आयकर अपीलीय अधिकरण "के" न्यायपीठ मुंबई में।

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

श्री शक्तिजीत दे,न्यायिक सदस्य **एवं**

श्री मनोज कुमर अग्रवल, लेख सदस्य के समक्ष।

BEFORE SHRI SAKTIJIT DEY, JM AND SHRI MANOJ KUMAR AGGARWAL, AM

आकरअपील सं./ I.T.A. No.1102/Mum/2015
(**निर्धारण वर्ष** / Assessment Year: 2010-11)

Godrej Consumer Products Ltd. [Successor to M/s. Godrej Household Products Ltd.-formerly known as Godrej Sara Lee Ltd.)] C/o Kalyaniwalla & Mistry 3rd Floor, Army & Navy Building 148, M.G. Road, Fort, Mumbai-400 001.	**बनाम**/ Vs.	**ACIT-14(1)(2)** 4th floor, Aaykar Bhavan, M.K. Road Mumbai-400 020.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AABCG-3365-J**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकरअपील सं./ I.T.A. No.1211/Mum/2015
(**निर्धारण वर्ष** / Assessment Year: 2010-11)

ACIT-14(1)(2) 4th floor, Aaykar Bhavan, M.K. Road Mumbai-400 020.	**बनाम**/ Vs.	**Godrej Consumer Products Ltd.** [Successor to M/s. Godrej Household Products Ltd.-formerly known as Godrej Sara Lee Ltd.)] C/o Kalyaniwalla & Mistry 3rd Floor, Army & Navy Building 148, M.G. Road, Fort, Mumbai-400 001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AABCG-3365-J**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Farrokh V.Irani- Ld. AR
Revenue by	:	Shri Anand Mohan-CIT-DR

Date of Hearing	:	03/04/2019
Date of Pronouncement	:	19/06/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member):-

1.1 Aforesaid cross-appeals for Assessment Year (AY) 2010-11 contest final assessment order dated 27/12/2014 passed by Ld. Assistant Commissioner of Income Tax-Circle 14(1)(2), Mumbai [AO] u/s 143(3) r.w.s 144C(13) pursuant to the directions of Ld. Dispute Resolution Panel-III, Mumbai [DRP] u/s 144C(5) dated 14/11/2014.

1.2 The Grounds raised by assessee reads as under: -

This Appeal is against the Order issued u/s.143(3) r.w.s.144C(13) of the Act dated December 5, 2014, of the Assistant Commissioner of Income Tax, Circle - 14(1)(2), Mumbai, in pursuance of the directions of the Hon'ble Dispute Resolution Panel - 3, Mumbai (DRP), and relates to the Assessment Year 2010-2011.

1) The learned DRP erred in directing the Assessing Officer to restrict the claim for depreciation under Section 32 of the Act on computer peripherals @15% as against the rate of 60% claimed by the Appellant.

2) The learned DRP erred in confirming the action of the Transfer Pricing Officer / Assessing Officer that the actual sales price and arms length price of each related party transaction are to be compared product wise independently and not on an aggregate country-wise basis for exports made to the AEs.

3) The learned DRP erred in confirming the disallowance of Rs.49,83,562/-being the reimbursement of advertisement expenses made by the Appellant Company to its Associated Enterprise during the year.

4) The learned DRP erred in directing the Assessing Officer to make an addition of Rs.22,02,204/- considering arm's length price of guarantee commission @ 3% in respect of the guarantee given on behalf of Godrej Sara Lee (Bangladesh) Pvt. Ltd and Godrej Sara Lee (Lanka) Pvt. Ltd.

5) The learned DRP erred in confirming the action of the Transfer Pricing Officer in concluding that the Appellant Company was rendering a significant function of advertising and marketing to its Associated Enterprise to promote brands owned by its Associated Enterprise.

6) The learned DRP erred in confirming the action of the Transfer Pricing Officer in applying the Bright Line Test and computing the arm's length price of Advertising, Marketing and Promotional expenses allegedly incurred by the Appellant Company for promotion of the brands owned by the Associated Enterprise.

