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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 22nd September, 2015
Decided on: 13th January, 2016

\+ **ITA 349/2015**

YUM RESTAURANTS (INDIA) PRIVATE LIMITED..... Appellant
Through: Mr. Nageshwar Rao with Mr. Sandeep S. Karhail, Mr. Aniket D. Agarwal, Advocates.

versus

INCOME TAX OFFICER ..... Respondent
Through: Mr. G.C. Srivastava with Mr. Daksh Bhardwaj and Ms. Lakshmi Gurung, Advocates.

**AND**

\+ **ITA 388/2015**

COMMISSIONER OF INCOME TAX-09 .... Appellant
Through: Mr. G.C. Srivastava with Mr. Daksh Bhardwaj and Ms. Lakshmi Gurung, Advocates
versus

YUM RESTAURANTS (INDIA) PRIVATE LIMITED..... Appellant
Through: Mr. Nageshwar Rao with Mr. Sandeep S. Karhail, Mr. Aniket D. Agarwal, Advocates.

**CORAM:**
**JUSTICE S.MURALIDHAR**
**JUSTICE VIBHU BAKHRU**

**J U D G M E N T**

% **13.01.2016**

**Dr. S. Muralidhar, J.:**

1. These are two appeals under Section 260-A of the Income Tax Act, 1961 ('Act') against the order dated 12th December 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 935/Del/2014 for the Assessment Year ('AY') 2009-10. ITA No. 388/2015 is by the Revenue and ITA No. 349 of 2015 is by the Assessee.

***Background facts***

2. The Assessee, Yum Restaurants (India) Private Limited ('Yum India'), is part of the Yum Restaurants Group with its ultimate holding company being Yum! Brands Inc. USA (Yum USA). 99.99% of shares of Yum India were initially held by Yum Restaurants Asia Private Limited ('Yum Asia'). After 28th November 2008, the shares were held by Yum! Asia Franchise Pte. Ltd. Singapore ('Yum Singapore') pursuant to a restructuring within the group. Yum India had a licence arrangement with Kentucky Fried Chicken International Holdings Inc. ('KFC') and Pizza Hut International LLC ('Pizza Hut') for opening KFC and Pizza Hut Restaurants in the Indian sub-continent. The licences were later assigned by KFC and Pizza Hut to Yum Asia. Subsequently it was assigned by Yum Asia in favour of Yum Singapore with effect from August 2008. Yum India also entered into an agreement with Yum Asia and subsequently with Yum Singapore with effect from August 2008 for the provision of support to Pizza Hut, KFC and ANW in South Asia.

3. The restructuring that took place in 2008 of the Yum Group saw the splitting up of the business region of Yum Asia, the regional franchisee, into

two major regions, viz., China and countries other than China including India. It is stated that the group decided to hold shares in Yum India through Yum Singapore and, therefore, the entire share holding in Yum India was transferred from one holding company, viz., Yum Asia to another immediate holding company, Yum Singapore, although the ultimate beneficial owner of the share holding in Yum India remained the holding company viz., Yum USA.

4. The entire business/revenue margin of Yum India is stated to be categorised into three business segments:

(a) The franchise segment through which the Pizza Hut and KFC restaurants are operated in India through various franchisees. Yum India receives royalty from such franchisees in India. A portion of such royalty is paid to Yum Asia/Yum Singapore in accordance with the licence agreement between Yum India and the said entities for providing system and system properties for such franchisee business.

(b) The equity segment under which KFC restaurants are operated in India through outlets/stores owned by Yum India. It earns profits from sales made through these outlets and pays royalty to Yum Asia/Yum Singapore in accordance with the licence agreement entered into with them. It is stated that during the relevant AY, royalty was paid to Yum Asia/Yum Singapore on the same basis as the franchisee agreement.

(c) Service income: Yum India provides various support services viz., market development, licence services, ongoing support services for operation of restaurants in Sri Lanka, Mauritius, Bangladesh etc. (area countries outside India) for which it receives 'service income' from Yum

Asia in accordance with a 'separate service agreement' entered with it. For the marketing support services so provided, Yum India receives 'service income' from Yum Asia on cost plus mark-up basis.

