IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA NO. 1521/MUM/2017 : **A.Y : 2012-13**

M/s. Heinz India Pvt. Ltd., Unit Nos. 1901 & 1902, 19th floor, E&G Wings, Lotus Corporate Park, Off Western Express Highway, Goregaon (E), Mumbai 400 063. **PAN : AAACH0667B** (Appellant)	Vs.	ACIT, Circle-7(1)(2), Mumbai (Respondent)

Appellant by : Shri Nishant Thakkar
Respondent by : Shri Jayant Kumar

Date of Hearing : 15/11/2017
Date of Pronouncement : 09/02/2018

O R D E R

PER G.S. PANNU, AM :

The captioned appeal filed by the assessee is arising from order dated 31.01.2017 passed by the Assessing Officer u/s 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (in short 'the Act') giving effect to the directions of Dispute Resolution Panel-I, Mumbai (DRP) dated 13.12.2016.

2. In its appeal, assessee has raised the following Grounds of appeal :-

"On the facts and in the circumstances of the case and in law, the AO/ Transfer Pricing Officer (TPO), based on directions of DRP:

TRANSFER PRICING ADJUSTMENT ON ACCOUNT OF ADVERTISEMENT AND SALES PROMOTION EXPENSES ('AMP expenses')

1. *erred in making transfer pricing adjustment on account of AMP expenses*
2. *erred in computing the adjustment on account of AMP expenses at Rs 78,02,64,000*
3. *erred in making an adjustment on account of mark up on AMP expenses*

CORPORATE TAX GROUNDS

Disallowance under section 40(a)(i) of the Act

4. *erred in making disallowance under section 40(a)(i) of the Act amounting to Rs 6,04,33,418*

5. *erred in not considering the information/ documents which were filed by the appellant to demonstrate that no taxes were required to be deducted under the Act and no disallowance is warranted under section 40(a)(i) of the Act*

Reduction in profits eligible for deduction section 80IC of the Act

6. *erred in recomputing the deduction under section 80IC of the Act at Rs 136,19,30,302 as against an amount of Rs 137,63,74,569 claimed by the appellant, by holding that income/ receipt of Rs 1,44,44,357 was not derived from the industrial undertaking*

Short TDS credit

7. *erred in granting TDS credit of Rs 4,28,02,477 as against Rs 4,36,75,587 claimed by the appellant in its return of income (i.e. short TDS credit of Rs 8,73,110)*

Levy of interest under section 234B and 234C of the Act

8. erred in levying interest under section 234B and 234C of the Act

Initiation of penalty proceedings

9. erred in initiating penalty under Section 271(1)(c) of the Act for various disallowances/ additions ,

Computation of MAT credit

10. erred in not carrying forward the MAT credit amounting to Rs 18,17,07,328 (including surcharge and education cess) to the subsequent years as claimed in the return of income for the AY 2012-13

11. Without prejudice to the above, erred in not setting off the brought forward MAT credit of AY 2011-12 amounting to Rs 14,10,57,711 while computing the tax liability for AY 2012-13"

3. The appellant before us is a company incorporated under the provisions of the Companies Act, 1956 and is the wholly owned subsidiary of Heinz Italia S.r.l., and is engaged in the manufacture and sale of well-known beverage and instant food products under the brand name, Heinz Ketchup, Complan, Glucon-D, Nycil and Sampriti ghee. For the assessment year under consideration, it filed a return of income declaring an income of Rs.61,83,70,430/-, which was subject to a scrutiny assessment and vide order dated 31.01.2017 passed u/s 143(3) r.w.s. 144C(13) of the Act, the total income has been assessed at Rs.150,23,29,780/-, against which assessee is in appeal before us on the abovestated Grounds of appeal.

