IN THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai

Before Shri G. Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.1997/Mum/2018
ITA No.2168/Mum/2014
&
C.O. No. 213/Mum/2014
(Arising out of ITA No. 2121/Mum/2014)
(Assessment Year: 2009-10)

India Medtronic Private Ltd. 1241, Solitaire Corporate Park, Building No.12, 4th Floor, Andheri Ghatkopar Link Road, Andheri (East), Mumbai 400 093 PAN – AAACI4227Q	Vs.	Assistant Commissioner of Income Tax, Circle-10(1)(1), 209, Aaykar Bhavan, Churchgate, Mumbai –20
(Appellant)		**(Respondent)**

ITA No.2121/Mum/2014
(Assessment Year: 2009-10)

Assistant Commissioner of Income Tax (OSD)-8(2), Room No. 218, Aayakar Bhavan, M.K. Marg, Mumbai – 400020 PAN – AAACI4227Q	Vs.	M/s India Medtronic Pvt. Ltd. Solitaire Corporate Park, Bldg. No. 12, 4th Floor, Andheri Ghatkopar Link Rd., Andheri (East), Mumbai- 400093
(Appellant)		**(Respondent)**

Appellant by: Shri Rajan R. Vora, A.R
Respondent by: Shri Anand Mohan, D.R

Date of Hearing : 19.07.2019
Date of Pronouncement : 24.07.2019

O R D E R

PER RAVISH SOOD, J.M :

The captioned appeals are directed against/arises from two orders viz. (i). the order passed by the A.O under Sec. 143(3) r.w Sec. 254 r.w Sec. 144C(13) of the Income-tax Act, 1961, dated 30.01.2018 giving effect to the earlier order passed by the Tribunal in ITA No. 2168/Mum/2014, dated. 31.12.2015 for A.Y 2009-10, which had set aside the issue as regards benchmarking of the Advertising, Marketing and Promotion transactions (for short "AMP transactions") to the file of the Transfer Pricing Officer (for short "TPO"); and (ii). the order passed by the Hon'ble High Court of Bombay in India Medtronic Private Limited vs. Dy. Commissioner of Income-tax OSD-8(2) [ITA No. 1404, 2016], dated 06.02.2019, wherein the impugned order of the Tribunal in ITA NO. 2168/Mum/2014, dated 31.12.2015 for A.Y 2009-10was assailed by the assessee before the Hon'ble High Court.Observing,that as the order passed by the A.O under Sec. 143(3) r.w Sec. 254 r.w Sec. 144C(13) giving effect to the impugned order of the Tribunal had been assailed by the assesseebefore the Tribunal, and the latter was in seisen of the issue as to whether the AMP expenses incurred by the assessee was an international transaction or not, the Hon'ble High Court had directed the Tribunal to decide the said issue in the said second round of appeal, without in any way being fettered with the view taken in its earlier order. As a result of the order of the Hon'ble High Court the earlier order of the Tribunal disposing off the appeals filed by the assessee and the revenue alongwith the cross-objection filed by the assessee viz. (i). Appeal of the assessee i.e ITA No.

2168/Mum/2014 for A.Y 2009-10; (ii). Appeal of the revenue i.e ITA No. 2121/Mum/2014 for A.Y 2009-10; and (iii). Cross-objection filed by the assessee i.e C.O No. 213/Mum/2014 (arising out of ITA No. 2121/Mum/2014) for A.Y 2009-10 stands revived, though, for the limited purpose of determining as to whether the AMP transactions are international transactions, or not. To sum up, the issue involved in the captioned appeals is confined to adjudicating as to whether AMP transactions are international transactions, or not. As a common issue is involved in the captioned appeals, therefore, they are being taken up and disposed off together by way of a common order.

2. Briefly stated, the assessee is a part of Medtronic Inc., a USA based global leader in medical technology which is engaged in developing and manufacturing a wide range of products and therapies i.e mostly patented or IP protected items. The assessee company is a subsidiary of Medtronic International Ltd., Hongkong, which in turn is a subsidiary of Medtronic USA, Inc. In India, the assessee company is engaged in the business of marketing and distribution of proprietary products of group companies i.e related to Cardiac Rhythm Disease Management (CRDM), Neuro-modulation, Spinal and Biologics, Diabetes, Cardio-vascular, Surgical technologies and physio-control. The assessee had e-filed its return of income for A.Y. 2009-10 on 27.09.2009, declaring its total income under the normal provisions at Rs. (2,59,39,470/-) and 'book profit' under Sec.115JB of the Income-tax Act,1961 (for short 'Act') at Rs.21,40,25,809/-.The return of income filed by the assessee was processed as such under Sec.143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec.143(2).