5. It is stated that Yum Restaurants Marketing Private Limited ('Yum Marketing') was formed as a wholly owned subsidiary of Yum India after obtaining all necessary approvals of the Government of India. Yum Marketing is stated to operate on a 'no profit basis' for carrying out advertising, marketing and promotion ('AMP') activities on behalf of Yum India, its franchisees and business associates in India. Yum India, Yum Marketing and each franchisee are stated to have entered into a Contributors' Operating Agreement under which each franchisee is required to contribute a fixed percentage of its sales as its contribution towards AMP activities in India. Yum India is also required to contribute a fixed percentage from its 'equity stores' as its contribution towards AMP activities. The additional expenditure where found necessary to be incurred on AMP activities by Yum Marketing, is contributed by Yum India. Yum Marketing's activities are stated to benefit Yum India's business by (i) increasing sales at its 'equity stores' and (ii) in the form of higher royalty income from its franchisees, a major portion of which is retained by Yum India in terms of its licence agreement with Yum Asia/Yum Singapore. It is stated that during the AY in question i.e. 2009-10, Yum India contributed Rs.4,79,48,122 to Yum Marketing for its 'equity segment'. According to Yum India since this was a purely domestic transaction, it was not included in Form 3CEB and/or transfer pricing (TP) study for the relevant AY.

***TP proceedings***

6. Yum India filed its income tax return for AY 2009-10 on 30th March 2010 declaring a loss of Rs.18,26,77,909. After accounting for credit for taxes deducted at source in the sum of Rs.4,00,07,839, a refund was computed. The return was picked up for scrutiny. Reference was made to the Additional Director of Income Tax, Transfer Pricing-II (IV), New Delhi (hereafter the Transfer Pricing Officer i.e. TPO) under Section 92CA(3) of the Act. Yum India submitted a TP Study and the relevant documents to explain the pricing of its international transactions with its Associated Enterprises ('AEs').

7. By an order dated 8th August 2012, the TPO proposed a TP adjustment of Rs.6,50,13,564. This included Rs.5,27,33,344 on account of the AMP contribution made by Yum India to Yum Marketing. According to the TPO, the said sum ought to have been received by Yum India as reimbursement from its AEs on account of the creation of marketing intangibles. After referring to the losses suffered by Yum India, the TPO concluded that Yum India had not been adequately compensated for the AMP expenses incurred by it. The TPO noted that of the total AMP contribution of Rs.8,42,07,083 made by Yum India to Yum Marketing during AY 2009-10 a sum of Rs.3,62,58,961 was its contribution for market support 'service income segment'. The TPO was of the view that this did not require any adjustment/separate benchmarking since Yum India was reimbursed cost of such expenses plus a mark-up of 12.51% by Yum Asia by way of service income under the service agreement. As regards the balance sum of Rs.4,79,48,122, the TPO found that it pertained to Yum India's contribution

for the AMP expenses for its 'equity segment'. Here the TPO was of the view that this had to be separately compensated by the AE due to creation of marketing intangibles. Further the TPO was of the view that a mark-up of 9.98% should be applied to the above sum. Consequently, the TPO recommended an adjustment of Rs.5,27,33,344 to the arm's length price ('ALP') of the 'international transaction' on 'account of contribution of brand building expenses.' For this purpose, the TPO considered the comparable ALP as 'Nil'.

8. The case of Yum India, however, has been that it is a separate entity undertaking an entrepreneurship function for promoting its own business. It is claimed that Yum India does not undertake any purchase transactions from its AEs. It is further claimed that AMP is an intrinsic function of Yum India. The further case of Yum India is that the TPO did not apply any prescribed method for taking the comparable ALP to be 'nil' and treating it as an international transaction.

***Proceedings before the AO and the DRP***

9. The Assessing Officer ('AO') accepted the recommendation of the TPO and issued a draft assessment order dated 28th March 2013 under Section 144(3) read with Section 144C(1) of the Act. The total income of Yum India was determined at Rs.40,65,40,535. In doing so the AO, inter alia, disallowed the set off and carry forward of business losses incurred till AY 2008-09. Separately, the AO also made a disallowance of Rs.6,05,01,229 towards payment made to Yum Marketing under Section40A(2)(b) of the Act which again included AMP contributions made by Yum India to Yum

Marketing.