7) The learned DRP erred in confirming the action of the Transfer Pricing Officer in making secondary adjustments for computing the mark up to determine arm's

length price in respect of the amount of Advertising, Marketing and Promotional expenditure erroneously computed using the Bright Line Test Method as being recoverable from the Associated Enterprise.

8) The learned DRP erred in confirming the action of the Transfer Pricing Officer in functionally equating the Appellant Company with companies engaged in advertising and marketing, to compute the mark-up which the appellant company ought to have charged.

9) The learned DRP erred in confirming the action of the Transfer Pricing Officer in cherry picking companies out of the companies selected, without giving any cogent reasons.

10) The Assessing Officer erred in ignoring the explanation and submissions made by the Appellant Company and in making an addition of Rs. 42,51,508/- in respect of the un-reconciled amount of AIR.

1.3 The effective grounds raised by revenue reads as under: -

1. On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel erred in directing the AO not to allocate certain expenses from 80IB non-eligible Units to the eligible Units.

2. On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel erred in directing the AO, without any supportive justification, to not to apply the average rate of profit margin within the 80-IC eligible units of Guwahati with that of Pondicherry belonging to the assessee company, thereby erred in allowing the assessee to claim higher deduction u/s 80-IC in respect of Guwahati Units to the extent of Rs.92.47 crores as compared to the products manufactured at Pondicherry Units.

2.2 On the facts and in the circumstances of the case and in law, the Dispute Resolution Panel erred in not appreciating that the AO had correctly invoked provision of section 80IA(10) of the Act.

1.4 The Ld. Sr. Counsel representing assessee [AR], at the outset, placed on record ground wise chart to submit that most of the issues in cross-appeals are covered by the earlier orders which squarely apply to the facts of the present case. The same were confronted to Ld. CIT-DR, who while fairly conceding the same, placed reliance on the stand of lower authorities. In this background, we proceed to adjudicate the grounds raised in revenue's appeal first.

1.5 The name of the assessee namely M/s Godrej Sara Lee Ltd. was changed to M/s Godrej Housing Products Ltd. which got merged into another group entity namely, M/s Godrej Consumer Products Ltd. from AY 2011-12 and accordingly, the assessment has been framed in the name of amalgamated company.

Revenue's Appeal : ITA No. 1211/Mum/2015

2.1 Briefly stated the assessee being *resident corporate assessee* stated to be engaged in *trading and manufacturing of insecticides / Air Care products* was assessee u/s 143(3) r.w.s.144C(13) on 27/12/2014 at Rs.6374.04 Lacs after certain additions / disallowances / Transfer Pricing [TP] Adjustment as against returned revised income of Rs.5703.82 Lacs e-filed by the assessee on 28/09/2010.

2.2 A draft assessment order was passed on 14/03/2014 denying deduction u/s 80-IB / 80-IC as claimed by the assessee. The said order was passed after considering the order of Ld. Transfer Pricing Officer u/s 92CA(3) with respect to Arm's Length price [ALP] of international transactions. The Ld. DRP provided certain relief to the assessee, against which the revenue is in further appeal before us.

2.3 During assessment proceedings, it transpired that the assessee was having various manufacturing units spread over Assam, Meghalaya, Pondicherry etc. and claimed deduction u/s 80-IB / 80-IC for Rs.104.19 Crores. Some of the units were eligible to claim deduction @100% u/s 80-IC/ 80-IE whereas some of the units were eligible to claim deduction @30% u/s 80-IB. During the year, the assessee did not claim any deduction u/s 80-

IB. Some of the units incurred losses during the year. The Ld. AO opined that expenses pertaining to miscellaneous expenses, conveyance & travelling, rates and taxes, advertising and publicity and schemes and promotions were incorrectly allocated between such units as held in earlier assessment years. From the perusal of profitability chart, it was observed that undertaking engaged in manufacturing mosquito repellant, mats and coils in Meghalaya earned profit @2.31%, two units situated in Assam earned margins ranging between 36%-38% whereas similar units located in Pondicherry incurred losses. The units situated at Meghalaya & Assam were eligible to claim higher deduction of 100% u/s 80-IC in comparison to loss making unit at Pondicherry, which was eligible for lower deduction of 30% u/s 80-IB. Accordingly, the assessee as asked to explain the discrepancies. It was submitted that product mix at various locations were different. However, not satisfied, invoking provisions of Section 80-IA(10), Ld. AO concluded that the assessee arranged his affairs in such a way that profit of Guwahati (Assam) Units were astronomically high and the assessee was showing more than ordinary profits which might be expected to arise in such eligible business. Therefore, the profits of Guwahati (Assam) units were taken as *Nil* and deduction u/s 80-IC for Rs.92.47 Crores was denied against two units situated at Guwahati (Assam).