3. During the course of the assessment proceedings a reference was made by the A.O to the Transfer Pricing Officer (for short 'TPO') for determination of the Arm's Length Price (for short 'ALP') of the international transactions of the assessee company. In the TP study report, the assessee by applying the Transactional Net Margin Method (for short 'TNMM') had determined its Profit Level Indicator (for short 'PLI') at 13.12%. In the TP study report the assessee had benchmarked the PLI of the comparable at 15.37%. Accordingly, the assessee considering its PLI of 13.12% observed, that its international transactions with the AEs were at ALP. The benchmarking analysis of the core international transactions of the assessee with its AEs were found by the TPO to be at arm's length price. Accordingly, the TPO did not suggest any addition on account of the import of the finished goods by the assessee from its AEs. Apart there from, there was also no disturbance as regards the method of benchmarking i.e TNMM that was adopted by the assessee. The assesses TP study report also included ALP analysis of the AMP expenses. While accepting the fact that the international transactions entered into with the AEs were at arm's length, the TPO proceeded to separately benchmark the AMP expenditure of the assessee. The TPO rejected the comparable companies that were selected by the assesse for benchmarking the AMP expenditure and after applying the "Bright Line Test" (for short "BLT") had observed, that the excess AMP expenditure was required to be reimbursed by the AEs to the assessee. As per the TP study report, it was observed by the TPO that the ratio of the AMP expenditure as against sales in the case of the assesseewas 11.29%. The TPO selected 5 new comparables for benchmarking the AMP expenditure of the assessee and pegged the average AMP of the comparables at 5.42% as

against the assessee ratio of 11.29%. In the TP study report, the TPO considered 80%:20% of the total travelling and personnel cost after excluding the non-business employees related expenses. Accordingly, on the basis of his aforesaid deliberations the TPO suggested an adjustment amounting to Rs.19,45,15,147/-.

4. The assessee objected to the proposed TP adjustment of Rs.19,45,15,147/- before the Dispute Resolution Panel-1, Mumbai (for short 'DRP'). The DRP directed the A.O/TPO to recompute the AMP expenses as per the approach that was adopted in the immediately preceding year i.e A.Y. 2008-09. Accordingly, the A.O pursuant to the directions of the DRP quantified the adjustments on account of AMP expenses by adopting 50% of the total personnel and travelling cost. As per the aforesaid modifications, the ratio of the assesses AMP expenditure as against sales was reworked at 9.49% instead of 11.29%, whereas that of the comparable companies was modified to 4.34% as against 5.42%. In the backdrop of the aforesaid modifications the A.O in his final assessment order passed u/s 143(3) r.w.s 144C(13), dated 29.01.2014 made an addition of Rs. 20,01,91,810/- on account of TP adjustment of AMP expenditure. Accordingly, the income of the assessee was assessed at Rs.17,64,83,650/- under the normal provisions, while for the 'book profit' under Sec.115JB was worked out at Rs.18,62,08,985/-.

5. Aggrieved, both the assessee and the revenue carried the matter in appeal before the Tribunal. Further, the assessee also filed a cross objection. It was observed by the Tribunal that the core international transaction of import of finished goods by the assessee from its AEswas found to be at arm's length and no addition on the said count was suggested by the TPO. Also, it was noticed that no disturbance

