs. | The Assistant Commissioner of Income Tax, Circle 1(1)(1), Bangalore. |
| APPELLANT | | RESPONDENT |

Appellant by : Shri Percy Pardiwala, Sr. Counsel
Respondent by : Shri Sunil Kumar Singh, CIT-2(DR)(ITAT), Bengaluru.

Date of hearing : 05.07.2023
Date of Pronouncement : 12.07.2023

ORDER

Per Laxmi Prasad Sahu, Accountant Member

This appeal is by the assessee against the final assessment DIN & Order No.ITBA/AST/S/143(3)/2022-23/1045040294(1) dated 30.8.2022 of the Assessing Officer for the assessment year 2018-19 on the following grounds:-

"That on the facts and circumstances of the case and in law:

1. The final assessment order issued by the learned AO dated 30 August 2022 pursuant to the Hon'ble DRP directions under section 144C is barred by limitation and liable to be quashed;

2. The impugned order of the learned AO pursuant to the directions of the Hon'ble DRP, erred in assessing the total income at INR 70,44,32,165 as against the returned income of INR 44,96,42,650.

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3. The learned AO/ Transfer Pricing Officer ("TPO")/ DRP have erred, in law and in facts, in making an addition of INR 15,32,27,229 to the total income of the Appellant on account of alleged excessive expenditure incurred towards Advertising, Marketing and Promotion ("AMP"), INR 10,84,876 towards Information Technology ("IT") support services, INR 61,89,154 towards Business support services("BSS") and INR 9,42,88,256 on account of disallowance of expenses incurred towards training, honorarium and travel and stay expenses included under the head seminars and conventions and sales promotion expenses.

Grounds relating to adjustment on account of alleged excessive AMP expenditure

4. The learned AO/ TPO/ DRP have erred, in law and in facts, by concluding that the Appellant has incurred excessive or non- routine AMP expenses attributable to the Development, Enhancement, Maintenance, Protection and Exploitation ("DEMPE") of marketing intangibles owned by the Associated Enterprise ("AE") and that such expenditure is a separate international transaction of provision of service, without appreciating that the Appellant operates as a Limited Risk Distributor ("LRD").

5. The learned AO/ TPO/ DRP have failed to appreciate that the advertisement and marketing expenses by the Appellant is on its own account and for furtherance of its business and that any benefit to the AE in this regard is purely incidental. Thus, the adjustment made by the lower authorities is erroneous.

6. The learned AO/ TPO/ DRP have erred in not appreciating that there are no machinery provisions in the Act to make adjustment in relation to AMP expenses.

7. The learned AO/ TPO/ DRP have erred, in law and in facts, by following the DRP directions of earlier years (i.e. AY 2013-14, AY 2014-15, AY 2016-17, AY 2017-18), and arbitrarily considering 25% of the distributor's commission as incurred towards warehousing facilities and treating the balance as part of AMP expenditure.

8. The Hon'ble DRP has erred, in facts, by concluding that the commission paid to M/s Parekh Integrated Services Private Limited forms part of the AMP expense by placing reliance on the DRP directions of the earlier years (i.e. AY 2013-14, AY 2014-15, AY 2016-17 and AY 2017-18), which states that 'the taxpayer may have to provide required incentives to M/s Parekh Integrated Services Private Limited to distribute its products, than that of its competitor's products'.

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9. Without prejudice to the above grounds, the learned AO/ TPO/ DRP have erred, in law and in facts, by failing to accept the aggregation approach adopted by the Appellant and by not appreciating that the sales and distribution expenditure incurred by the Appellant is included in the Profit Level Indicator ("PLI") used for the distribution activity, which is tested under the Transactional Net Margin Method ("TNMM").

10. Without prejudice to the above grounds, the learned AO/ TPO/ DRP have erred, in law and in facts, in treating the sales and distribution expenses incurred as a separate international transaction to benchmark it independently from distribution activity, as in the absence of any computation mechanism prescribed under the Act, the machinery provision fails.

11. Without prejudice to the above grounds, the learned AO / TPO and the Hon'ble DRP have erred, in law and in facts, by alleging that the Appellant has not been compensated for the sales and distribution expenditure incurred.

12. Without prejudice to the above grounds, the learned AO/ TPO/ DRP have erred, in law and in facts, by considering 'distributor's commission', 'sales commission', 'sales promotion expenses', 'seminar and conventions expenses' and 'travelling and conveyance', incurred in respect of the distribution segment, as part of AMP expenditure while computing the compensation for the alleged DEMPE function performed by the Appellant.

13. Without prejudice to the above grounds, the learned AO/ TPO/ DRP have erred, in law and in facts, by erroneously computing the compensation for the alleged DEMPE function performed by the Appellant for computing the transfer pricing adjustment.

14. The learned AO/ TPO/ DRP has erred, in law and in fact by applying the Bright line test ("BLT") approach to determine excessive AMP or non-routine expenditure which is not in accordance with provisions of the Income Tax Act, 1961.

15. Without prejudice to the above grounds, the learned AO/ TPO/ DRP erred in law and fact, by considering 'Other method' as the Most Appropriate Method ("MAM") and in not appreciating that TNMM has been considered as the MAM and the operating margin of the Appellant is higher that the operating margins of the comparable companies, thus no separate adjustment for AMP expenditure is required.

16. Without prejudice to the above grounds, the learned AO/ TPO/ DRP have erred, in law and in facts, in the selection of companies engaged in the business of advertising & media services, public relations, digital marketing, etc., as comparable to the Appellant to benchmark the alleged excessive or non-

IT(TP)A No.1018/Bang/2022 routine AMP expenditure; and also, comparing these companies (i.e. services providers) to the Appellant would be incorrect considering that Alcon India operates as an LRD and therefore there could be inconsistencies in the accounting policies adopted.

17. Without prejudice to the above grounds, the learned AO / TPO has erred, in law and in fact, by accepting certain companies as a comparable company.

(i) Concept Communications Limited
(ii) Goldmine Advertising Limited
(iii) Pressman Advertising Limited
(iv) Majestic Research Services & Solutions Limited

(v) Scarecrow Communications Limited

18. The learned AO / TPO has erred, in law and in fact, by making erroneous computation of AMP to sales ratio of comparable companies.

(i) ADS Diagnostics Limited
(ii) Sandu Pharmaceuticals Limited
(iii) Bayer Zydus Pharma Private Limited
(iv) Mankind Pharma Limited

19. Without prejudice to the above grounds, the learned AO / TPO has erred, in law and in fact, by making transfer pricing adjustment in respect of certain sales and distribution expenses under Section 92CA of the Act, when the learned AO has disallowed certain portion of seminars & convention expenses and sales promotion expenses under Section 37 of the Act.