2.4 Proceeding further, the balance claim of deduction of Rs.14.74 Crores was also denied on the basis of re-allocation of certain expenses like miscellaneous expenses, conveyance & travelling, rates and taxes, advertising and publicity and schemes and promotions, as done in the

earlier years. In other words, entire deduction of Rs.104.19 Crores was denied to the assessee.

3.1 Aggrieved, the assessee agitated the same before Ld. DRP vide directions dated 14/11/2014 and submitted that Ld. AO erred in disregarding the method of allocation of expenses as consistently adopted by the assessee. The Ld. DRP noted that similar claim arose in AYs 2005-06 to 2009-10 wherein the matter was decided against the assessee by CIT(A) / DRP. However, the Tribunal in AYs 2005-06 & 2006-07, after considering the decision of Hon'ble Supreme Court rendered in **Consolidated Coffee Ltd. V/s State of Karnataka [248 ITR 432],** decided the issue in assessee's favor. Following the same, Ld. DRO directed Ld. AO not to restrict the claim of the assessee for deduction u/s 80-IB/80-IC by reallocating common indirect expenses.

3.2 The invocation of Section 80-IA(10) was also overruled by Ld. DRP by following the directions of Ld. DRP in earlier AYs 2008-09 & 2009-10.

Aggrieved, the revenue is in further appeal before us.

4.1 We have carefully considered the same. We find that while deciding the issue of reallocation of expenses, Ld. DRP has merely followed the decision of Tribunal in assessee's own case for AYs 2005-06 & 2006-07. The revenue is unable to point out any distinguishing feature during the impugned AY. Nothing on record would suggest that the ruling of Tribunal is not applicable to the facts of the present case. In fact, the decision of AY 2006-07 has been followed by Tribunal in AY 2008-09 in ITA No.598/Mum/2013 dated 11/03/2015 and also in AY 2009-10 in ITA

No.1251/Mum/2014 order dated 18/11/2015. It has been brought to the notice that department's appeal against Tribunal's decision for AY 2008-09 has already been dismissed by Hon'ble Bombay High Court. Respectfully following binding judicial pronouncement, we upheld the stand of Ld. DRP. Ground No. 1 stand dismissed.

4.2 The Ld. DRP has overruled application of provisions of Section 80-IA(10) by following the decision of Ld. DRP in AY 2008-09 & 2009-10. It has been brought to our notice that department assailed the stand of Ld. DRP for AY 2009-10 before this Tribunal vide ITA No.1356/Mum/2014 order dated 18/11/2015 wherein the stand of Ld. DRP was confirmed. Therefore, taking consistent stand in the matter, we confirm the directions of Ld. DRP, in this year also. Ground Nos. 2 & 3 stands dismissed.

5. Resultantly, the revenue's appeal stands dismissed.

Assessee's Appeal: ITA No. 1102/Mum/2015

6. Ground No. 1 & 10 are corporate tax grounds whereas grounds nos. 2 to 9 arises out of certain Transfer Pricing adjustments.

Corporate Tax Grounds

7.1 In ground No.1, the assessee is aggrieved by the fact that Ld. AO has restricted the depreciation claim on computer peripherals to 15% as against 60% as claimed by the assessee. The Ld. AO, treating UPS & printers as Plant & Machinery, has allowed depreciation @15% instead of 60% claimed by the assessee as applicable to computers. The Ld. DRP has confirmed the same.