was called for to the method of benchmarking i.e TNMM that was adopted by the assessee. It was observed by the Tribunal that by virtue of the judgement of the Hon'ble High Court of Delhi in the case of **Sony Ericsson Mobile Communication India Pvt. ltd. Vs. CIT (2015) 374 ITR 118 (Del)**, the decision of the 'Special Bench' of the Tribunal in the case of **L.G. Electronics India Pvt. ltd. Vs. ACIT (2013) 152 TTJ 273 (Del) (SB)** had been reversed on the issue as regards adoption of the "Bright Line Test" (for short "BLT") for benchmarking the AMP transactions. However, as the order of the Hon'ble High Court of Delhi in the case of Sony Ericsson (supra) was not available during the course of framing of the assessment by the A.O, therefore, the Tribunal remanded the issue to his file for readjudicating the same afresh after applying the ratio of the aforesaid judicial pronouncement. It was observed by the Tribunal that as per the settled position of law the A.O/TPO were required to adopt a 'bundled approach' for benchmarking the AMP expenses. Accordingly, it was observed by the Tribunal that after the TPO had accepted the comparables adopted by the assessee as a 'bundled transaction', thereafter treating the AMP expenditure as a separate international transaction for benchmarking the same was not justified. On the basis of its aforesaid observations, the Tribunal remanded to the matter to the file of the A.O/TPO for benchmarking the AMP transactions after considering the rejection of the BLT by the Hon'ble High Court of Delhi. Apart there from, the TPO was also directed to apply all the principles which had been laid down by the Hon'ble High Court of Delhi in the case of Maruti Suzuki India Ltd. Vs. CIT (2016) 381 ITR 117 (Delhi) as regards the benchmarking of the AMP transactions. The TPO giving effect to the order of the Tribunal, passed an order under Sec.92CA(3) r.w.s 254, dated 27.01.2017, and again suggested an

adjustment of Rs.19,45,15,147/- as regards the AMP expenditure incurred by the assessee. The TPO while taking recourse to BLT while benchmarking the AMP expenditure incurred by the assesse, observed, that the judgment of the Hon'ble High Court of Delhi in the case of Maruti Suzuki India Ltd. Vs. CIT (2016) 381 ITR 117 (Del) was distinguishable on facts as against those involved in the case of the assessee which was a distributor of the products manufactured by the foreign AEs, and was not manufacturing the products as a licensed manufacturer. Apart there from, it was observed by the TPO that as the revenue had not accepted the judgment of the Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. Vs. CIT (2015) 374 ITR 118 (Del) and had assailed the same before the Hon'ble Supreme Court, therefore, the same had not attained finality.

6. The A.O on the basis of the aforesaid order passed by the TPO under Sec. 92CA(3) r.w.s. 254, dated 27.01.2017 passed a draft assessment order on 14.03.2017. The assessee objected to the aforesaid proposed TP adjustment as suggested by the TPO. It was submitted by the assessee that the TPO was in error in not following the directions of the Tribunal and had wrongly rejected the 'bundled approach' principle as had been laid out by the Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. Vs. CIT (2015) 374 ITR 118 (Del)& Maruti Suzuki India Ltd. (2016) 381 ITR 117 (Del). It was the claim of the assessee that as it had followed a bundled transaction approach for determining the ALP of its trading transactions, therefore, it was illogical and improper on the part of the TPO to have segregated the AMP expenses and benchmarked the same as a separate international transaction. The

assessee objected to the application of BLT by the TPO for determining the arm's length price of the AMP expenses, without comprehending that the Tribunal while remanding the matter, had specifically observed that BLT was not a proper method for benchmarking the AMP expenses. The DRP observed that the Tribunal had remanded the matter back to the A.O in order to enable him to consider the two decisions of the Hon'ble High Court of Delhi viz. (i) Sony Ericsson Mobile Communications India Pvt. ltd. (2015) 55 taxman.com 240 (Del); and (ii) Maruti Suzuki India Pvt. ltd. Vs. CIT (2016) 381 ITR 117 (Del)for taking a considered call with respect to identification of the AMP expenditure as an international transaction and benchmarking the same. It was also observed by him that the issue of aggregation/segregation was also to be decided in light of the judgment of the Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. (supra). Further, it was noticed by the DRP that the TPO was also directed not to alter the comparables which were selected by him. The DRP after necessary deliberations observed, that in the case of Maruti Suzuki India Pvt. ltd. Vs. CIT (2016) 381 ITR 117 (Del) the Hon'ble High Court of Delhi was dealing with a different category of assesse viz. a licensed manufacturer. In the backdrop of the aforesaid facts, it was observed by the DRP that as the case of the assessee before them was that of a pure distributor and not as that of a manufacturer, therefore, the various decisions relied upon by it could not be followed for arriving at a proper conclusion. It was further observed by the DRP that the claim of the assessee that the advertising activity carried out by it was an independent activity and was not done in close co-ordination with the actual brand owner, or that it was being done only with the view to ensure efficient distribution/routine marketing and had no

relationship with the DEMPE functions, could not be accepted. Also, it was observed by the DRP that though the assessee had tried to follow the aggregated approach, however, it had not discussed the AMP expenditure in its TP study report and there was no evidence that its comparables had been selected with a view to ensure that they were performing similar marketing functions. On the contrary, it was observed by the DRP that in addition to the significantly high AMP expenses, the nature of the services which were necessary for selling the products which admittedly were not being rendered by the AEs in India clearly revealed that the assessee was performing the DEMPE functions on behalf of its AE. Also, it was observed by the DRP that though the assessee had claimed that as it had adopted an aggregate approach, therefore, the AMP transactions should be treated as having been aggregated with the other transactions while conducting the TNMM analysis did not merit acceptance in the absence of any supporting evidence. Further, it was observed by the DRP that just because the AMP expenses formed part of the expenditure incurred while conducting the TNMM, it could not be held that the TNMM included the AMP expenditure. Accordingly, it was observed by the DRP that the aggregation approach could not be taken as the correct approach in the case of the assessee. Infact, it was observed by the DRP that as the AMP expenses had not been benchmarked by the assessee at all, therefore, they were required to be identified as a separate transaction for the purpose of their benchmarking. The DRP also declined to accept the claim of the assessee that the AMP expenses incurred were in context of its own sales efforts and any benefit to the AE was incidental. On the basis of the aforesaid observations, it was concluded by the DRP that the assessee had rendered significant DEMPE services to its AE which constituted an

independent international transaction and was required to be benchmarked separately. Further, the claim of the assessee that the TPO had wrongly rejected the 'bundled approach' that was adopted by the assesse for benchmarking the transactions of purchase of finished goods and other associated transactions, and was thus in error in separately benchmarking the AMP expenses also did not find favour with the DRP. On the basis of its aforesaid observations the DRP directed the TPO to recompute the adjustments as per the directions contained in its order.

7. The A.O pursuant to the order passed by the DRP under Sec.144C(5), dated 21.12.2017, therein passed the final assessment order under Sec. 143(3) r.w.s 254 r.w.s. 144C(13), dated 30.01.2018. The A.O after interalia making an addition on account of TP adjustment of Rs.8,98,53,433/-assessed the income of the assessee company at Rs.6,57,50,870/-.

8. The assessee being aggrieved with the order passed by the A.O under Sec. 143(3) r.w.s 254 r.w.s. 144C(13), dated 31.01.2018 has carried the matter in appeal before us. At this stage, we may also observe that the order passed by the Tribunal in the first round of appeal while disposing off the appeal and the cross-objection of the assessee, viz. ITA No. 2168/Mum/2014 & C.O No. 213/Mum/2104, and also the appeal of the revenue viz. ITA No. 2121/Mum/2014, vide its consolidated order dated 31.12.2015 for the year under consideration viz. AY. 2009-10 was assailed by the assesse before the Hon'ble High Court of Bombay. The assessee in its appeal before the Hon'ble High Court had raised the following question of law:

> "Whether the expenditure incurred by the appellant of Rs.31,31,06,96,140/- (referred to as AMP expenditure) be regarded as an international transaction and subjected to the rigors of Chapter X of the Act ?"

It was the claim of the assesse before the Hon'ble High Court, that though before the Tribunal, the issue as to whether AMP expenditure was to be regarded as an international transaction was specifically raised, however, the same was not adjudicated upon and was remanded by the Tribunal to the A.O/TPO for determining the ALP of the transactions. Further, it was brought to the notice of the Hon'ble High Court that the order passed by the A.O in the course of the 'set aside' proceedings, wherein he had examined the issue as to whether AMP expenditure incurred by the assessee was an international transaction, or not, was carried in appeal by the assessee before the Tribunal. We find that the Hon'ble High Court taking cognizance of the fact that the Tribunal in the second round of appeal was now in seisen of the issue as to whether the AMP expenses incurred by the assessee was an international transaction or not, had observed, that it would be proper that the same may be adjudicated by the Tribunal without in any manner being fettered by its earlier order. To sum up, the Hon'ble High Court had disposed off the appeal with a direction to the Tribunal to decide the issue which was a subject matter of dispute in the second round of appeal before the Tribunal, along with the appeal of the assesse against the quantum assessment which was pending before it. At the same time, we find that the Hon'ble High Court had also categorically observed that the other issues raised in the first round of appeal (except those remanded) were not to be re-adjudicated by the Tribunal.

9. In the backdrop of the aforesaid facts, we may herein observe that the core issue involved in the present appeal revolves around the

aspect i.e as to whether incurring of the AMP expenditure by the assessee is an international transaction, or not. The ld. Authorized Representative (for short 'A.R') for the assessee took us through the facts of the case. It was submitted by the ld. A.R that it is the second round of appeal of the assessee before the Tribunal. Apart there from, the ld. A.R also drew our attention to the order of the Hon'ble High Court in the case of India Medtronic Pvt. Ltd. Vs. Dy. Commissioner of Income Tax OSD-8(2) (ITA No. 1404 of 2016, dated 06.02.2019). The ld. A.R submitted that as there was no explicit arrangement between the assessee and its AEs for incurring of AMP expenses, therefore, the AO/TPO had proceeded with on the basis of misconceived facts and therein erroneously held to the contrary viz. (i) that, AMP expenses incurred by the assessee was an international transaction; (ii) that, as the AMP expenses incurred by the assessee were excessive and benefitted the group entities owning the "Medtronic" Brand, hence the assesse should have been compensated by the AEs for such excessive AMP expenditure; and (iii) that, the TPO had erroneously relied on 'Article 3' of the 'Distribution Agreement', and had wrongly concluded that as there was an arrangement with its AE, therefore, incurring of AMP expenses was to be construed as an international transaction. It was submitted by the ld. A.R that the issue as to whether AMP expenses incurred by the assessee was an international transaction, or not, was covered by the order of the Tribunal in the assesses own case for the immediately succeeding year viz. A.Y. 2010-11 in India Medtronics Pvt. ltd. Vs. DCIT-10(1)(1), Mumbai (ITA No. 1600/Mum/2015, dated 17.01.2018) (copy placed on record). It was submitted by the ld. A.R that in the aforesaid case the Tribunal had observed that in absence of any agreement for sharing of AMP expenses, the same could not have been held to be an international

transaction. Apart there from, it was observed by the Tribunal, that even if the AE was benefitted indirectly by the AMP expenditure incurred by the assessee, it could not be held that it had entered into an agreement for sharing of AMP expenses. It was also submitted by the ld. A.R that the aforesaid order of the Tribunal was thereafter followed by the Tribunal while disposing off its appeal for the immediately preceding year i.e A.Y. 2008-09 in India Medtronic Pvt. Ltd. Vs. DCIT-8(2), Mumbai (ITA No.7555/Mum/2012, dated 04.05.2018) (copy placed on record). It was submitted by the ld. A.R that the 'distribution Agreement' between the assessee and its AEs was effective from 28.04.2007 and was renewable automatically on year-to-year basis. Accordingly, it was submitted by the ld. A.R that the terms of the distribution agreement had not changed and had remained the same. In the backdrop of the aforesaid facts, it was submitted by the ld. A.R that the Tribunal while concluding that AMP expenses incurred by the assessee was not an international transaction had relied on a similarly placed the 'distribution agreement' as wasin force during the year under consideration. On the basis of his aforesaid contention, it was submitted by the ld. A.R that now when there had been no change in facts, therefore, no adjustment as regards the AMP expenses on the basis of an inconsistent approach was warranted.

10. Per contra, the Ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. However, the ld. D.R did not controvert the claim of the assessee that the issue involved in the present appeal was covered by the orders of the Tribunal passed in its own case for A.Y. 2010-11 and A.Y 2008-09.

11. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. Our indulgence in the present appeal has been sought by the assessee for adjudicating as to whether the AMP expenses incurred by the assessee is to be construed as an international transaction, or not. We have given a thoughtful consideration to the facts before us and find that the aforesaid issue under consideration is squarely covered by the order passed by the Tribunal in the assesses own case for A.Y. 2010-11 in **India Medtronics Pvt. ltd. Vs. DCIT-10(1)(1), Mumbai (ITA No. 1600/Mum/2015, dated 17.01.2018)**. Admittedly, the "distribution agreement" which had been effective from 28.04.2007 was renewable automatically on year-to-year basis and involving the same terms and conditions was applicable during the period relevant to A.Y.2010-11. Accordingly, the terms of the distribution agreement had not changed/modified. Also, we find that the similarly placed "distribution Agreement" was relied upon by the Tribunal while disposing off the appeal of the assessee for the immediately preceding year viz. A.Y. 2008-09. A perusal of the order of the Tribunal in the assesses own case for A.Y. 2010-11, viz. **India Medtronic Vs. DCIT-10(1)(1), Mumbai (ITA No. 1600/Mum/2015, dated 17.01.2018)**, reveals that the Tribunal had observed viz. (i) that, in the agreements between the assessee and its AE there was no condition of sharing of AMP; (ii) that, the agreements only referred to using best efforts to distribute the products or promote products in a commercially reasonable manner; and (iii) that, the terms of the agreement did not provide that the assessee had to share AMP expenses; (iv) that, even if the AE was benefitted indirectly by the AMP expenditure incurred by the assessee, it could not be inferred that it had entered into an agreement for

sharing AMP expenses; and (v) that, the 'Bright Line Test' should not have been applied by the TPO. We find that the Tribunal after relying on its earlier order in the case of Thomas Cook India Ltd. (ITA No. 1261 & 1238/Mum/2015, dated 31.05.2016), had therein decided the issue in favour of the assessee, observing as under:

> 3.4.We have heard the rival submissions. We find that the TPO had held that assessee should have been compensated by its AE for the AMP expenditure incurred by it. We have gone through the agreements entered in to by the AE.s with the assessee, that in the agreements there is no condition about sharing of AMP, that the agreements talks of using best efforts to market and distribute the product or promote the products in a commercially reasonable manner. In our opinion, these terms do not give any indication that the AE and the assessee had to share AMP expenses. Secondly, if the AE was benefitted indirectly by the AMP expenditure incurred by the assessee, it cannot be held that it had entered into agreement for sharing AMP expenses. We are also of the opinion that Bright Line Method should not have been applied by the TPO. We would like to reproduce the relevant portion of the order of the Thomas Cook (supra),wherein the identical issue has been dealt in length, and it reads as under:
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> > "8.3.We have heard the rival submissions and perused the material before us. In the earlier part of our order, we have mentioned that we would like to deal with the issue of AMP expenses for both the years at one place, as there is no change in the facts except for the amounts involved and the non adjudication of the issue in the earlier year. The arguments of the assessee for both the years are identical. We find that assessee had incurred an expenditure of Rs.12,25,71,652/-and Rs.10,01,37,032/-respectively for the earlier and current AY. under the head AMP, that it was paying name and licence fee to TCUK, that the TPO held that the assessee was spending much more than Industry average in promoting and building brand of TCUK, that he made an adjustment of Rs.8.09 crores and Rs.8.31 crores for the AY.s.2009-10 and AY.2010-11 towards AMP expenditure, that the assessee had filed additional evidences before the FAA, that the FAA did not admit the evidences referring to the provisions of Rule 46A of the Rules, that he upheld the order of the TPO, that for the AY.2010-11 the assessee had filed objections before the DRP, that the adjustment made by the TPO were confirmed the DRP, that the adjustment was made/confirmed by the TPO/DRP because both of them were of the opinion that by incurring expenditure in India the assessee was benefitting a brand name of TCUK.
> > 8.3.1.First of all, we would like to mention that as on today the legal position is as clear as crystal with regard to AMP expenses. The Hon'ble Delhi High Court has dealt the issue in depth and has arrived at the conclusion that in absence of any agreement for sharing AMP expenses it cannot be held that AMP expenditure was an IT. Probable incidental benefit to the AE would not make such a transaction an IT. The factors like payment under the head AMP expenditure to the third independent parties, promoting own business interest by way of AMP expenses take away the alleged 'internationality' of the transaction. In absence of any direct or direct evidence of incurring of AMP expenses by the assessee for the benefit of the AE or on behalf of the

AE, it is has to be held that the transaction in dispute is not covered by the provisions of section 92B or 92B(1)of the Act and hence is not an IT. Once it goes out of the ambit of being an IT,FAR analysis of comparables or any other adjustment will and cannot come in picture. Folk wisdom of rural India the says that mother (Maa)is must for existence of her sister(Mausi).Similarly the existence of an IT is the pre-requisite of applying the provisions of chapter X of the Act. The assessee from the very beginning was arguing that it is not an IT, but, the TPO and the DRP did not deal with the core issue. In these circumstances, we are of the opinion that the matter should not be remitted back to the file of the TPO/ AO. Litigation has to be put to an end at some stage .Judicial time of every authority, including the TPO/DRP, is very precious and it should not be wasted for dealing with mere academic arguments. The recourse of remanding of matters/issue to the AO.s has to resorted rarely and selectively. In the case before us, no reasonable cause has been shown to justify the setting aside the issue. Here, we would also like to refer to the case of Bosch and Lomb (supra) wherein all the arguments raised by the TPO & FAA/DRP have been deliberated upon in length and the relevant portion of the order reads 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.
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> 55. Section 92B defines 'international transaction' as under: "Meaning of international transaction. 92B.(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."
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> 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 ensure 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:

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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 hereinbefore, 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 BLT, 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 from 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. 1261 & 1238/M/15 Thomas Cook 33 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.”

> With reference to the submissions of the DR, we would like mention that first of all the issue before us is not an assessee that is engaged in distribution and manufacturing of certain goods, so the question of slicing of expense in two portions would not arise. However, the other part of the argument that matter should be restored back to the file of the AO/TPO as they were following the order of LG and did not have benefit of later judgments of the Hon'ble High Court, we would like to mention that matter can be restored back in certain conditions only. Restoration of matters to the AO.s is not a tool to give one more opportunity of hearing to the litigants. It is not advisable to prolong the judicial proceedings in the name of fair play. It is not a case where new evidences have been placed on record by the assessee, that were not made available to the AO at the time of original assessment. It is not also a matter wherein some ground of appeal has remained un-adjudicated. There is violation of principles of natural justice. So, we hold that it is not a fit case to be sent back to the TPO for fresh adjudication.
>
> Considering the above, we decide the first effective ground of appeal(GOA-1-16)in favour the assessee."

We have perused the aforesaid order of the Tribunal for A.Y 2010-11, and finding ourselves to be in agreement with the view therein taken respectfully follow the same and delete the impugned T.P adjustment of Rs.8,98,53,433/- made by the A.O in the hands of the assessee. At this stage, we may herein observe that as the issue that AMP expenses incurred by the assessee had been held by us as not being an international transaction, therefore, the other grounds on the basis of which the TP adjustment in respect of the said transaction had been assailed by the assessee before us would be rendered as merely academic in nature. Accordingly, the **Grounds of appeal No. 4 to 19** are disposed off in terms of our aforesaid observations.

12. The ld. A.R has further assailed the order of the A.O on the ground that he had erred in not granting the consequential depreciation on non-compete fees as the same was held to be in the nature of a capital expenditure in A.Y. 2002-03. We have perused the order of the Tribunal passed in the first round of appeal and find that no such contention of the assessee as regards its entitlement towards depreciation of non-compete fees was remanded by the Tribunal to the

file of the A.O. Accordingly, respectfully following the directions of the Hon'ble High Court that other issues raised in the first round of appeal (except those remanded) are not to be re-adjudicated by the Tribunal, therefore, we refrain from adverting to and therein adjudicating the aforesaid claim of the assessee which as observed by us hereinabove, arises from a fact that had not been remanded by the Tribunal to the file of the A.O for fresh adjudication.

13. The appeals of the assessee viz. ITA No. 2168/Mum/2014; and C.O. No. 213/Mum/2014 (Arising out of ITA No. 2121/Mum/2014) and also ITA No. 1997/Mum/2018 are allowed in terms of our aforesaid observations. The appeal filed by the revenue viz. ITA No. 2121/Mum/2014 is dismissed pursuant to our aforesaid observations.

Order pronounced in the open court on 24.07.2019

Sd/-	Sd/-
(G.Manjunatha)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 24.07.2019
**Ps. Rohit

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

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

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt. Registrar)

आयकरअपीलीयअधिकरण, मुंबई **/ ITAT, Mumbai**