4. Insofar as Ground of appeal no. 1 is concerned, the same relates to an addition made by the Assessing Officer of Rs.78,02,64,000/- as a transfer pricing adjustment in terms of the determination of arm's length price by the Transfer Pricing Officer (TPO) vide order passed u/s 92CA(3) of the Act dated 28.01.2016. In this context, the relevant facts are that the TPO noted that assessee had incurred Advertising, Marketing and Promotional (AMP) expenditure of Rs.159.41 crores (exclusive of expenses on domestic products) and, therefore, he show-caused the assessee as to why the benefit accruing to its associate enterprises with regard to the accretion in the value of brand should not be treated as an international transaction subject to transfer pricing assessment. A perusal of the order of the TPO reveals that the assessee-company made varied submissions, *inter-alia*, contending that the AMP expenditure was incurred by way of payment to third parties in India, and it was for assessee's own benefit and that any benefit resulting to the associate enterprises was only incidental inasmuch as assessee was not engaged in the distribution of products manufactured by its associate enterprises. One of the pertinent defence canvassed by the assessee was that an identical controversy in Assessment Year 2011-12 had arisen, and the then DRP, vide its order dated 28.12.2015, had negated the position canvassed by the TPO. The TPO, however, disagreed with the assessee and held that on account of incurrence of AMP expenses by the assessee, benefit accrued to assessee's associate enterprises, Heinz Italia and H.J. Heinz Company, U.S.A (in short 'Heinz USA') by way of accretion to the value of the brands owned by the respective associate enterprises. Accordingly, he proceeded to determine the arm's length price of such benefit, which he quantified at Rs.78,02,64,000/-, and this has formed the basis for the Assessing Officer to make the impugned addition to the returned income.

Assessee also raised objections before the DRP, but it has also concurred with the decision of the TPO. So far as the plea based on the decision of the DRP on the very same issue for Assessment Year 2011-12 was concerned, the DRP noted that the decision of the DRP in Assessment Year 2011-12 was based on the judgment of the Hon'ble Delhi High Court in the case of *Maruti Suzuki India Ltd. vs CIT, [2015] 64 taxmann.com 150 (Delhi)*, against which the Hon'ble Supreme Court has admitted Department's SLP and thus, it was concurring with the action of the TPO in order to keep the matter alive. Accordingly, the Assessing Officer made an addition of Rs.78,02,64,000/- to the returned income.

5. At the time of hearing, the learned representative for the assessee pointed out that the said issue had come up before the Tribunal on two occasions; firstly, in relation to Assessment Years 2008-09 to 2010-11, wherein vide order dated 27.04.2016 in ITA Nos. 7732/Mum/2010, 1210/Mum/2014, 1167/Mum/2014 & 393/Mum/2015, the issue has been decided in favour of the assessee and, secondly, in relation to Assessment Year 2011-12, wherein the Tribunal, following its earlier decision, affirmed the decision of the DRP vide its order dated 06.11.2017 in ITA No. 2101/Mum/2016. By referring to both the precedents, it is canvassed that the transfer pricing adjustment on account of AMP expenditure deserves to be deleted, since in this year too, there is no agreement between the assessee and its associate enterprises for sharing of AMP expenditure, a fact-situation similar to earlier years.

6. The ld. DR appearing for the Revenue has not contested the factual matrix brought out by the learned representative, but referred to the

discussion in para 2.2 of the assessment order dated 31.01.2017 (supra), wherein the Assessing Officer, by referring to the report in Form 3CEB, has stated that assessee itself admits that the AMP expenditure was an 'international transaction' inasmuch as "*there is price reduction on goods imported towards AMP expenditure incurred by the assessee as reported in Form 3CEB*".

7. The learned representative strongly rebutted the contention sought to be raised by the ld. DR, and in this context, referred to page 161 of the Paper Book wherein is placed the relevant Appendix-B to Form no. 3CEB, which according to him, rather points to the contrary. In Form no. 3CEB, while detailing the international transaction of sale of intermediate goods to the associate enterprises, assessee had pointed out that such sales are made at direct cost plus 10% in terms of the global transfer pricing policy and it is further stated therein that the assessee does not incur marketing and promotional expenditure with respect to such sales. On this basis, it is sought to be pointed out that the argument raised by the ld. DR is factually incorrect.

8. We have carefully considered the rival submissions. As our aforesaid discussion reveals, the sum and substance of the case made out by the income-tax authorities is that on account of incurrence of AMP expenditure, assessee has benefitted the associate enterprises inasmuch as it has resulted in promotion and enhancement in the value of brands, which are otherwise owned by the associate enterprises. This controversy is a recurring issue and in the past, it had come-up before the Tribunal. For Assessment Years 2008-09 to 2010-11, the Tribunal vide order dated 27.04.2016 considered a similar

stand of the income-tax authorities and found, on facts, that there was no evidence to suggest that the assessee has rendered any service to its associate enterprises in the course of incurrence of the AMP expenditure. The operative part of the order of the Tribunal dated 27.04.2016 (supra) is reproduced hereinafter :-