7.2 We find that this issue stood covered in assessee's favor by the decision of this Tribunal in assessee's own case for AY 2008-09 ITA No.598/Mum/2013 order dated 11/03/2015. This decision has been followed by the Tribunal in AY 2009-10, ITA No.1251/Mum/2014 order dated 18/11/2015. It has been submitted that the revenue has not challenged the order of Tribunal for both these years in further appeal. Respectfully following the consistent stand, we direct Ld. AO to allow depreciation @60% on the computer peripherals. Ground No. 1 stand allowed.

8.1 In ground No. 10, the assessee is aggrieved by addition of Rs.42.51 Lacs, being un-reconciled amount reflected in Annual Information Return [AIR]. The said addition stem from the fact that AIR information reflected time deposits made by assessee aggregating to Rs.39.36 Lacs with ICICI Bank, *Alwarthiunagar Branch.* The assessee submitted that no such transactions have taken place. Another discrepancy of Rs.3.15 Lacs was also noted which the assessee could not reconcile. Resultantly, aggregate amount of Rs.42.51 Lacs was added to the income of the assessee.

8.2 The Ld. Sr. Counsel has drawn our attention to the letter dated 05/12/2014 to impress upon the fact that no such transactions were entered into by the assessee with ICICI Bank. Reliance has been placed on various decisions of the Tribunal to submit that mistaken reporting could not entail additions in the hands of the assessee.

8.3 We find that the stated issue is matter of reconciliation. The perusal of directions of Ld. DRP reveal that this issue was not raised by the assessee

before Ld. DRP. The letter stated to be issued by the bank, as placed before us, is after the date of directions of Ld. DRP. Therefore, while concurring with the stand of Ld. Sr. Counsel that mistaken reporting in AIR could not entail addition in the hands of the assessee, we deem it fit to restore the matter back to Ld. AO with a direction to the assessee to reconcile the stated discrepancy of Rs.42.51 Lacs. The Ld. AO is free to peruse latest AIR information of the assessee and seek information from the bank so as to arrive at logical conclusion. The balance discrepancy of Rs.3.15 Lacs shall also be reconciled by the assessee. This ground stand allowed for statistical purposes.

Transfer Pricing Grounds

9.1 Certain International transactions as reported by the assessee in Form No.3CEB were referred u/s.92CA (1) to Ld. Transfer Pricing Officer-I(8), Mumbai [TPO] for determination of their Arm's Length Price [ALP]. The issue of determination of ALP of following international transactions are the subject matter of dispute before us: -

No.	Nature of Transactions
1.	Export of Goods
2.	Provision of Bank Guarantee
3.	Reimbursement of Market Survey Expenses
4.	Advertising, Marketing & Promotional Expenditure

9.2 The assessee made export sale of Rs.75.76 Crores to its various Associated Enterprises [AE] located in various parts of the world and benchmarked the same using *cost plus method* as used in earlier years. The difference between the Arm Length net Sales Value to be charged per

unit and the net sale value actually charged per unit was computed on an aggregate basis and no TP adjustment was proposed by the assessee. However, rejecting assessee's methodology and considering the products on standalone basis i.e. without allowing netting-off of the items, Ld. TPO proposed TP adjustment of Rs.129.83 Lacs against the same. The Ld. DRP confirmed the same by relying upon the order of Ld. DRP for AYs 2008-09 & 2009-10.

9.3 The assessee provided Corporate Guarantee [CG] to its AE situated in Bangladesh and Sri Lanka and offered commission against the same @1.5%. However, since the said commission in earlier years, was offered by the assessee @3%, Ld. TPO taking the ALP @3%, proposed TP adjustment of Rs.22.02 Lacs against the same. The Ld. DRP confirmed the stand of Ld. TPO.

9.4 Regarding reimbursement of market survey fees, it was submitted by the assessee that *Sara Lee* was the world leader in household and body care business and made products under various global brands. The group incurred various costs globally to develop the market of said brands by appointing advertising agencies, incurring various marketing costs, developing marketing strategies, running advertising programs etc. for the benefits of group entities worldwide. Similar other costs were stated to be incurred by the group to generate and obtain new rights, information and experience for the benefit of all the group companies. The group was also stated to be providing marketing concepts, marketing assistance and support and other experience and informative data concerning the

marketing of the products under *Sara Lee* brand at considerable cost. As part of the arrangement, an agency i.e. *Grey Global* was stated to be appointed as the worldwide advertising agency for supporting *Kiwi* brand of products. *Grey Global* provided support for the *Kiwi* brand development to Sara Lee worldwide and since the assessee sold *Kiwi* product in India, a proportionate cost was recharged to the assessee. The allocation was stated to be done in proportion to the sale of *Kiwi* products in India as compared to the worldwide sale of *Kiwi* products of the group. Accordingly, the assessee reimbursed an amount of Rs.49.83 Lacs to *Sara Lee international BV.* Since the payment was stated to be mere reimbursement and stated to be made to a third party, *Comparable Uncontrolled Price [CUP]* method was relied upon to benchmark the same and no TP adjustment was proposed by the assessee.

9.5 However, since the assessee could not substantiate the basis on which the said amount of Rs.49.83 Lacs were reimbursed and no evidences / third party invoices were given in support, ALP of the same was determined as *Nil* and TP adjustment of Rs.49.83 Lacs was proposed by Ld. TPO. The Ld. DRP while confirming the stand of Ld. TPO, directed Ld. AO to verify the allowability of same u/s 37(1).

9.6 The last TP addition stem from the fact that upon perusal of financial statements, it transpired that the assessee was incurring considerable expenditure on Advisement, Marketing and Sales Promotion [AMP]. These transactions were not reported as international transactions in Form 3CEB. The expenditure amounting to Rs.91.51 Crores, as a percentage of sale

were 13.63% as against 8% reflected by comparable entities selected by Ld. TPO. In defense, the assessee submitted that the expenditure was routine expenditure in nature.

9.7 However, Ld. TPO observed that the taxpayer was rendering significant function of advertisement and marketing expenses which mainly cater to the brand promotion / trademarks owned by its AE namely Kiwi European Holding BV Netherlands, Sara Lee Household and Bodycare Research Netherlands and Buttress BV. The brands of AE were licensed to assessee to manufacture and sell these products in India. Therefore, the assessee do not get any benefit by promoting brands, not owned by the assessee as compared to other Indian Companies which are having their own brands. Therefore, the assessee, in the opinion of Ld. TPO, was to be compensated with appropriate mark-up. The assessee, while opposing application of *Bright Line Test,* submitted that the stated expenditure was being incurred for brands manufactured as well as owned by the assessee and the expenditure was incurred to advertise all the products of the assessee company i.e. own product brands as well as product brands of AE.

9.8 However, disregarding assessee's various submissions, Ld. AO proceeded to compute the ALP of the same. Adopting 9.76% as ALP of AMP expenditure, Ld. TPO worked out TP adjustment of Rs.416.42 Lacs. The working of the same has already been given in *para 11* of Ld. TPO's order. Although the assessee agitated the same before Ld. DRP, however,

the submissions could not find favor with Ld. DRP who confirmed the stand of Ld. TPO, in this regard.

9.10 Aggrieved by the above TP adjustments, the assessee is in further appeal before us.

10. We have considered the rival submissions as made before us on the above stated issues and also deliberated on the judicial pronouncements as cited before us. So far as the ALP of Export Sales is concerned, we find that Ld. DRP confirmed the adjustment by relying upon the order of DRP for AYs 2008-09 & 2009-10 which were challenged by the assessee before this Tribunal. The Tribunal in ITA No. 598/Mum/2013 order dated 11/03/2015 for AY 2008-09, has approved the clubbing / aggregation approach as adopted by the assessee and reversed the stand of Ld. DRP. This order has subsequently been followed by Tribunal in AY 2009-10 also vide ITA No.1251/Mum/2014 order dated 18/11/2015. It has been submitted that revenue's further appeal for 2008-09, on this issue, has already been dismissed by Hon'ble Bombay High Court whereas no further appeal has been preferred by revenue for AY 2009-10 against the order of the Tribunal, on this issue. The revenue is unable to controvert the same. Therefore, respectfully following the consistent view of the Tribunal, we delete TP adjustment of Rs.129.83 Lacs on account of export sales and allow ground no. 2 of assessee's appeal.