Grounds relating to adjustment in respect of IT support services

20. The learned AO/ TPO/ DRP have erred, in law and in facts, by disregarding the economic analysis undertaken by the Appellant in the TP documentation and conducting a fresh search to arrive at the arm's length price ('ALP') for the impugned international transaction of IT support services transaction. Further, the ALP was determined by using incorrect comparable companies engaged in end-to-end software development services.

21. The learned TPO have erred, in law and in facts, by considering the operating margin of Alcon India for IT support services segment as 10.12% instead of 15% while computing the adjustment.

22. The learned AO/ TPO/ DRP have erred, in law and in facts, by applying only the lower cap on the turnover filter of INR1 crore and not applying any upper cap for the comparability criterion.

23. The learned AO/ TPO/ DRP have erred, in law and in facts, by wrongly applying the persistent loss filter by rejecting the IT(TP)A No.1018/Bang/2022 companies reporting losses for any two years out of the last three years.

24. Without prejudice to the above grounds, the learned AO/ TPO/ DRP have erred in law and in facts, by using employee cost greater than 25% of the total revenues as a comparability criterion.

25. Without prejudice to the above grounds, the learned AO/ TPO/ DRP have erred in law and in facts, by rejecting certain comparable companies identified by the Appellant using export earnings greater than 75% of the total revenues as a comparability criterion.

26. Without prejudice to the above grounds, the learned AO/ TPO/ DRP have erred in law and in facts, by accepting / rejecting companies based on unreasonable comparability criteria:

a) The learned AO/ TPO/ DRP erred, in law and in facts, by accepting the following companies that cannot be considered as comparable to the Appellant in law and fact

on one or more grounds:

(i) Exilant Technologies Private Limited
(ii) Larsen & Toubro Infotech Limited
(iii) Great Software Laboratory Private Limited
(iv) Black Pepper Technologies Private Limited
(v) Elveego Circuits Private Limited
(vi) Nihilent Technologies Private Limited
(vii) Aptus Software Labs Private Limited

(viii) Acewin Agriteck Ltd. (Formerly known as OFS Technologies Limited)

(ix) Persistent Systems Limited

(x) Infobeans Technologies Ltd

(xi) Wipro Limited

(xii) Tata Elxsi Limited

(xiii) Threesixty Logica Testing Services Private Limited

(xiv) Infosys Ltd.

(xv) Cybage Software Private Limited
(xvi) Mindtree Limited

b) The learned AO/ TPO/ DRP erred, in rejecting the following

comparable companies selected by the Appellant in its TP documentation even though the companies are functionally comparable to the Appellant:

(i) Smartcloud Infoservices P. Ltd.
(ii) Evoke technologies Limited
(iii) E-Zest Solutions Ltd
(iv) Sasken Technologies Ltd.



(i) The learned AO/ TPO/ DRP erred, in rejecting the following comparable companies selected by the Appellant as additional comparables even though the companies are functionally comparable to the Appellant:

(i) Celstream Technologies Private Limited
(ii) Kals Informations Systems Limited
(iii) Kireeti Soft Technologies Limited
(iv) Yudiz Solutions Private Limited
(v) Jindal Intellicom Limited (Segmental)

(vi) Sankhya Infotech Ltd (segmental)

27. The learned AO/ TPO/ DRP have erred, in law and in facts, by wrongly computing the operating margins of the following of the comparable companies considered in the TP order:

(i) Harbinger Systems Private Limited
(ii) Great Software Laboratory Private Limited
(iii) Black Pepper Technologies Private Limited
(iv) Mindtree Limited
(v) Wipro Limited
(vi) Tata Elxsi Limited
(vii) Infobeans Technologies Limited
(viii) Nihilent Limited
(ix) Cybage Software Private Limited
(x) Threesixty Logica Testing Services Private Limited

28. The learned AO/ TPO/ DRP have erred, in law and in facts, by not making suitable adjustment to account for differences in working capital position of the Appellant vis-à-vis the comparables.

29. The learned AO/ TPO/ DRP have erred, in law and facts, by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-à-vis the comparables.

Grounds relating to adjustment in respect of business support services

30. The learned AO/ TPO/ DRP have erred, in law and in facts, by disregarding the economic analysis undertaken by the Appellant in the TP documentation and conducting a fresh search to arrive at the ALP for the impugned international transaction of business support services. Further, the ALP was determined by using incorrect comparable companies engaged in end-to-end software development services.

31. [Modified ground] The learned AO / TPO /DRP have erred, in law and in facts, by accepting / rejecting companies based on unreasonable comparable criteria.

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a) Functionally comparable companies identified by the Appellant but rejected by the learned TPO

(i) Honeycomb Relationship Management Services Private Limited

(ii) Spectrum Business Solutions Limited

(iii) Hansa Research Group Private Limited

(iv) Kestone Integrated Marketing Services Private Limited

b) Functionally dissimilar companies identified by the learned TPO as comparable to the Appellant

(i) Axience Consulting Private Limited

(ii) Dun & Bradstreet Information Services India Private Limited

(iii) Pressman Advertising Ltd

(iv) Lintas India Private Limited

(v) Cheil India Private Limited

32. The learned AO / TPO have erred, in law and in facts, by wrongly computing the operating margins of some of the comparable companies considered in the TP order.

(i) Confluence Integrated Services Private Limited
(ii) Pressman Advertising Limited
(iii) Majestic Research Services and Solutions Limited
(iv) Cheil India Private Limited

Grounds relating to adjustment on account of disallowance of expenses

33. The learned AO has erred, in law and on facts, in disallowing an amount of INR 9,42,88,256 under section 37 of the Act.

34. Without prejudice to the above:

a. The travel and stay expenses amounting to INR 18,38,304 incurred during the AY 2018-19 are allowable expenses as these were not incurred for doctors who were 'delegates' in the conference and hence not violative of Indian Medical Council Regulations, 2002 (IMC regulations). The learned AO erred in quantifying the expenditure as per the amount incurred in the earlier assessment year ie. AY 2017-18 instead of the subject assessment year ie. AY 2018-19.

b. The honorarium expenses amounting to INR 21,14,320 incurred during the AY 2018-19 are allowable expenses as these expenses were incurred for professional consultancy services to the Appellant and hence not violative of IMC regulations. The learned AO erred in quantifying the expenditure as per the amount incurred in the earlier assessment year ie. AY 2017-18 instead of the subject assessment year ie. AY 2018-19.