> *"5.2. We also find that the TPO has not brought on record any evidence to prove that the assessee had rendered any services to its AE.s under the head AMP. On the contrary, payment on account of advertisements etc.(Rs.71.04 crores) was made to unrelated domestic third parties. In our opinion, these basic facts compelled the TPO to hold that in the case under consideration the international transaction was not the actual AMP expenditure, but the benefit conferred by it to its AE.s in form of promotion and brand value augmentation of the brands owned by them. So, the fundamental question to be answered is to decide as to whether in absence of any agreement for payment of AMP expenses to the AE.s can it be held that there was an international transaction only on the basis that AMP expenditure, incurred by the assessee, would have benefitted the AE.s., who owned the brands used by the assessee. In our opinion, the arguments suffers from the very basic flaw that an assessee does not incurs AMP to increase its sales, but to benefit the AE.s. In other words, the TPO has failed to prove that the real intention of the assessee in incurring advertisement and marketing expenses were to benefit the AE.s. and not to promote its own business. The turnover of the assessee proves that during the year under consideration the assessee had done a reasonably good business, as state earlier. The resultant profit was offered for taxation in India. Therefore, transferring of profit from India, the basic ingredient to invoke the provisions of section 92 of the Act, remains unproved.*
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> *5.3. Here, we would like to refer to the case of Maruti Suzuki (supra) of the Hon'ble Delhi High Court.(supra). In that matter all the arguments raised by the TPO have been discussed at length. Similar judgments were delivered in the cases Whirlpool of India Ltd.(supra), Bausch & Lomb Eyecare(India) Pvt. Ltd (supra), Yum Restaurants (India) Pvt. Ltd. (ITA*

No.349/2015 dated 13/01/ 2016). In the above-mentioned decisions, the issue of the very existence of international transaction on incurring AMP expenditure and the method of determination of ALP had arisen. The Hon'ble Delhi High Court had categorically held that in the absence of agreement between Indian entity and foreign AE whereby the Indian entity was obliged to incur AMP expenditure of a certain level for foreign entity for the purpose of promoting the brand value of the products of the AE.s, no international transaction can be presumed. It was further held that the fact that there was an incidental benefit to the foreign AE, it could not be concluded that AMP expenditure incurred by an Indian assessee was for promoting brand of foreign AE. The Hon'ble Court further held that in the absence of machinery provisions, bringing an imagined transaction to tax was not possible. While coming to this conclusion, the Hon'ble High Court had placed reliance on the decisions of B.C.Srinivasa Setty (128 ITR 294) and PNB Finance Ltd.(307 ITR 75).

We find that in the case of Bausch & Lomb Eyecare (India) (P) Ltd.(supra), the Hon'ble Delhi High Court, after referring to its earlier decisions in the cases of Maruti Suzuki India Ltd.(supra) and Whirlpool of India (P) Ltd.(supra), has considered the question of existence of the inter-national transaction and computation of ALP thereon. We would like to reproduce relevant portion of the order and same read as under:

> *"53. A reading of the heading of Chapter X['Computation of income from international transactions having regard to arm's length price"] and Section 92 (1) which states that any income arising from an international transaction shall be computed having regard to the ALP and Section 92C (1) which sets out the different methods of determining the ALP, makes it clear that the transfer pricing adjustment is made by substituting the ALP for the price of the transaction. To begin with there has 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 ALP.*
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> *54. Under Sections 92B to 92F, the pre-requisite for commencing the TP exercise is to show the existence of an international transaction.*

The next step is to determine the price of such transaction. The third step would be to determine the ALP by applying one of the five price discovery methods specified in Section 92C. The fourth step would be to compare the price of the transaction that is shown to exist with that of the ALP and make the TP adjustment by substituting the ALP for the contract price.

55. Section 928 defines 'international transaction' as under:
"Meaning of international transaction. 928.(1) For the purposes of this section and sections 92, 92C, 92D and 92E ,"international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents; in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost. or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to anyone or more of such enterprises. (2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes 'of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to' the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise."

56. Thus, under Section 92B(1) an 'international transaction' means- (a) a transaction between two or more AEs, either or both of whom are non-resident (b) the transaction is in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, incomes or losses of such enterprises, and (c) shall include a mutual agreement or arrangement between two or more AEs for allocation or apportionment or contribution to the any cost or expenses incurred or to be incurred in connection- with the - benefit,

service or facility provided or to be provided to one or more of such enterprises.