10. Yum India then filed objections before the Dispute Resolution Panel ('DRP'). By its order dated 20th December 2013, the DRP upheld the conclusions reached by the AO and rejected Yum India's submission as regards set off and carry forward of business losses. The proposed TP adjustment was also upheld. However, the alternative plea of Yum India that the same AMP expenses could not be disallowed twice, i.e., once as a TP addition and secondly as disallowance under Section 40A(2)(b) of the Act was upheld. Accordingly, the DRP directed that the TP addition of Rs.5,27,33,344 be deducted from the disallowance of Rs.6,05,01,229 under Section 40A(2)(b) of the Act. A net disallowance/addition of Rs.77,67,895 was made under Section 40A(2)(b) of the Act.

11. On the basis of the DRP's order the AO completed the assessment and assessed the income of Yum India (including the TP addition) at Rs.35,39,95,572 by the final assessment order dated 24th January 2014.

***The impugned order of the ITAT***

12. Both Yum India as well as the Revenue filed appeals before the ITAT. While the Revenue challenged the directions of the DRP to reduce the amount of disallowance under Section 40A(2)(b) of the Act, Yum India challenged it to the extent of sustaining the TP addition as recommended by the TPO as well as the disallowance of the carry forward of business losses.

13. By the impugned order dated 12th December 2014, the ITAT upheld the disallowances of the carry forward of business losses of earlier years. The

ITAT referred to the change in immediate share holding of Yum India from Yum Asia to Yum Singapore and held that by virtue of Section 79 of the Act, since there had been a change of more than 51% of the share holding pattern of the voting powers of shares beneficially held in AY 2008-09 of Yum India, the carry forward and setting off of business losses could not be allowed. As regards the TP adjustment, the ITAT followed the decision of its Special Bench in ***LG Electronics India Pvt. Ltd. v. ACIT 2013 152 TTJ (Del) (SB) 273*** (hereafter '***LG Electronics***') and directed the AO to decide the question afresh after allowing the Assessee a reasonable opportunity of being heard.

***The decision in Sony Ericsson***

14. It must be mentioned at this stage that prior to the filing of the present appeals by the Assessee and the Revenue against the aforementioned order of the ITAT, this Court in ***Sony Ericsson Mobile Communication India P. Ltd. v. Commissioner of Income Tax (2015) 374 ITR 118 (Del)*** decided the correctness of the decision of the Special Bench of the ITAT in ***LG Electronics.*** The said decision was delivered in a batch of appeals concerning Indian entities who were distributors of products manufactured by their respective foreign AEs. The following questions were addressed by the Division Bench in ***Sony Ericsson*** (*supra*):

> "(i) Whether the additions suggested by the Transfer Pricing Officer on account of Advertising/Marketing and Promotion Expenses (AMP Expenses' for short) was beyond jurisdiction and bad in law as no specific reference was made by the Assessing Officer, having regard to retrospective amendment to

Section 92CA of the Income Tax Act, 1961 by Finance Act, 2012.

(ii)Whether AMP Expenses incurred by the assessee in India can be treated and categorized as an international transaction under Section 92B of the Income Tax Act, 1961?

(iii) Whether under Chapter X of the Income Tax Act, 1961, a transfer pricing adjustment can be made by the Transfer Pricing Officer/ Assessing Officer in respect of expenditure treated as AMP Expenses and if so in which circumstances?

(iv) If answer to question Nos.2 and 3 is in favour of the Revenue, whether the Income Tax Appellate Tribunal was right in holding that transfer pricing adjustment in respect of AMP Expenses should be computed by applying Cost Plus Method.

(v) Whether the Income Tax Appellate Tribunal was right in directing that fresh bench marking/comparability analysis should be undertaken by the Transfer Pricing Officer by applying the parameters specified in paragraph 17.4 of the order dated 23.01.2013 passed by the Special Bench in the case of LG Electronics India (P) Ltd.?"

15. The important conclusions of the Division Bench in ***Sony Ericsson*** (*supra*) relevant to the case on hand were as under:

(i) The Court concurred with the majority of the Special Bench of the ITAT in ***LG Electronics*** qua the applicability of 92CA (2B) and how it cured the defect inherent in 92CA (2A). The issue concerning retrospective insertion of 92CA (2B) was decided in favour of the Revenue.

(ii) AMP expenses were held to be international transaction as this was not denied as such by the assessees therein.

(iii) Chapter X and Section 37(1) of the Act operated independently. The former dealt with the ALP of an international transaction whereas the latter deals with the allowability/disallowability of business expenditure. Also, once the conditions for applicability of Chapter X were satisfied nothing shall impede the law contained therein to come into play.

(iv) Chapter X dealt with ALP adjustment whereas Section 40A (2) (b) dealt with the reasonability of quantum of expenditure.

(v) TNMM applied with equal force on single transaction as well as multiple transactions as per the scheme of Chapter X and the TP Rules. Thus, the word 'transaction' would include a series of closely linked transactions.

(vi) The TPO/AO could overrule the method adopted by the Assessee for determining the ALP and select the most appropriate method. The reasons for selecting or adopting a particular method would depend upon functional analysis comparison, which required availability of data of comparables performing of similar or suitable functional tasks in a comparable business. When suitable comparables relating to a particular method were not available and functional analysis or adjustment was not possible, it would be advisable to adopt and apply another method.

(vii) Once the AO /TPO accepted and adopted the TNMM, but chose to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would lead to unusual and incongruous results as AMP expenses was the cost or expense and was not diverse. It was factored in the net profit of the inter-linked transaction. The TNMM proceeded on the assumption that functions, assets and risks being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm‘s length price. Then to make a comparison of a horizontal item without segregation would be impermissible.

(viii) The Bright Line Test (BLT) was judicial legislation. By validating the BLT the Special Bench in ***LG Electronics Case*** went beyond Chapter X of the Act. Even international tax jurisprudence and commentaries do not recognise BLT for bifurcation of routine and non-routine expenses.

(ix) Segregation of aggregated transactions requires detailed scrutiny without which there shall be no segregation of a

bundled transaction. Set off of transactions segregated as a single transaction is just and equitable and not prohibited by Section 92(3). Set-off is also recognized by international tax experts and commentaries.

(x) Segregation of bundled transactions shall be done only if exceptions laid down in ***EKL Appliances Case [2012] 345 ITR 241 (Del)*** are justified. Re-categorisation and segregation of transactions are different exercises; former would require separate comparables and functional analysis.

(xi) Economic ownership of a brand would only arise in cases of long-term contracts and where there is no negative stipulation denying economic ownership. Economic ownership of a brand or a trade mark when pleaded can be accepted if it is proved by the Assessee. The burden is on the Assessee. It cannot be assumed.

(xii) The RP Method loses its accuracy and reliability where the reseller adds substantially to the value of the product or the goods are further processed or incorporated into a more sophisticated product or when the product/service is transformed. RP Method may require fewer adjustments on account of product differences in comparison to the CUP Method because minor product differences are less likely to have material effect on the profit margins as they do on the price.

(xiii) Determination of cost or expense can cause difficulties in applying cost plus (CP) Method. Careful consideration should be given to what would constitute cost i.e. what should be included or excluded from cost. A studied scrutiny of CP Method would indicate that when the said Method is applied by treating AMP expenses as an independent transaction, it would not make any difference whether the same are routine or non-routine, once functional comparability with or without adjustment is accepted.

(xiv) The task of arm's length pricing in the case of tested party may become difficult when a number of transactions are interconnected and compensated but a transaction is bifurcated and segregated. CP Method, when applied to the segregated transaction, must pass the criteria of most appropriate method. If and when such determination of gross profit with reference to AMP transaction is required, it must be undertaken in a fair, objective and reasonable manner.

(xv) The marketing or selling expenses like trade discounts, volume discounts, etc. offered to sub-distributors or retailers are not in the nature and character of brand promotion. They are not directly or immediately related to brand building exercise, but have a live link and direct connect with marketing and increased volume of sales or turnover. The brand building

connect is too remote and faint. To include and treat the direct marketing expenses like trade or volume discount or incentive as brand building exercise would be contrary to common sense and would be highly exaggerated. Direct marketing and sale related expenses or discounts/concessions would not form part of the AMP expenses.