11. We find that issue of commission on Corporate Guarantee is recurring issue for the assessee. The Chart, as placed before us, in this regard, would reveal that the assessee did not offer any commission against the

same for AYs 2005-06 & 2006-07. The Ld. TPO estimated the same @2.25% & 1.15% for these two years which was restricted to 0.50% by the Tribunal in both the years. In 2008-09, the assessee offered a rate of 3% which was accepted by Ld. TPO. In AY 2009-10, the assessee offered a rate of 3% which was estimated by Ld. TPO @5.22%. However, Ld. DRP;'s directions reduced the same to 3.94% which was agitated before this Tribunal in cross-appeals vide ITA Nos. 1251,1356/Mum/2014 order dated 18/11/2015. The matter was restored back to Ld. AO to decide the issue based on orders of ITAT for AYs. 2005-06 & 2006-07. It has been submitted before us that in the set-aside proceedings, the rate has been estimated @3.5% which has attained finality and no further appeal has been preferred by the assessee against the same. In the impugned AY, the assessee has offered the same @1.5% which has been estimated by the revenue @3%. The Ld. Sr. Counsel, in support, has placed reliance on the decision of Hon'ble Bombay High Court rendered in **Glenmark Pharmaceuticals Ltd. V/s ACIT [85 Taxmann.com 349 02/02/2017]** as confirmed by Hon'ble Supreme Court in Civil Appeal No. 12632/2017 dated 11/12/2018. In the said decision, Hon'ble court has approved the estimation @ 0.53% & 1.47%. This decision has been rendered after considering the decision in **CIT V/s Everest Kento Cylinders Ltd. [378 ITR 57].** Therefore, respectfully following the higher judicial wisdom, on the facts, we restrict the estimation to 2%. The Ld. AO / TPO is directed to recompute the impugned TP adjustment. Ground No. 4 stand partly allowed.

12.1 The third TP adjustment pertains to ALP of intra group services. The Ld. Sr. Counsel, assailing the TP adjustment, submitted the payment under question was reimbursement to AE at cost. The cost was allocated in the ratio of sale of *Kiwi Products* worldwide. Reliance has been placed on the decision of Hon'ble High Court of Delhi rendered in **CIT V/s EKL Appliances Ltd. [24 Taxmann.com 199]** for the submissions that Ld. TPO had no authority to disallow entire expenditure. Reliance has also been placed on the decision of this Tribunal rendered in **CLSA India P. Ltd. V/s DCIT [101 Taxmann.com 388]** for the submissions that Ld. TPO has not followed any prescribed method while computing ALP of the transactions.

12.2 The Ld. CIT-DR controverted the same by submitting that as per *OECD guidelines* on Intra-Group services, it was incumbent on the part of the assessee to establish that the said services were, in fact, rendered and secondly, the charges paid for availing such services were at Arm's Length Principal and commensurate with benefits derived by the assessee. Our attention has bene drawn to *Chapter VII-Special Considerations for Intra-Group Services* to submit that no evidences were produced by the assessee before lower authorities to demonstrate receipt of any benefit against such services. No details, whatsoever, were furnished in support of the costs reimbursed to its AE. Therefore, no payment was required to be made by the assessee in the absence of any services, as rightly held by Ld. TPO. Arguments have been advanced to submit that when expenditure is incurred by the AE for stewardship / shareholders' activities then the same need not be charged to other group entities unless it was shown that direct

tangible benefit accrued to the group entity and further, the payment was in commensurate with benefits derived by that entity. Reliance has been placed, *inter-alia,* on the decision of this Tribunal rendered in **Deloitte Consulting India Pvt. Ltd. [ITA No. 579,1272,1273/Mum/2011 30/03/2012].** In the above background, it was submitted that Ld. TPO was right in determining the ALP of the transactions as *Nil.*

12.3 We have carefully heard the submissions and deliberated on judicial pronouncements as cited before us. The facts that emerges are that the assessee has reimbursed an expenditure of Rs.49.83 Lacs which was reported as international transaction in Form No. 3CEB. The Ld. TPO records a finding that no evidence of cost allocation was submitted by the assessee and no third-party invoices were given. It was also alleged that the assessee failed to demonstrate that any services were received by it against the same. Similar was the position before Ld. DRP wherein it was noted that the stated payments failed to pass the benefit test and the assessee failed to provide the basis of allocation of the said expenditure. Additionally, the aforesaid facts led the Ld. DRP to direct the assessing officer to test the allowability of the expenditure at the threshold of Section 37(1). Before us, the Ld. Sr. Counsel has submitted that the basis of allocation, as already submitted to lower authorities, was sale value of Kiwi Products worldwide. It has further been submitted that Ld. TPO was not justified in determining the ALP of the same as *Nil.* As against this, Ld. CIT-DR has placed reliance on *OECD guidelines* to submit that it was

incumbent on the part of the assessee to demonstrate receipt of benefits and justify that the payments were at Arm's Length Price.

12.4 After due consideration of factual matrix, we find certain force in the arguments of Ld. CIT-DR that in the absence of complete information, Ld. TPO was precluded to proceed with determination of ALP of these transactions. The primary onus to provide complete TP documentation was on assessee. No doubt, *OECD guidelines* makes it imperative for the assessee to demonstrate that the services were, in fact, received and thereafter, it was to be established that the price paid for these services was at Arm's Length. Therefore, in the aforesaid circumstances, we deem it fit to restore the matter back to the file of Ld. TPO for re-determination of ALP of these transactions with a direction to the assessee to demonstrate cost allocation keys, evidences in support of the receipt of services etc. Needless to add that sufficient opportunity of being heard shall be granted to the assessee. Ground No. 3 stands allowed for statistical purposes.

13.1 For Ground Nos. 5 to 9, Ld. Sr. Counsel laid down various propositions in the written submissions. The primary arguments revolve around the facts that proposed TP adjustment for AMP expenditure is contrary to transfer pricing provisions contained in Chapter-X of the Act as laid down in decisions of this Tribunal in **Johnson & Johnson Pvt. Ltd. [ITA No.6142/Mum/2017], Hon'ble Delhi High Court in Maruti Suzuki India Ltd. [381 ITR 117], Honda Siel Power products Ltd. [283 CTR 322] & Whirlpool of India Ltd. [381 ITR 154].** It has been submitted there is no sanction to application of *Bright Line Test* on the basis of presumed /

alleged benefits to the Associated Enterprises [AE]. Our attention is further drawn to the fact that assessee company was joint venture between Godrej Group and Sara Lee Group in the ratio of 49:51. In fact, the assessee purchased 51% stake of Sara Lee Group during May, 2010 and therefore, the allegation that the assessee incurred these expenses to promote the brand owned by Sara Lee Group could not be sustained. Per Contra, Ld. CIT-DR placed reliance on the decision of Delhi Tribunal rendered in **Suzuki Motorcycles (I) Pvt. Ltd. V/s DCIT [ITA No. 476/Del/2015 26/11/2018], Sennheiser Electronics India Pvt. Ltd. V/s ACIT [ITA No. 269/Del/2017 19/11/2018] & Nikon India P. Ltd. V/s DCIT [81 Taxmann.com 300 31/03/2017]** to submit that the matter may be restored back to lower authorities for proper determination of ALP.

13.2 We have carefully perused the same. We find that this very bench, in the case of **Johnson & Johnson Pvt. Ltd. [supra],** after considering catena of decisions including the decision of Hon'ble Delhi High Court rendered in **Maruti Suzuki India Ltd. [supra],** has taken a view that unless there is an arrangement between the assessee and its AE for incurring AMP expenditure, it cannot be considered as international transaction u/s 92B of the Act. Hon'ble Delhi High Court in the cited case has disapproved the application of *Bright Line Test.* We find that the assessee, in the present case, is engaged in manufacturing activities. Nothing has been brought on record by the revenue that there is an arrangement between the assessee and the AE for incurring AMP expenditure. Nothing on record would establish that the aforesaid

expenditure was incurred by the assessee on behalf of its AE or for the benefits of its AE. Therefore, on the given factual matrix, the ratio of decision rendered by us in **Johnson & Johnson Pvt. Ltd. [supra]** would squarely become applicable to the facts of the present case. For ease of reference, the operative portion of the decision could be extracted in the following manner: -

> 15. Thus, it is to be understood from the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra), unless, there is an arrangement between the assessee and the AE for incurring AMP expenditure, it cannot be considered as international transaction under section 92B of the Act. Further, the Hon'ble Court has held that no adjustment for determination of arm's length price with regard to AMP expenditure can be made by resorting to bright line test or any other similar method which is not provided in the statute. Undisputedly, the decision in Maruti Suzuki India Ltd. (supra) was delivered by the Hon'ble Delhi High Court at a later point of time and after taking note of its own decision in Sony Ericson Mobile Communications (supra). Therefore, the ratio laid down in Maruti Suzuki India Ltd. (supra) would prevail. Moreover, the ratio laid down in Maruti Suzuki India Ltd. (supra) would be applicable to the present appeal since facts are more or less similar. Like in Maruti Suzuki India Ltd. (supra), the assessee before us is involved in manufacturing activity, hence, the AMP expenditure incurred in India by making payment to third parties in India certainly is connected with such manufacturing activities. Moreover, the Department has failed to establish on record that there is an arrangement between the assessee and the AE for incurring AMP expenditure. In any case of the matter, quantification of AMP expenditure by applying the bright line test or any such similar method has not only been disapproved by the Hon'ble Delhi High Court in Sony Ericson Mobile Communications (supra) but also in Maruti Suzuki India Ltd. (supra). In our considered view, the Transfer Pricing Officer was totally wrong in not applying the principle laid down in the decision of the Maruti Suzuki India Ltd. (supra) by taking the alibi that the decision is of a Non–Jurisdictional High Court. Further, the Transfer Pricing Officer was totally wrong in determining the arm's length price expenditure by applying the bright line test or routine arm's length price simply relying upon the Special Bench decision of the Tribunal, Delhi Bench, conveniently ignoring the fact that the bright line test method adopted in case of L.G. Electronics India Pvt. Ltd. (supra) was disapproved by the Hon'ble Delhi High Court not only in case of Sony Ericson Mobile Communications (supra) but also in case of Maruti Suzuki India Ltd. (supra). Thus, the reasoning of the Assessing Officer in not following the decision of Maruti Suzuki India Ltd. (supra) is totally unacceptable. We must put it on record, the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra) has subsequently been followed not only by the same High Court in a number of other cases but also by different Benches of Tribunal, including Mumbai Benches, insofar it relates to the issue whether AMP expenditure incurred in India gives rise to

international transaction with the AEs. It is relevant to observe, the DRP has upheld the adjustment made by the Transfer Pricing Officer simply for the reason that the Department has no remedy available against an order of the DRP favourable to the assessee. As regards the decisions relied upon by the learned Departmental Representative as noted herein before, on a careful analysis of each one of these decisions we are of the considered opinion that they will not be of any help to the Department, since, they were rendered prior to the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra) and all of them proceeded on the basis of the decision rendered in Sony Ericson Mobile Communications (supra). In view of the aforesaid, we hold that the AMP expenditure incurred by the assessee not being an international transaction as defined under section 92B of the Act, no transfer pricing adjustment could have been made by the Transfer Pricing Officer. More so, when the method adopted by the Transfer Pricing Officer for making such adjustment is not provided under the statute. Before parting, we must observe that all other international transactions entered into between the assessee and its AE were found to be at arm's length. It is also not disputed, if the international transactions are considered as a whole, the margin shown by the assessee is more than the margin shown by the comparables selected by the Transfer Pricing Officer. Grounds raised are allowed.

Applying the same, we hold that in the absence of any arrangement between the assessee and its AE, the mere incurring of third-party AMP expenditure could not be termed as international transaction as defined under section 92B of the Act and therefore, the question of determination of ALP of the same would not arise at all. Therefore, we delete the impugned adjustment as proposed in the final assessment order. Resultantly, Ground Nos. 5 & 6 stands allowed which makes Ground Nos. 7 to 9 *infructuous.*

Conclusion

14. The revenue's appeal stands dismissed whereas the assessee's appeal stands partly allowed in terms of our above order.

Order pronounced in the open court on 19th June, 2019.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांकDated : 19/06/2019
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**