57. Clauses (b) and (c) above cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of BLI is "any other transaction having a bearing" on its "profits, incomes or losses", for a 'transaction' there has to be two parties. Therefore for the purposes of the 'means' part of clause (b) and the 'includes' part. of clause (c), the Revenue has to show that there exists an 'agreement' or 'arrangement' or' 'understanding' between BLI -and B&L, USA whereby BLI is obliged to spend excessively on AMP in order to promote the brand of B&L, USA. As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i) (a) to (e) to Section 92B are described as an 'International transaction'. This might be only an illustrative list, but significantly' it does not list AMP spending as one such transaction.

58. In Maruti Suzuki India Ltd. (supra), one of the submissions of the Revenue was: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for the same has been paid or remains payable or there is a mutual agreement to not charge any compensation for the service or benefit. "This was negatived by the Court by pointing out; "Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to Section 92F (v), which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means', part and the 'includes' part of Section 928 (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC."

59. In Whirlpool of India Ltd. (supra), the Court interpreted the expression "acted in concert" and in that context referred to the decision of the Supreme Court in Daiichi Sankyo Company Ltd. v.. Jayaram Chigurupati 2010(6)MANU/SC/0454/2010, which arose in the context of acquisition of shares of Zenotech Laboratory Ltd. by the Ranbaxy Group. The question that was examined was whether at the relevant time the Appellant, i.e., 'Daiichi Sankyo Company and Ranbaxy were "acting in concert" within the meaning of Regulation 20(4) (b) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. In. para 44, it was observed as under:

> *"The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares etc. of a- certain target company, There can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares etc. of the target company, For, de hors the element of the shared common Objective' or purpose the idea of "person acting in concert" is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The relationship' can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition of substantial acquisition of shares etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement' or an understanding, formal or informal; 'the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares etc. or they may agree to, cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sine qua non for the relationship of "persons acting in concert" to come into being. "*

60. The transfer pricing adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceeding to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred , for the AE. In any event, after the decision in Sony Ericsson (supre), -- the question of applying the BLT to determine the existence-of an-international transaction involving AMP expenditure does not arise.

61. There is merit in the contention of the Assessee that a distinction is required to be drawn between a 'function' and a 'transaction' and that every expenditure forming part of the function, cannot be construed as a 'transaction'. Further, the- Revenue's attempt at re-characterising the AMP expenditure incurred as a transaction by itself when it has neither been identified as such by the Assessee or legislatively recognised in the Explanation to Section 92 B runs counter to legal position explained in CIT vs. EKL Appliances Ltd. (supra) which required a TPO "to examine the 'international transaction' as he actually finds the same."

62. In the present case, the mere fact that B&L, USA through B&L, South Asia, Inc holds 99.9% of the share of the Assessee will not ipso facto lead to the conclusion that the mere increasing of AMP expenditure by the Assessee involves an international transaction in that regard with B&L, USA. A similar contention by the Revenue, namely the fact that even if there is no explicit arrangement, the fact that the benefit of such AMP expenses would also encure to the AE is itself self sufficient to infer the existence of an international transaction has been negatived by the Court in Maruti Suzuki India Ltd. (supra) as under:

> *"68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an exercise. The Court is unable to find*

one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions", Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly -in-light of the fact that -the-BLT has been expressly negatived by the Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT,

70. What is clear is that it. is the 'price' of an international transaction which is required to be adjusted: The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an adjustment had to be made. The -burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment. "

71- Since a quantitative adjustment is not permissible for the purposes of a TP adjustment under Chapter X, equally it cannot be permitted in respect of AMP expenses either. As already noticed hereinbetore, what the Revenue has sought to do in the present case is to resort to a quantitative adjustment by first determining whether the AMP spend of the Assessee on- application of the BL T, is excessive, thereby evidencing the existence of an international

transaction involving the AE. The quantitative determination forms the very basis for the entire TP exercise in the present case.

74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to Section 928 of the Act. The problem does not stop here. Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?