(xvi) The prime lending rate cannot be the basis for computing mark-up under Rule 10B(1)(c) of the Rules, as the case set up by the Revenue pertains to mark-up on AMP expenses as an international transaction. Mark up as per sub-clause (ii) to Rule 10B(1)(c) would be comparable gross profit on the cost or expenses incurred as AMP. The mark-up has to be benchmarked with comparable uncontrolled transactions or transactions for providing similar service/product.

(xvii) An order of remand to the ITAT for *de novo* consideration would be appropriate because the legal standards or ratio accepted and applied by the ITAT was erroneous. On the basis of the legal ratio expounded in this decision, facts have to be ascertained and applied. If required and necessary, the assessed and the Revenue should be asked to furnish details or tables. The ITAT, in the first instance, would try and dispose of the appeals, rather than passing an order of remand to the AO /TPO. An endeavour should be to ascertain and satisfy whether the gross/net profit margin would duly account for AMP

expenses. When figures and calculations as per the TNM or RP Method adopted and applied show that the net/gross margins are adequate and acceptable, the appeal of the assessed should be accepted. Where there is a doubt or the other view is plausible, an order of remand for re-examination by the AO/TPO would be justified. A practical approach is required and the ITAT has sufficient discretion and flexibility to reach a fair and just conclusion on the ALP.

***The present appeals***

16. In the appeal filed by Yum India, the questions urged for consideration broadly touch upon the issue of treatment of the AMP expenses of the international transactions as well as the issue of carry forward of accumulated business losses for the past years and set off under Section 79 of the Act.

17. The Revenue in its appeal seeks remand to the AO/TPO for a fresh decision on the issue concerning determination of the ALP of the international transactions involving AMP expenses in light of the decision of this Court in ***Sony Ericsson Mobile Communication India P. Ltd.*** (*supra*).

***Issue of carry forward of accumulated losses***

18. As regards the issue concerning the disallowance of carry forward of accumulated business losses of the past years and set off under Section 79 of the Act, the AO did not accept the contention of Yum India that since the ultimate holding company remained Yum USA, it was the beneficial owner of the shares, notwithstanding that the shares in Yum India were held

through a series of intermediary companies. The AO observed that the requirement of Section 79 was that the shares should be beneficially held by the company carrying 51% of voting power at the close of the financial year in which the loss was suffered. The parent company of Yum India on 31st March 2008 was the equitable owner of the shares but not as on 31st March 2009. Accordingly, Yum India was not permitted to set off the carry forward business losses incurred till 31st March 2008.

19. In dealing with this issue, the ITAT has in the impugned order analysed Section 79 of the Act and noted that the set off and carry forward of loss, which is otherwise available under the provisions of Chapter VI, is denied if the extent of a change in shareholding taking place in a previous year is more than 51% of the voting power of shares beneficially held on the last day of the year in which the loss was incurred. In the present case, there was a change of 100% of the shareholding of Yum India and consequently there was a change of the beneficial ownership of shares since the predecessor company (Yum Asia) and the successor company (Yum Singapore) were distinct entities. The fact that they were subsidiaries of the ultimate holding company, Yum USA, did not mean that there was no change in the beneficial ownership. Unless the Assessee was able to show that notwithstanding shares having been registered in the name of Yum Asia or Yum Singapore, the beneficial owner was Yum USA, there could not be a presumption in that behalf.

20. Having examined the facts as well as the concurrent orders of the AO and the ITAT, the Court finds that there was indeed a change of ownership

of 100% shares of Yum India from Yum Asia to Yum Singapore, both of which were distinct entities. Although they might be AEs of Yum USA, there is nothing to show that there was any agreement or arrangement that the beneficial owner of such shares would be the holding company, Yum USA. The question of 'piercing the veil' at the instance of Yum India does not arise. In the circumstances, it was rightly concluded by the ITAT that in terms of Section 79 of the Act, Yum India cannot be permitted to set off the carry forward accumulated business losses of the earlier years.

21. Consequently, the Court declines to frame a question at the instance of the Assessee Yum India on the issue of carry forward and set off of the business losses under Section 79 of the Act.