IT(TP)A No.1018/Bang/2022 c. The training expenses for doctors amounting to INR 69,15,277 incurred during the AY 2018-19 are allowable expenses as these expenses were incurred for training in relation to use of Appellant's products/ equipment and not violative of IMC regulations. The learned AO erred in quantifying the expenditure as per the amount incurred in the earlier assessment year ie. AY 2017-18 instead of the subject assessment year ie. AY 2018-19.

d. The meeting, conference and event related expenses amounting to INR 51,01,377 incurred in respect of conference/events organized by the Appellant during the AY 2018-19, are allowable expenses as the Hon'ble DRP has specifically directed to allow such expenses in the DRP directions. The learned AO erred in quantifying the expenditure as per the amount incurred in the earlier assessment year ie. AY 2017-18 instead of the subject assessment year ie. AY 2018-19.

e. The sponsorship expenses amounting to INR 8,96,16,573 are allowable expenses incurred during the AY 2018-19 as these sponsorship costs includes expenses pertaining to stall/booth charges for display of products, subscription of journals, information books, to conduct live surgery sessions or sessions by speaker doctors to discuss Appellant's products/ technology etc., in conferences and events organized by various societies/institutions/hospitals and not violative of IMC regulations. The learned AO erred in quantifying the expenditure as per the amount incurred in the earlier assessment year ie. AY 2017-18 instead of the subject assessment year ie. AY 2018-19.

35. The learned AO has erred, in law and in facts, in disallowing expenses incurred towards honorarium expenses, meeting and conference expense and sponsorship expenses on the ground that the same is not incurred wholly and exclusively for the regular course of business.

36. The learned AO erred in disallowing expenses towards travel and stay expenses under Explanation to sec 37(1) of the Act.

37. The learned AO erred in disallowing expenses incurred towards training expenses and ignoring the details furnished by the Appellant.

General grounds

38. The learned AO has erred in levying interest of INR 1,74,44,426 under section 234D of the Act.

39. The learned AO has erred, in laws and in facts, in initiating penalty proceedings u/s 270A of the Act.

The Appellant submits that each of above grounds is independent and without prejudice to one another.

IT(TP)A No.1018/Bang/2022 The Appellant craves leave to add, alter, amend, vary, omit, or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law."

2. The assessee filed its return of income for AY 2018-19 electronically on 30.11.2018 declaring total income of Rs.44,96,42,650 under the normal provisions of the Act and Rs.24.99 crores under deemed income u/s. 115JB of the Act. The case was selected for scrutiny and statutory notices were issued to the assessee. The assessee company is engaged in the business of selling ophthalmic surgical electronic equipments, intraocular lenses, spare parts and pharmaceutical products, provides services in relation to maintenance of the products and support services to group companies.

3. The assessee had undertaken international transactions with its AE and the case was referred to the TPO. Accordingly the TPO on 29.07.2021 made TP adjustment u/s. 92CA of the Act. The AO passed draft assessment order on 30.09.2021 incorporating the TP adjustment of Rs.34,59,026/- in the Software Development Services [SWD] segment, Rs.69,04,266/- in the Business Support Services [BSS] segment and Advertisement & Market Promotion [AMP] expenditure of Rs.15,44,18,487/- totaling to TP adjustment of Rs.16,47,81,779/- and also made addition of Rs.25,19,46,815/- towards disallowance of Seminars, Conventions and Sales Promotion Expenses. Accordingly, the assessed income was determined at Rs. 86,63,71,244/-.

4. The assessee filed objections before the DRP and the ld. DRP passed the order on 27.06.2022 giving marginal relief to the assessee. As per the directions of the DRP, the TPO passed OGE dated 26.07.2022 revising the TP adjustment to Rs.16,05,01,259/- which was IT(TP)A No.1018/Bang/2022 incorporated by the AO in the final assessment order. Also, as directed by the DRP, the AO after considering the submissions of the assessee regarding the disallowance of Seminars, Conventions and Sales Promotion Expenses made a disallowance of Rs.9,42,88,256/-. Aggrieved, the assessee has filed the appeal before the Tribunal.

5. The assessee has raised the grounds on the following issues:-

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(i)     AMP Expenses (Grounds 4 to 19)
(ii)    IT Support Services/SWD segment (Grounds 20 to 29)
(iii)   BSS segment (Grounds 30 to 32)
(iv)    Corporate issue regarding disallowance of Seminar,
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Conventions & Sales Promotion expenses (Grounds 33 to

37).

(v) Ground No. 01 to 03 is general in nature, hence, not required for adjudication.

(vi) Ground No. 38 & 39 is consequential in nature, hence, not required for adjudication.

AMP Expenses (Grounds 4 to 19)

6. The TPO noted that the assessee has incurred AMP expenses and no adjustment was made by the assessee. In this regard a show cause notice was issued and the assessee furnished reply stating that the AMP expenses is not an international transactions. The TPO after examining the issue in detail computed the adjustment as under:-

| Amount Particulars | |
|---|---|
| Excess AMP Incurred for the benefit of the AE | 13,09,07,500 |
| Arm's length Margin 17.96% | |
| Arm's Length Price (19,69,75,840*115.88%) | 15,44,18,487 |
| Price received - | |
| Adjustments | 15,44,18,487 |



7. The ld. AR submitted that AMP expenditure is covered by the decision of the coordinate Bench of this Tribunal in favour of the assessee in the assessee's own case for AY 2017-18 in IT(TP)A No.535/Bang/2022 dated 29.03.2023 and submitted that the facts are the same. Therefore the addition made is not sustainable.

8. The ld. DR relied on the orders of the lower authorities and could not controvert the submissions of the ld. AR.

9. After hearing both the sides, perusing the entire material on record and the orders of the lower authorities, we note that similar issue on similar facts has been decided by the coordinate Bench of the Tribunal in assessee's own case (supra) in favour of the assessee and it is held as under:-

"6. The ld. AR submitted that the issue has been already considered by the coordinate bench of the Tribunal in assessee's own case for the AYs 2013-14 & 2014-15 in IT(TP)A No.2889/Bang/2017 & 3376/Bang/2018 dated 16.11.2022 as under:-

"2.1 Facts of the issue are that the TPO has discussed in detail in para 9 of his order that AMP is an international transaction. He has also discussed that when the Indian subsidiary is discharging both the distribution and marketing functions, then both the functions need to be benchmarked separately. He has discussed in detail the various clauses of the "Distribution and Marketing Services" agreement with its AE w.e.f. 01/04/2006 to conclude that it is obligatory for the assessee (distributor) to undertake marketing activities on behalf of supplier (its AE). He has also referred that it is operating under the direct supervision and control of its AE. As the assessee has not benchmarked this marketing function, the TPO has benchmarked this transaction separately to determine the ALP of this international transaction. Therefore, the TPO has rightly concluded that the assessee has incurred excessive or non-routine AMP expenditure attributable to DEMPE of marketing intangibles owned by the AE and that such expenditure is a separate international transaction of provision of service.