63. Further, in Maruti Suzuki India Ltd. '(supra) the Court further explained the absence of a 'machinery provision qua AMP expenses by the following analogy:

"75. As an analogy; and for-no other purpose; in the- context of a domestic transaction involving two or more related parties, reference may' be made to Section 40 A (2) (a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the AO is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods." In such event, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction." The AO in such an instance deploys the 'best judgment' assessment as a device to disallow what he considers to be an excessive expenditure. There is no corresponding 'machinery' provision in Chapter X which enables' an AO to determine what should be the fair 'compensation' an Indian entity would be entitled to if it is found' that there is an International transaction in that regard. In practical terms, absent a clear statutory guidance, this may encounter further difficulties. The strength of a brand, which could be product specific, may be "impacted by numerous other

imponderables not limited to the nature of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on. A simplistic approach using one of the modes similar to the ones contemplated by Section 92C may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance."

64. In the absence of any machinery provision, bringing an imagined transaction to tax is not possible. The decisions in CIT v. B.C. Srinivasa Setty (1981) 128 ITR 294 (SC) and PNB Finance Ltd. v, CIT (2008) 307 ITR 75 (SC) make this position explicit. Therefore, where the existence of an international transaction involving AMP expense with an ascertainable price is- unable to be shown to exist, even if such price is nil, Chapter X provisions cannot be invoked to undertake a TP adjustment exercise.

65. As already mentioned, merely because there is an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of the foreign AE. As mentioned-in- Sassoon -J David-(supra)-"the--fact that-somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being 'allowed by way of a deduction under Section 10 (2) (xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law".

Considering the facts-like absence of an agreement between the assessee and the AE.s. for sharing AMP expenses, payment of Rs.71. 04 Crores to domestic parties by the assessee, failure of the TPO prove that expenses were not for the business carried out by the assessee in India-and following the judgments of the Hon'ble Delhi High Court delivered in the case of Bausch and Lomb (India) Pvt. Ltd (supar), we are of the opinion that the transaction in question was not an international transaction and that the TPO had wrongly invoked the provisions of Chapter X of the Act for the said

transaction. As we have decided the jurisdictional issue in favour of the assessee, so, we are not adjudicating the issues raised with regard to the methodology adopted by the TPO i.e. the controversy of following the TNMM and BLT. First effective ground of appeal is decided in favour of the assessee and the additions made by the AO are directed to be deleted."

9. Following the said decision, in Assessment Year 2011-12 also, the Tribunal vide order dated 16.11.2017 disagreed with the view of the income-tax authorities and deleted the addition on account of transfer pricing adjustment *qua* the incurrence of AMP expenditure.

10. In the instant year, the fact-situation remains similar to that considered by the Tribunal on the earlier two occasions and, therefore, we find no reasons to depart from the precedents noted above. Pertinently, the discussion in the respective orders of the authorities below does not bring out existence of any agreement between the assessee and its associate enterprises for incurrence of the AMP expenditure, which fact-situation was considered by the Tribunal in the earlier years. Since the facts and circumstances in the instant year are similar, following the decision of the Tribunal in assessee's own case for earlier assessment years, the impugned addition is liable to be deleted. We hold so.

11. Before parting, we may also refer to another argument of the ld. DR to set-aside the matter back to carry out transfer pricing assessment afresh, and this has been set-up by the ld. DR based on the decision of the Delhi Bench of the Tribunal in the case of Luxottica India Eyewear Pvt. Ltd., ITA No. 344/Del/2017 & others dated 26.05.2017. In terms of the decision of the Tribunal rendered in relation to Assessment Year 2012-13, the ld. DR

submitted that a fresh transfer pricing exercise be carried out in relation to the AMP intensity adjustment to the profit rates of the comparables. In other words, as per the ld. DR, the computation of transfer pricing adjustment be carried out by using the ratio of proportionate excess cost incurred by the assessee on AMP expenditure over and above the arm's length cost. In this regard, we find that the plea of the ld. DR is wholly misplaced, having regard to the facts and circumstances of the case before us. The Tribunal, in the case of *Luxottica India Eyewear Pvt. Ltd. (supra)* for Assessment Year 2012-13 approved the approach of the TPO for AMP intensity adjustment after clearly noticing that the TPO therein did not treat the AMP expenditure as a separate international transaction. Instead, the TPO had made an AMP intensity adjustment to the profit rates of the comparables for bringing the level of AMP functions performed by the assessee at par with those of the comparables while computing the arm's length price of the 'international transaction' relating to import of goods. The aforesaid approach of the TPO was founded on the premise that the marketing function performed by the assessee therein was a part of its role and responsibility as a distributor for the associate enterprises therein and, therefore, he did not treat the AMP expenditure as a separate international transaction. However, in the instant case, the aforesaid fact-situation is conspicuous by its absence inasmuch in the present case the TPO has treated the AMP expenditure as a separate international transaction and determined its arm's length price independently. Therefore, the decision in the case of *Luxottica India Eyewear Pvt. Ltd. (supra)* for Assessment Year 2012-13 does not help the Department in the present case. Be that as it may, we may refer to the very same decision of the Delhi Bench of the Tribunal dated 26.05.2017 (supra) wherein appeals for other assessment