***AMP expenses***

22. On the issue of AMP expense, however, the appeals are admitted and the following questions of law are framed for consideration in both the appeals:

> "Does the issue concerning the determination of the existence of an international transaction between the Assessee and its AE involving AMP expenses and the further question of determination of its ALP have to be remanded to the AO/TPO for a fresh decision in light of the judgment of this Court in ***Sony Ericsson Mobile Communication India P. Ltd.*** (*supra*)?

23. On behalf of Yum India, it is submitted by Mr. Nageshwar Rao, learned counsel, that there is difference, for the purposes of determination of the existence of an international transaction involving AMP expenses, between a 'function' and a 'transaction'. It is further submitted that the operating agreement entered into between Yum India with its AE was not for rendering any services directly or indirectly. It is urged that AMP expenses

incurred were exclusively for the benefit of Yum India. It is submitted that the existence of international transactions had to be determined factually and could not be based on presumptions.

24. Mr. Rao further submitted that an ideal comparable as far as Yum India was concerned was Jubilant Foodworks Limited ('JFL') which was one of its main competitors. JFL was the franchisee of Domino's restaurants in India. Although JFL was set up in 1994-95 it kept incurring losses and did not break even till 2005-06. It was acknowledged even by the Revenue in the course of its submissions in ***Sony Ericsson Mobile Communication India P. Ltd.*** (*supra*) that the business franchise model of JFL did not result in an independent international transaction concerning AMP expenses. It is submitted that the AO/TPO, as well as the DRP, overlooked the JFL model and proceeded to infer the existence of an international transaction between Yum India and its AE involving AMP expenses merely because Yum India incurred losses. It is submitted that Yum Marketing was set up to provide transparency in regard to the AMP expenses incurred and to enable third parties to make a contribution to the overall AMP activity. It is for this reason that Yum Marketing carried out its marketing activities on a non-profit basis and on the principles of mutuality.

25. Countering the above submissions it is pointed by Mr. G.C. Srivastava, learned counsel for the Revenue, that while an independent third party discharging similar function in an uncontrolled situation would be a proper comparable, the Assessee had to discharge its burden of showing that JFL was promoting the brand owned by its AE 'without any compensation'. It is

submitted that agreement between JFL and its AE would have to be examined to ascertain the nature and extent of the obligation of brand promotion that is placed on JFL or the absence thereof. It is conceded that the comparable cannot be limited to application of the BLT.

26. The Court is of the view that after the decision in ***Sony Ericsson Mobile Communication India P. Ltd.*** (*supra*), the adoption of the BLT for determining the existence of an international transaction involving AMP is expenses no longer legally permissible. In that scenario, there would be a need for a detailed examination of the operating Agreement between Yum India, Yum Marketing and the franchisees to ascertain if any part of the AMP expenses is for the purpose of creating marking intangibles for the AE of Yum India. It is only after an international transaction involving Yum India and its AE in relation to AMP expenses is shown to exist, that the further question of determining the ALP of such international transaction would arise.

27. It is not possible to state that the Revenue has not placed any material to even prima facie show the existence of an agreement regarding AMP expenses. The question however remains whether it discloses an international transaction between Yum India and its AE in regard to AMP expenses for creating of marketing intangibles for the AE. If it is shown to exist the further question would be whether it is at ALP. The submission on behalf of Yum India that for that purpose, the franchise marketing model of JFL is an ideal comparable would then require to be considered.

28. For the above reasons, without commenting one way or the other on the

submissions of either the Revenue or the Assessee, the Court sets aside the impugned order dated 12th December 2014 of the ITAT in ITA No. 935/Del/2014 for AY 2009-10 and the corresponding orders of the AO/TPO and the DRP as regards the issue of AMP expenses and remands the issue concerning the determination of the existence of an international transaction between the Assessee and its AE involving AMP expenses and the further question of determination of its ALP to the AO/TPO for a fresh decision in light of the judgment of this Court in ***Sony Ericsson Mobile Communication India P. Ltd.*** (*supra*). The question framed is answered in the affirmative.

29. The appeals are accordingly disposed of.

**S.MURALIDHAR, J**

**VIBHU BAKHRU, J**

**JANUARY 13, 2016**
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