2.2 Further, the TPO has discussed in para 9.4 of his order that the assessee has not been compensated for the sales and distribution expenditure incurred. It is seen that the TPO has proved that the assessee has incurred far more expenses when it was compared to the companies involved in similar activity. He has mentioned that the assessee has spent IT(TP)A No.1018/Bang/2022 substantial portion of money on brand awareness activities. He concluded that this has enhanced the brand image in India. The fact remains that the brand is owned by its AE and hence, the AE has certainly benefitted by the expenses incurred by the assessee. However, the assessee has not been compensated for this. Ld. DRP was in agreement with the arguments of the TPO and found no reason to interfere with the order of the TPO on this ground.

2.3 Finally, the Ld. DRP followed the earlier order of Ld. DRP in assessment year 2012-13 and observed as under:-

"Having considered the submissions, (For above 4 grounds), it is observed from the perusal of the TP order (in paragraphs 6 to 11) that the TPO has examined the issues raised above and recorded a detailed reasoning before making an adjustment on AMP expenditure. While deciding the issue, the TPO has discussed and considered the submissions made by the assessee. Before the DRP, the assessee has made similar submissions. We are in complete agreement with the conclusions drawn in para 10.8 of the TP order. However, considering the submissions of the assessee that routine expenditure has beer? treated as AMP by the TPO, we have sought Remand Report (RR) from the TPO after giving an opportunity to the assessee. After giving an opportunity to the assessee, the TPO submitted RR dated 06.12.2016; the relevant extract is reproduced below:

"5. The TPO is of the view that there may be different forms of distribution channels adopted by tax payers wherein some companies may adopt direct selling of products to end customers (or) some companies may use retails chains to distribute end products to consumers. In the taxpayer's case, it has adopted the consignment model to distribute its products. Further, as per the website of M/s Parekh Integrated Solutions Ltd, it offers consignment services to various companies. This being the case, the taxpayer may have to provide required incentives to M/s Parekh Integrated Solutions Ltd to distribute its products, then that of its competitor's products.

6. Further, the warehousing & logistics function provided by M/s Parekh Integrated Solutions Ltd, does not result in any value addition of the taxpayer's products. On the other hand, facilities such cold storage/warehousing etc. are essentially required to maintain the composition of taxpayer's products, which are to be distributed. Therefore, such functions/Services are only incidental to the distribution function undertaken by M/s Parekh Integrated Solutions Ltd, for/on behalf of the taxpayer. Hence, the TPO has rightly considered the distribution commission paid as part of AMP expenses and therefore, it is requested that the Hon'ble DRP may kindly affirm the TPO's order."

Considering the facts and circumstances of the case, and also considering the submissions of the assessee, we are of the view that the TPO for the detailed reasoning given therein is justified in his approach to make an adjustment on AMP. However, in respect of ground No 2, relating to distributors' commission, we are of the view that the cost relating to IT(TP)A No.1018/Bang/2022 provision of warehousing, particularly the cold storage being provided by the distributors, needs to be excluded from the AMP. As per the Consignment Agency Agreement (CAG) entered by the assessee with M/s Parekh Integrated Services Pvt Ltd, Consignment Agent (CA), responsibility is cast on the CA by Clause 11 (a) to provide:

> (a) The CA shall provide work space equivalent to 500 square feet at the zonal offices and 300 square feet at other locations including two cabins for the zonal mangers of Alcon at the Zonal offices. It is agreed between the Parties that the area of the above work space(s) may be increased or decreased by Alcon as ....The work space provided at the zonal offices and other locations shall include telephone facilities and other accessories of an office premises including but not limited to chairs, tables. CA shall also provide table space with telephone facility for each of Alcon's Area Managers when visiting the CA's warehouses.

The assessee is having distribution activities in 38 locations across India as per the submissions made by the assessee vide letter dated 25.01.2016. Further, the Warehousing charge is inbuilt in the distributor's commission and accordingly, we are of the view that an estimated cost of 25% of distributors' commission could be treated as towards the cost relating to provision of warehousing facility, which may be excluded for AMP purposes. Accordingly, we direct the AO to reduce 25% of the distributors' commission from the AMP. "

> 2.4 Consistent with the view taken by the Ld. DRP for 2012-13, Ld. DRP directed the AO to reduce 25% of the distributors' commission from the AMP. Against this assessee is in appeal before us.

> 3. We have heard the rival submissions and perused the materials available on record. In our opinion, this issue was considered by the Tribunal in assessee's own case in assessment year 2012-13 in IT(TP)A No.726/Bang/2017 vide order dated 29.4.2022 and decided the issue in favour of the assessee by observing as under:-

> "9.1 The Ld.AR submitted that, the assessee purchases ophthalmic pharmaceuticals and ophthalmic surgical products from its AE is for distribution in India. It was submitted that assessee also renders services in relation to the products during and after warranty period. The Ld.AR submitted that, on one hand the revenue accepts the distribution activities and marketing activities carried on by assessee to be at arm's length whereas on the other hand while making the AMP expenditure the Ld. TPO holds that the selling and distribution expenses incurred by assessee promotes the intangibles of AE in India and the distribution expenses incurred being towards the products amounts to advertisement.

9.2 The Ld.AR submitted that, the Ld. TPO did not consider that the sales promotion expenses and the seminars and conventions carried on ease to educate the Indian market in respect of the products distributor by the assessee within the Indian territory he submitted that by these IT(TP)A No.1018/Bang/2022 expenditures the assessee is promoting its own business in India as a distributor. The details of the expenditure are as under:

9.3 The Ld.AR submitted that, the revenue made adverse observation that assessee incurred excessive sales and distribution expenses and compared to the comparable companies by using CUP as the most appropriate method. He submitted that the revenue has attributed excessive sales and distribution expenditure to the additional function of promoting and developing the marketing intangibles of the AE by assessee in India by using bright line test. It is the submission of the Ld.AR that, this is not a recognised method under the trans-uprising regulation.