years have also been dealt with. For instance, in the appeal for Assessment Year 2010-11 and 2011-12, the TPO therein had treated the AMP expenditure as a separate international transaction and determined its arm's length price independently and did not undertake the AMP intensity adjustment vis-a-vis comparables. Before the Tribunal, assessee raised the point of setting-aside the action of TPO of separately benchmarking the international transaction of AMP expenditure; and, instead pleaded the matter be set-aside back to the TPO in order to carry out AMP intensity adjustment on the financial results of the comparables. The Tribunal negated this plea on the ground that if such a plea was to be accepted, it will change the entire complexion of the case and would amount to travelling beyond the order impugned before it. This approach of the Tribunal was founded on the fact that the TPO had considered the AMP expenditure as a separate international transaction and determined its arm's length price accordingly. In our considered opinion, the said approach of the Tribunal for Assessment Years 2010-11 and 2011-12 makes the picture clear and on the same reasoning we find no reason to accept the plea raised by the ld. DR for restoring the matter back to the file of the TPO to enable him to carry out AMP intensity adjustment. If the plea of the ld. DR is accepted, it would amount to changing the entire complexion of the case and would amount to travelling beyond the impugned order, an approach which did not find favour with our coordinate Bench in the case of *Luxottica India Eyewear Pvt. Ltd. (supra).* We concur with the same and, therefore, the plea of the ld. DR is negated.

12. Insofar as the plea of the ld. DR that assessee has itself admitted that the AMP expenditure is an 'international transaction', the same, in our view,

is factually untenable. As rightly pointed out by the learned representative, Form no. 3CEB while detailing the international transaction of sale of intermediate goods to the associate enterprises, does not contain any averment of the sort canvassed by the ld. DR; and, rather the relevant note, which is at page 161 of the Paper Book, brings out that no marketing and promotional expenditure is incurred with respect to sale of intermediate goods to the associate enterprises. Therefore, the plea of the ld. DR, which is based on the observation by the Assessing Officer, is devoid of any factual support and is negated.

13. In the result, we direct the Assessing Officer to delete the transfer pricing adjustment on account of AMP expenditure made at Rs.78,02,64,000/-. Thus, insofar as Ground of appeal no. 1 is concerned, the same is allowed.

14. The issues in Ground of appeal nos. 2 and 3 raised by the assessee relate to the manner of computation of arm's length price of the international transaction of AMP expenditure. These issues are rendered academic once it has been held by us in Ground of appeal no. 1 that there was no international transaction of AMP expenditure requiring transfer pricing analysis. Thus, Ground of appeal nos. 2 & 3 are not adjudicated as the same have been rendered infructuous.

15. Insofar as Ground of appeal nos. 4 & 5 are concerned, same relate to disallowance of Rs.6,04,33,418/- made by the Assessing Officer by invoking Sec. 40(a)(i) of the Act. In this context, the relevant facts are contained in paragraphs 4 to 4.5 of the order of the Assessing Officer. The Assessing

Officer noted that assessee had made payments to foreign entities of Rs.6,04,33,418/- on which no tax was deducted at source and, therefore, he disallowed the said expenditure by invoking Sec. 40(a)(i) of the Act.

16. At the time of hearing, the learned representative for the assessee pointed out that before the lower authorities, assessee had duly explained that the payments in question were in the nature of reimbursements or otherwise not liable for tax deduction at source and, therefore, the disallowance u/s 40(a)(i) of the Act was not justified. The learned representative pointed out that though the assessee had furnished the relevant details, but the disallowance has been affirmed by the DRP on the ground that in the absence of details, the plea of assessee that payments were in the nature of reimbursements, was not verifiable. In this context, the learned representative referred to page 533 of the Paper Book, wherein is placed the copy of the communication dated 22.09.2016 addressed to the DRP, wherein the relevant details have been placed. Our attention was also invited to pages 538 to 749 of the Paper Book and thereafter to pages 814 to 1267 of the Paper Book, wherein the complete details alongwith the supporting documents pertaining to the payments in question have been placed. It has been emphasised that the DRP has disposed off the issue without referring to any of such details and, therefore, the disallowance is unjustly made. The learned representative submitted that the assessee would be satisfied if the matter is examined by the Assessing Officer afresh and as per law.

17. On the other hand, the ld. DR has defended the orders of the lower authorities, but has no objection if the matter is restored back to the file of the Assessing Officer for examination afresh.

18. We have carefully considered the rival submissions. Ostensibly, in its written submission dated 23.09.2016 to the DRP, assessee pointed out that though the disallowance was made by the Assessing Officer of Rs.6,04,33,418/-, yet there are no details forthcoming of the payments, which have been subjected to the disallowance. In any case, assessee explained that the payments to the foreign entities are two-fold; firstly, to its U.S parent company, H.J. Heinz Co. (now called as Kraft Heinz Food Company) and Transcom Distribution Co. Ltd., third party distributor of assessee in Bangladesh. It was explained that so far as the payment to the U.S company are concerned, they are in the nature of reimbursement of the amounts incurred by the U.S company for providing stock option to the employees of the assessee. The payment to the distributor in Bangladesh consisted of one-time reimbursement of expenditure incurred on air time of T.V channel in Bangladesh, payment of salary of employee, etc. At pages 538 to 539 of the Paper Book, details of the payments made during the year totalling to Rs.6,06,25,908/- is also tabulated. In our view, in order to justify the disallowance, specific findings are required to be arrived at by the income-tax authorities, an aspect which is conspicuous by its absence in the orders of the authorities below. Therefore, we deem it fit and proper to set-aside the impugned disallowance and restore the matter back to the file of the Assessing Officer who shall consider the material and submissions put forth by the assessee and thereafter pass an order afresh on this limited

aspect as per law. Thus, insofar as Ground of appeal nos. 4 & 5 are concerned, assessee succeeds for statistical purposes.

19. Insofar as Ground of appeal no. 6 is concerned, same relates to part denial of deduction u/s 80IC of the Act at Rs.136,19,30,302/- as against a sum of Rs.137,63,74,569/- claimed by the assessee. In this context, the relevant facts are that *qua* the receipts by way of (i) interest on electricity deposit – Rs.76,332/-; (ii) gain on sale of machinery – Rs.20,523/-; (iii) transport damage recovery – Rs.1,15,73,918/-; (iv) foreign exchange gain on export realisation – Rs.4,09,288/-; and (v) sale of raw material – Rs.23,84,818/-, the Assessing Officer denied the claim of deduction u/s 80IC of the Act on the ground that such receipts could not be said to be derived from the industrial undertaking.

20. Before us, the learned representative has assailed the stand of the lower authorities *qua* the impugned disallowance except in relation to gain on sale of machinery of Rs.20,523/-, which has been *suo moto* disallowed by the assessee. On other receipts, it is canvassed that the same are very much in the nature of being derived from the business of undertaking and, in that manner, such incomes also qualify for the benefit envisaged u/s 80IC of the Act. The learned representative pointed out that the reliance placed by the lower authorities on the judgment of the Hon'ble Supreme Court in the case of *Pandian Chemicals Ltd. vs CIT, 262 ITR 278 (SC)* is not justified inasmuch as the same was rendered in the context of Sec. 80HH of the Act, which is materially differently worded than Sec. 80IC of the Act. In support, the learned representative relied upon the judgment of the Hon'ble Bombay High Court in the case of *CIT vs. Jagdishprasad M. Joshi, 318 ITR 420 (Bom.)*,

wherein interest income on deposits was held eligible for deduction u/s 80IA of the Act. It has been pointed out that in the case before the Hon'ble Bombay High Court, Revenue had relied upon the judgment of the Hon'ble Supreme Court in the case of *Pandian Chemicals Ltd. (supra)*, which was found distinguishable since it dealt with Sec. 80HH and not Sec. 80IA of the Act, which was before the Hon'ble High Court. Further, it was canvassed that the judgment of the Hon'ble Supreme Court in the case of *CIT vs Meghalaya Steel Limited, 383 ITR 217 (SC)* also supports the stand of the assessee.

21. On the other hand, the ld. DR has reiterated the stand of the lower authorities by pointing out that the aforesaid receipts could not be said to be derived from the industrial undertaking and was, therefore, not eligible for the benefit of Sec. 80IC of the Act.