9.4 The Ld.AR submitted that, there is no agreement between the assessee and the AE to make such expenditure in order to promote the intangibles of the AE in India. And in the absence of any specific requirement to make such expenditure on behalf of AE, the expenditures incurred by assessee cannot be treated to be an international transaction. In support, he placed reliance on the decision of Hon'ble Delhi High Court in case of Maruti Suzuki India Ltd. vs. CIT, reported in 381 ITR 117 and M/s. Sony Ericsson Mobile Communications Pvt. Ltd. vs CIT reported in 374 ITR

118. 9.5 On the contrary the Ld. CIT.DR placed reliance on orders passed by authorities below.

9.6 We have perused submissions advanced by both sides in light of records placed before us.

9.7 We know that the DRP refused to follow the above decisions of Hon'ble Delhi High Court by observing that these decisions have not been accepted by the Department and SLP has been filed before Hon'ble Supreme Court.

9.8 It is not the case of the revenue that assessee is mandated to incur such expenditure as per any agreement between the assessee and a. It is also not disputed that these expenditures incurred by assessee or towards its own business promotion in India as assessee is a distributor further from the transfer pricing study report we note that assessee operates in limited risk environment in respect of the distribution and marketing segment. As per the TP study the description of activities carried on by the assessee IT(TP)A No.1018/Bang/2022 that has been allegedly characterised by the Ld. TPO towards the promotion of brand are as under:

9.9 On an identical situation, Coordinate Bench of this Tribunal in case of Essilor India Pvt. Ltd vs DCIT in IT(TP)A No 29/Bang/2014 and IT(TP)A No.

227/Bang/2015 observed and held as under:

"12. We have heard the submissions of the learned counsel for the assessee as well as the ld. DR. The first aspect which was brought tour notice by the ld. counsel for the assessee is the decision of the ITAT in assessee's own case for assessment year 2009-10 and 2010-11 on the same issue of AMP expenses. The Tribunal took the following view after extracting the decision of the Hon'ble Delhi High Court in the case of M/s Maruti Suzuki India Ltd. (supra).

"21. Respectfully following the ratio of the decision of the Hon'ble Delhi High Court in the above cases, we hold that no TP adjustment can be made by deducing from the difference between AMP expenditure incurred by assessee-company and AMP expenditure of comparable entity, if there is no explicit arrangement between the assessee - company and its foreign AE for incurring such expenditure. The fact that the benefit of such AMP expenditure would also ensure to its foreign AE is not sufficient to infer existence of international trans action. The onus lies on the revenue to prove the existence of international transaction involving IT(TP)A No.1018/Bang/2022 AMP expenditure between the assessee-company and its foreign AE. We also hold that that in the absence of machinery provisions to ascertain the price incurred by the assessee-company to promote the brand values of the products of the foreign entity, no TP adjustment can be made by invoking the provisions of Chapter X of the Act.

22.Applying the above legal position to the facts of the present case, it is not a case of revenue that there existed an arrangement and agreement between the assessee-company and its foreign AE to incur AMP expenditure to promote brand value of its products on behalf of the foreign AE, merely because the assessee-company incurred more expenditure on AMP compared to the expenditure incurred by comparable companies, it cannot be inferred that there existed international transaction between assessee-company and its foreign AE. Therefore, the question of determination of ALP on such transaction does not arise. However, the transaction of expenditure on AMP should 'co treated as a part of aggregate of bundle of transactions on which TNMM should be applied in order to determine the ALP of its transactions with its AE. In other words, the transaction of expenditure on AMP cannot be treated as a separate transaction. In the present case, we find from the TP study that the operating profit cost to the total operating cost was adopted as Profit Level Indicator which means that the AMP expenditure was not considered as a part of the operating cost. This goes to show that the AMP expenditure was not subsumed in the operating profitability of the assessee-company. Therefore, in order to determine the ALP of international transaction with its AE, it is sine qua non that the AMP expenditure should be considered a part of the operating cost Therefore, we restore the issue of determination of ALP, on the above lines, to the file of the AO/TPO. The grounds of appeal raised by the assessee- company on this issue are partly allowed."

13. The ld. counsel for the assessee pointed out that none of the reasons given by the TPO in the order for assessment year 2013-14, for not following decision of the ITAT can be sustained. In this regard, the ld. counsel brought to our notice the facts which were highlighted by the assessee before the DRP.

16. We have given our careful consideration to the rival submissions. The Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. (MSIL) v. Addl. CIT, TPO [2010] 328 ITR 210 (Delhi), in the case of a licensed manufacturer incurring AMP expenses it was held that it incurring of AMP expenses would be an international transaction and the issue of determination of ALP was remanded. This decision was however overruled in Maruti Suzuki India Ltd. v. Addl. CIT [2011] 335 ITR 121 (SC) wherein the Hon'ble Supreme Court left the question whether AMP expenses gives raise to international transaction or not open with the following observations:

> "In this case, the High Court has remitted the matter to the Transfer Pricing Officer ("the TPO" for short) with liberty to issue fresh show- cause notice. The High Court has further directed the Transfer Pricing IT(TP)A No.1018/Bang/2022 Officer to decide the matter in accordance with law. Further, on going through the impugned judgment of the High Court dated July 1, 2010, we find that the High Court has not merely set aside the original show cause notice but it has made certain observations on the merits of the case and has given directions to the Transfer Pricing Officer, which virtually conclude the matter. In the circumstances, on that limited issue, we hereby direct the Transfer Pricing Officer, who, in the meantime, has already issued a show cause notice on September 16, 2010, to proceed with the matter in accordance with law uninfluenced by the observations/directions given by the High Court in the impugned judgment dated July 1, 2010.
>
> The Transfer Pricing Officer will decide this matter on or before December 31, 2010.
>
> The civil appeal is, accordingly, disposed of with no order as to costs."

17. The Hon'ble Delhi High Court in an other case of Maruti Suzuki India Ltd. Vs. CIT 381 ITR 117 (Delhi) held that the fact that the benefit of such AMP expenses would also ensure to the AE is itself insufficient to infer the existence of an international transaction. Similar decision was also rendered by the Hon'ble Delhi High Court in the case of CIT (LTU) v. Whirlpool of India Ltd., 381 ITR 154. The bright line test which was applied by the AO in the present case was also applied by the AO in the aforesaid cases. The bright line test which was accepted by the Special Bench of ITAT in the case of L.G. Electronics India Pvt. Ltd. v. ACIT (2013) 22 ITR (Trib.) 1 (Del)(SB) was held by the Hon'ble Delhi High Court to be not correct. In the case of Maruti Suzuki (supra), the facts were Maruti Suzuki India Ltd. (MSIL) was engaged in the manufacture of passenger cars in India. It was a subsidiary of SMC, a Japanese company. MSIL started its business in 1982 as a Government of India owned company. SMC was selected as the business partner independently by MSIL. The co-branded trade mark "Maruti-Suzuki" was used since the inception of MSIL. A licence agreement was entered into between MSIL and SMC in October 1982 for its models M-800, Omni and Gypsy. By the agreement, MSIL was permitted to use the co-branded trade mark "Maruti- Suzuki" on the vehicles.

In the assessment of MSIL for assessment year 2005-06, the AO invoked the provisions of section 92CA(1) of the Act and referred the case to the Transfer Pricing Officer for determination of the arm's length price in relation to the international transactions undertaken by MSIL with its associated enterprise, SMC. The Transfer Pricing Officer passed an order making an adjustment of Rs. 154.12 crores towards the advertisement, marketing and sales promotion expenses imputing a notional arm's length compensation towards the advertisement, marketing and sales promotion expenses incurred by MSIL for SMC. On the above facts, the Hon'ble Delhi High Court held as follows:

> "…. when the licence agreements were originally entered into in 1982, MSIL was known as MUL and SMC did not hold a single share in MUL. In 2003 SMC acquired the controlling interest in MSIL. There were various models of Suzuki motor cars manufactured by MSIL and each IT(TP)A No.1018/Bang/2022 model was covered by a separate licence agreement. Under these agreements, granted licence to MSIL to manufacture that particular car model and provided technical know-how and information and right to use Suzuki's patents and technical information. It also gave MSIL the right to use Suzuki's trade mark and logo on the product. Pursuant to this agreement, MSIL was using the co-brand, i.e., Maruti Suzuki trade mark and logo for more than 30 years. This cobrand could not be used by SMC and was not owned by it. The clauses in the agreement between MSIL and SMC indicated that permission was granted by SMC to MSIL to use the co- brand "Maruti Suzuki" name and logo. The mere fact that the cars manufactured by MSIL bore the symbol "S" was not decisive as the advertisements were of a particular model of the car with the logo "Maruti-Suzuki". The Revenue had been unable to contradict the submission of MSIL that the co-brand mark "Maruti-Suzuki" in fact did not belong to SMC and could not be used by SMC either in India or anywhere else. The decision in the case of Sony Ericsson requires that the mark or brand should belong to the foreign associated enterprise. The Revenue also did not deny that as far as the brand "Suzuki" was concerned its legal ownership vested with the foreign associated enterprise, i.e., SMC. Moreover as MSIL was concerned, its operating profit margin was 11.19 per cent. which was higher than that of the comparable companies whose profit margin was 4.04 per cent. Therefore, applying the transactional net margin method it must be stated that there was no question of a transfer pricing adjustment on account of advertisement, marketing and sales promotion expenditure. The advertisement, marketing and sales promotion expenses incurred by MSIL could not be treated and categorised as an international transaction under section 92B of the Act."

18. In the case of Whirlpool of India Ltd. (supra), it was held that there had to be an international transaction with a certain disclosed price. The transfer pricing adjustment envisages the substitution of the price of such international transaction with the arm's length price. The transfer pricing adjustment was not expected to be made by deducing from the difference between the excessive advertising, marketing and sales promotion expenditure incurred by the assessee and the advertising, marketing and sales promotion expenditure of a comparable entity that an international transaction existed and then proceeding to make the adjustment of the difference in order to

determine the value of such advertising, marketing and sales promotion expenditure incurred for the associated enterprise. Thus, the bright line test had been rejected as a valid method for either determining the existence of an international transaction or for the determination of the arm's length price of such transaction. Although under section 92B read with section 92F(v), an international transaction could include an arrangement, understanding or action in concert, this could not be a matter of inference. There had to be some tangible evidence on record to show that two parties had acted in concert. It was also held that the provisions under Chapter X envisaged a separate entity concept. In other words, there could not be a presumption that the assessee was a subsidiary of the foreign company and that all the activities of the assessee were in fact dictated by the foreign company. Merely IT(TP)A No.1018/Bang/2022 because the foreign company had a financial interest, it could not be presumed that advertising, marketing and sales promotion expenses incurred by the assessee were at the instance or on behalf of the foreign company. The initial onus was on the Revenue to demonstrate through some tangible material that the two parties acted in concert and further that there was an agreement to enter into an international transaction concerning advertising, marketing and sales promotion expenses."

19. In the light of the law as it exists today, we shall examine the arguments of the rival parties. There has been no agreement between Essilor International which owns the various brands set out by the TPO in his order and the Assessee to incur any Advertisement and Marketing or Sales promotion expenses. None of the other reasons given by the TPO which have been explained by the Assessee and set out in the earlier paragraph can be the basis to hold that there was in fact an international transaction in the matter of incurring of AMP expenses by the Assessee. The order of the Tribunal in Assessee's own case for A.Y.2009-10 and 2010-11 in our view requires to be followed and there are no reasons whatsoever to take a different view. Consequently, there could not be any exercise of determining the ALP of the AMP expenses by comparing the expenses incurred by the Assessee with comparable companies. In view of the above conclusions, the other aspects whether the comparable companies chosen by the TPO are in fact comparable in terms of Functions performed, Assets employed and Risks assumed (FAR) analysis and other aspects of determination of ALP does not require any consideration. Therefore the addition made on account of determination of ALP of AMP expenses in AY 2011-12 to 2014-15 is directed to be deleted."

10. In our view the above view by the coordinate bench requires to be followed, and there are no reasons whatsoever to take a different view. Respectfully following the above view, we redirect the Ld.AO/TPO to delete the addition made towards AMP expenses.

3.1 In view of the above order of the Tribunal, taking a consistent view, we allow these grounds taken by the assessee in both the appeals for the assessment years 2013-14 & 2014-15."

7. The facts being identical in the year consideration, respectfully following the above decision, we direct the AO/TPO to delete the addition made towards ALP determined for AMP expenses.

10. Respectfully following the above decision, we delete the addition towards ALP for AMP expenses. These grounds are allowed.

IT Support Services/SWD segment (Grounds 20 to 29)

11. The ld. AR submitted that in the TP study the assessee calculated the PLI @ 15%. However, in the OGE to the DRP IT(TP)A No.1018/Bang/2022 directions, the TPO has considered the assessee's PLI at 10.12% which is wrong. He submitted that since the assessee's PLI is 15% and 35th percentile of the comparable companies is 13.37%, no adjustment should be made in the IT Support services/SWD segment. He submitted that a rectification application dated 28.07.2022 in this regard filed by the assessee is pending before the revenue authorities & copy of the same is also produced.

12. The ld. DR relied on the orders of lower authorities.

13. We have considered the rival submissions. We find substance in the submission of the ld. AR. We note that at page 516 of the Appeal set, the operating margin (OP/OC) has been calculated at 15% by the assessee. In the OGE to the DRP directions, the TPO has considered the taxpayer's PLI at 10.12% which is at page 42 of Appeal set, which is wrong. The assessee's PLI at 15% has not been disputed by the TPO/DRP, which is more than the 35th percentile at 13.37%. In view of the this, no adjustment can be made in the SWD segment. It is held accordingly. The grounds are allowed.

BSS Segment (Grounds 30 to 32)

14. Consequent to the directions of the DRP, the TPO in OGE retained 9 comparables as follows:-

(i) Goldmine Advertising Ltd.

(ii) Confluence Integrated Services Pvt. Ltd.

(iii) ScareCrow Communications Ltd.

(iv) Axience Consulting Pvt. Ltd.

(v) Dun & Bradstreet Information Services India Pvt. Ltd.

(vi) Pressman Advertising Ltd.

(vii) Lintas India Pvt. Ltd.

(viii) Majestic Research Services & Solutions Ltd.

(ix) Chell India Pvt. Ltd.

15. The TPO calculated the ALP as under:-

IT(TP)A No.1018/Bang/2022 Business Support Services Particulars Amount (in Rs.) Taxpayer's operating revenue 16,12,73,531 Taxpayer's operating cost 14,02,18,274 Taxpayer's operating profit 2,10,55,257 Taxpayers PLI 15.02% 35th Percentile Margin of comparable set 17.11% Adjustment required (if PLI < 35th percentile) Yes Median margin of comparable set 19.43% Arm's Length Price {(1+M)*OC} 16,74,62,684 Price received 16,12,73,531 Shortfall being adjustment 61,89,154

16. The ld. AR sought for exclusion of 6 companies at Sl.No.(iv) to

(ix) listed above and relied on the decisions of the coordinate Bench of this Tribunal in the following cases:-

(i) ARM Embedded Technologies Pvt. Ltd. [IT(TP)A No.899/Bang/2022 for AY 2018-19 dated 8.6.2023.

(ii) TiVo Tech Pvt. Ltd. [IT(TP)A No.862/Bang/2022 for AY 2018-19 dated 30.3.2023.

17. He further submitted that the six companies at Sl. Nos. (iv) to

(ix) above have been excluded on the functional dissimilarity in the BSS segment by the Tribunal in the case of ARM Embedded Technologies Pvt. Ltd. (supra), therefore the same ratio may be applied in this case also. He further submitted that if any one of the six companies at sl. Nos. (iv) to (ix) is excluded on functional dissimilarity, the assessee will not press for exclusion of the remaining companies.

18. The ld. DR relied on the orders of the lower authorities.

19. We have heard both the parties and perused the material on record. We have gone through the functional profile of the assessee. As per the submission of the assessee, out of the six comparable companies, we think it fit to consider Dun & Bradstreet Information IT(TP)A No.1018/Bang/2022 Services India Pvt. Ltd. which is functionally different with the assessee's functional profile. This company has been considered by the Tribunal in the case of ARM Embedded Technologies Pvt. Ltd. (supra) and it is observed that this company is engaged in providing services such as business information report, credibility and business insight solutions, supply management solutions, etc. and held that it is functionally not comparable with the BSS segment as follows:-

"(C) Dun & Bradstreet Information Services India Pvt. Ltd.:

Functionally dissimilar

10. The ld. A.R. submitted that Dun & Bradstreet is engaged in providing service such as Business Information Report, Credibility & Business Insight solutions, Supply Management Solutions, etc. These suites of services are in the nature of credit risk

> solutions and trading exchange solutions, which are not comparable activities undertake by MSS providers such as the Assessee. Further, the Company is not a pure service provider as it also offers technology products, unlike the Assessee. It is also submitted that the Company earns revenue from subscription or retainership arrangements as well as royalty income which is in contrast to the Assessee's business model under MSS segment. It is submitted that no segmental details are available as regards to various suites of services provided by the Company.
>
> 10.1 Reliance in this regard is placed by the ld. A.R. on the Order dated 30.03.2023 passed by this Tribunal in the case of TiVo Tech Pvt.

Ltd. v. ACIT in IT(TP)A No. 862/Bang/2022, wherein in the case of a similarly placed assessee for the assessment year 2018-19, this company came to be excluded.

10.2 The ld. D.R. relied on the orders of the lower authorities.

11. We have heard the rival submissions and perused the materials available on record. This issue came for consideration before this Tribunal in the case of Tivo Tech Pvt. Ltd. cited (supra) wherein the Tribunal held as under:

> "9(ii) It is submitted that Dun & Bradstreet is engaged in providing services in the nature of credit reporting, risk management, learning and economic insights, etc. The company provides credit risk and financial analysis data insights for businesses, which are different from that of the functions performed by the Assessee in its MSS segment. Further, the company is also not a pure service provider as it also offers technology products. It has earned revenue from sale of products during FY 2017-18 and as per the revenue recognition policy, the IT(TP)A No.1018/Bang/2022 company earns revenue from subscription or retainership arrangements as well as royalty income which is not comparable to the services rendered by the Assessee. It is submitted that no segmental details are available as regards the varied services provided by the Company. It is evident from the Company's website that the company is engaged in providing varied products/ services such as Business Information Report, Credibility & Business Insights Solutions, Supply Management Solutions, etc. These suites of services are in the nature of credit risk solutions and trading exchange solutions, which are not comparable to the activities undertaken by a routine MSS provider. Therefore, the company ought to be excluded from the final list of comparables.
>
> The Ld.DR relied on the orders passed by the authorities below. We have perused the submissions advanced by both sides in light of records placed before us.
>
> We note that as per the annual report placed at page 4556, the description of the project or services provided by this company is mentioned to be credit reporting services. At page 4662, we note that this company is engaged primarily in the

business of providing risk management and sales and marketing solutions. The background of the company also describes to be providing learning and economic insight services. The company offers a wide suite of information solutions and its services are used extensively by banks, financial institutions, multi nationals, corporate entities, public sector undertaking, exporters and importers. It also describes itself to be in the field of market analysis, locate prospects and incurs revenue from new and existing customers. The sales and marketing solutions offered by this company also include sale of data and related services. In our considered opinion, these functions cannot be compared with the limited services rendered by assessee to its AEs.

We accordingly direct this comparable to be excluded."

11.1 In view of the above order of the Tribunal on the basis of functionality, we direct the AO/TPO to exclude this company M/s. Dun & Bradstreet Information Services India Pvt. Ltd. from the list of comparables."

20. Respectfully following the above decision, we direct the TPO/AO for exclusion of Dun & Bradstreet Information Services India Pvt. Ltd. on the basis of functional dissimilarity. Accordingly, as per the submission of the ld. AR, the other companies are not considered as not pressed. This issue is partly allowed.

IT(TP)A No.1018/Bang/2022 Disallowance of Seminar, Conventions & Sales Promotion expenses (Grounds 33 to 37).

21. The assessee incurred expenses towards Seminar, Conventions & Sales Promotion. The AO issued notices u/s. 142(1) and the assessee submitted reply on 22.09.2021. The AO relied on CBDT Circular No.5/2012 dated 01.08.2012 and observed that any expenses incurred in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible u/s. 37(1) of the Act. He also relied on the judgement of Hon'ble High Court of Punjab & Haryana in the case of CIT vs. Kap Scan and Diagnostic Centre (P.) Ltd. reported in [2012] 25 taxmann.com 92/344 ITR 476. He also relied on the ITAT Mumbai decision in the case of ACIT v. Liva Healthcare Ltd. [2016] 181 TTJ 433 (Mum Trib). Pursuant to the directions of the ld. DRP to the AO to verify the evidence submitted before the DRP and identify the allowable business expenditure like meetings, conferences, etc.; after verifying the details of expenditure and sample copies of supporting documents, the AO noted that the following expenditure incurred towards training, honorarium and travel & stay of Doctors are not allowable u/s. 37(1) of the Act:-

Sr Description Amount Remarks No of expenses (in Rs.) 1 Training 22,34,814 The assessee has claimed that these expenses 1,35,000 payments are made to institutions for providing necessary information to doctors on use of equipments etc. However, no supporting documents are provided to show that any such training is imparted to 2 Honorarium 29,57,490 doctors.

The assessee has submitted that it is paid for appreciation to the speakers.

However, these expenditure are in nature of business expenditure like internal meetings / conferences of the assessee. Hence the same is not allowed.

IT(TP)A No.1018/Bang/2022

| | | | |
|---|---|---|---|
| 3 | Travel and stay and other expenses | 47,91,603 | The assessee has submitted that these expenses are for travel and accommodation of doctors to attend the events and conferences. The nature of these expenses are prohibited by law, hence the same is not allowable in view of explanation to section 37(1) of I T Act. |
| 4 | Meeting, Conference and event related expenses | 2,08,86,244 | The assessee has submitted that these expenses are in relation to event/conference organized by Alcon India(Such as meeting expenses, banquet hall and other associated expenses)- whereinkey speakers/doctors |

are invited to share their insights. However, these expenditure are not in nature of business expenditure like internal meetings / conferences of the assessee. Hence the same is not allowed in view of directions of Hon'ble DRP.

5 Sponsorship 6,18,26,713 The assessee has submitted that these 14,56,392 expenses include payments made to various organisations/institutions in connection with patient education and awareness programmes etc. However, these expenditure are not in nature of business expenditure like internal meetings/conferences of the assessee.

Hence the same is not allowed in view of directions of Hon'ble DRP.

| | | |
|---|---|---|
| | Total disallowance | 9,42,88,256 |

22. The AO accordingly disallowed Rs.9,42,88,256 u/s. 37 of the Act.

23. The ld. AR of the assessee reiterated the submissions made before the lower authorities and strongly submitted that these are not in the nature of freebies. It was incurred for the business expediency of the assessee and referred to sample copy at page 2697 and submitted that it was paid to All India Ophthalmological Society and not to the Doctors.

24. The ld. DR relied on the orders of the lower authorities.

IT(TP)A No.1018/Bang/2022

25. After hearing the rival contentions, we note that similar issue has been decided by the coordinate Bench of the Tribunal in the assessee's own case for AY 2017-18 (supra) and it was held as under:-

> "27. We have heard rival submissions and perused the material on record. It is pertinent to note that prior to the judgment of the Hon'ble Apex Court in the case of M/s.Apex Laboratories Pvt. Ltd. v. DCIT [2022] 135 taxmann.com 286 (SC) many of the judicial pronouncements had held that MCI Regulations are not applicable on pharmaceutical companies and expenses incurred by such companies are not violative of CBDT Circular. During this phase of assessment, there were only adhoc summary basis evaluation of expenditure. In the present case also there is no critical evaluation of the expenses and post the Hon'ble Supreme Court judgment, the dictum laid down, same needs to be followed and each of the expenditure needs to be evaluated to see if the disallowance is justified. It was claimed that even if the criteria as laid down in CBDT Circular and also the MCI Regulation (as now affirmed by the Hon'ble Apex Court is applied), the expenditure incurred towards contractual obligation with Doctors and employees of pharmaceutical companies does not call for disallowance. In the present case, the A.O. had primarily made disallowance by referring the CBDT Circular No.5/2012 dated 01.08.2012. In the larger interest of justice, in view of the latest judgment of the Hon'ble Apex Court, which has examined the very same issue, it becomes necessary to examine the exact nature of expenses incurred by the assessee for Doctors from all angles. Therefore, for substantial question and cause, necessarily, the matter needs fresh verification by the A.O., especially in the light of the recent judgment of the Hon'ble Supreme Court in the case of M/s.Apex Laboratories Pvt. Ltd. v. DCIT (supra). For the aforesaid purpose, the issues is remitted back to the AO to examine the details submitted in the light of the decision of the Apex Court after giving an opportunity of being heard to the assessee. It is ordered accordingly."

26. Respectfully following the above decision of the Tribunal, we also remit the issue to the AO for examination and fresh decision in accordance with law in the same terms.

IT(TP)A No.1018/Bang/2022

27. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Pronounced in the open court on this 12th day of July, 2023.

| | |
|---|---|
| Sd/- | Sd/- |
| ( GEORGE GEORGE K.) | (LAXMI PRASAD SAHU ) |
| VICE PRESIDENT | ACCOUNTANT MEMBER |

Bangalore,
Dated, the 12th July, 2023.

/Desai S Murthy /

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.