22. We have carefully considered the rival submissions. Ostensibly, insofar as the eligibility of the assessee for the benefits of Sec. 80IC of the Act is concerned, there is no dispute. The dispute is only with regard to the inclusion of certain elements of income for computing the deduction u/s 80IC of the Act. The contention of the Revenue is that interest on electricity deposit, transfer damage recovery, foreign exchange gain on export realisation and sale of raw material cannot be said to be receipts derived from the industrial undertaking and hence ineligible for deduction u/s 80IC of the Act. Factually, there is no dispute that so far as the interest income is concerned, the same is on deposit placed with the electricity board in relation to the electricity connection provided to the eligible unit. The transport damage recovery refers to the receipts from transporters in

respect of goods damaged in transit from assessee's factory to the clearing and forwarding unit. As per the assessee, such recovery compensates for the shortage/damage in the quantity of goods finally sold by the assessee through its clearing and forwarding agents and distributors and, therefore, it constitutes receipts derived from the eligible business. Thirdly, with regard to the foreign exchange gain, it is canvassed by the assessee that it arises on account of exports made by the assessee from the eligible unit and, therefore, it can be said to be derived from the business of the eligible undertaking. With regard to the sale of raw material, it is pointed out that the eligible unit sells the raw material at cost to the vendors for further processing. The raw material so sold/supplied to the vendors is converted to granules by the vendor and same is purchased by the assessee for use in the products manufactured in its eligible unit. Thus, it is canvassed that said receipts are also derived from the eligible undertaking.

23. In this factual background, we may now turn to the judgment of the Hon'ble Supreme Court in the case of *Meghalaya Steel Limited (supra)*. In the context of Sections 80IB and 80IC of the Act, the Hon'ble Supreme Court approved the test of direct nexus between a particular receipt and the industrial undertaking or business in order to determine whether a particular receipt is derived from the business or industrial undertaking. It has been specifically noted that so far as Sections 80IB & 80IC of the Act are concerned, what is required to be seen is whether the profit and gains are derived from the eligible business. In the context of the controversy before it, the Hon'ble Supreme Court held that so long as the profit and gains emanate from the business itself, the fact that the immediate source of the subsidy is the Government would make no difference to the benefit claimed

under Sec. 80IB or 80IC of the Act. Considered in the said light, in our view, the aforesaid four receipts can be seen to be in the nature which emanate directly from the business of eligible undertaking of the assessee and, therefore, in our view, there was no justification for denying the benefit of Sec. 80IC *qua* the aforesaid receipts. At the time of hearing, the learned representative had also relied upon the decision of our coordinate Bench in the case of *Marico Ltd. vs ACIT, [2016] 70 taxmann.com 214 (Mumbai - Trib.)* wherein also similarly placed receipts have been held to be eligible for the benefits of Sec. 80IB/80IC of the Act and the judgment of the Hon'ble Supreme Court in the case of *Pandian Chemicals Ltd. (supra)* was found to be inapplicable. Pertinently, our coordinate Bench in the case of *Marico Ltd. (supra)* has also decided the issue after considering the ratio of the judgment of the Hon'ble Supreme Court in the case of *Meghalaya Steel Limited (supra)*, an approach which we have also adopted. Thus, in view of our aforesaid discussion, the Ground of appeal no. 6 is allowed, accordingly.

24. By way of Ground of appeal no.7, assessee is aggrieved with the short credit of TDS of Rs.8,73,110/-. Since this aspect requires a factual appreciation, same is restored back to the file of the Assessing Officer for appropriate verification. Thus, on this aspect, assessee succeeds for statistical purpose.

25. Ground of appeal no. 8 relates to levy of interest under Sections 234B and 234C of the Act, which are consequential in nature and do not require any separate adjudication.

26. Ground of appeal no. 9 is with regard to initiation of penalty proceedings u/s 271(1)(c) of the Act, which is dismissed as premature.

27. Grounds of appeal no. 10 & 11 relate to computation of MAT credit, an aspect which requires a factual appreciation and is restored back to the file of the Assessing Officer to be decided afresh, as per law. Thus, on this aspect also, assessee succeeds for statistical purpose.

28. In the result, appeal of the assessee is partly allowed, as above.

Order pronounced in the open court on 9th February, 2018.

Sd/-	Sd/-
(SANDEEP GOSAIN)	**(G.S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Date : 9th February, 2018

SSL

Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "K" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai