आयकर अपीलीय अधिकरण "जे" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

माननीय श्री शक्तिजीत दे, न्यायिक सदस्य **एवं**
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI SAKTIJIT DEY, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आ□करअपील सं./ I.T.A. No.7539/Mum/2012
(**निर्धारण वर्ष /** Assessment Year: 2008-09)

Mondelez India Foods Private Limited Mondelez House Unit Number-2001, 20th Floor Tower-3(Wing-C), India Bulls Finance Centre Parel, Mumbai-400 013.	**बनाम**/ Vs.	**Addl. CIT–Range-5(1)** Aaykar Bhavan, M.K. Road Mumbai-400 020.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAACC-0460-H**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	S/Shri J.D. Mistry & Hiten Chande-Ld. ARs
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri V. Janardhan-Ld. DR

सुनवाईकीतारीख**/ Date of Hearing**	:	24/07/2019
घोषणाकीतारीख / **Date of Pronouncement**	:	14/10/2019

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member): -

1.1 Aforesaid appeal by assessee for Assessment Year [in short 'AY'] 2008-09 contest certain additions / disallowances / adjustments made in final assessment order dated 18/10/2012 passed by Ld. Addl. CIT, Range-

5(1), Mumbai u/s.143(3) r.w.s.144C pursuant to the directions of Ld. Dispute Resolution Panel-I, Mumbai [DRP] u/s 144C(5) dated 07/09/2012.

1.2 The erstwhile assessee M/s Cadbury India Ltd. has merged with M/s Mondelez India Foods Private Limited and accordingly, the assessee has filed revised Form No. 36B reflecting aforesaid change. Finding the same in order, we proceed to adjudicate the appeal as argued before us.

1.3 A chart has been placed before the bench to submit that most of the issues, under appeal, are covered by orders of Tribunal in assessee's own case for various Assessment Years and there is no change in material facts and therefore, similar view may be taken in the matter. Both the representatives broadly converge on this point. For ease of reference, the decisions rendered by Tribunal for various years could be tabulated in the following manner: -

No.	Citation	Assessment Year
1.	ITA No. 7408/Mum/2010 order dated 13/11/2013 (Cross-Appeals)	2002-03
2.	ITA No. 3510/Mum/2011 order dated 13/05/2015 (Cross-Appeals)	2003-04 & 2004-05
3.	ITA No. 5470/Mum/2011 order dated 18/05/2016 (Cross-Appeals)	2005-06
4.	ITA No. 1512/Mum/2013 order dated 28/11/2018 (Cross-Appeals)	2006-07
5.	ITA No. 4225/Mum/2014 order dated 04/07/2019 (Assessee's Appeal)	2007-08

The decision for AY 2006-07 as tabulated at serial no. 6 has been delivered by this very bench vide order dated 28/11/2018.

1.4 The grounds of appeal, in revised form, read as under: -

"Based on the facts and circumstances of the case and in law, Mondelez India Foods Private Limited (hereinafter referred to as the 'Appellant') craves leave to prefer an appeal against the order passed by the Additional Commissioner of Income-tax, Range 5(1) [hereinafter referred to as the 'learned Additional CIT] dated 18 October 2012 (received by the Appellant on 22 October 2012) under section 143(3) read with section 144C of the Income-tax Act, 1961 (hereinafter referred to as the 'Act'), in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel-I, (hereinafter referred to as the 'Hon'ble DRP') on the following grounds, each of which are without prejudice to one another:

On the facts and circumstances of the case and in law, the learned AO based on the directions of the Hon'ble DRP has:

Transfer pricing adjustment

1. Erred on the facts and circumstances of the case and in law in making an adjustment of Rs.281,052,937 to the total income of the Appellant under Section 92CA(3) of the Act on account of adjustment in the arm's length price of the international transactions of the Appellant.

Royalty payment

2. Erred on the facts and circumstances of the case and in law, in not accepting the economic analysis undertaken by the Appellant using the Transactional Net Margin Method (TNMM'), in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ('the Rules'), for the determination of the arm's length price in connection with the international transaction of payment of royalty to its associated enterprises ('AE')

3. Erred on the facts and circumstances of the case and in law, in disallowing the trademark royalty of Rs.130,022,203 paid to Cadbury Schweppes Overseas Limited on the ground that the same was subsumed in the technical assistance royalty paid by the Appellant.

4. Erred on the facts and circumstances of the case and in law, in disallowing the technology royalty of Rs.8,761,354 paid to Cadbury Adams USA LLC on the ground that license to use the technology was not obtained directly from the licensor but from a sub-licensor and that if the payment gets subsumed in trademark royalty, the same can be allowed only upto 1%.

5. Erred on the facts and circumstances of the case and in law, in disallowing the technology royalty of Rs.14,251,888 paid to Cadbury Enterprises Pte Limited on the ground that license to use the technology was not obtained directly from the licensor but from a sub-licensor.

Service fees to Cadbury Schweppes Asia Pacific Pte Limited

6. Erred on the facts and circumstances of the case and in law, in completely disallowing the service fees of Rs 107,314,992 paid to Cadbury Schweppes Asia Pacific Pte Limited, Singapore on the ground that the Appellant has failed to establish that the services have been rendered at requisite amount.

7. Erred on the facts and circumstances of the case and in law, in not accepting the economic analysis undertaken by the Appellant using the TNMM method, in accordance with the provisions of the Act read with the Rules, for the determination of the arm's length price in connection with the international transaction of payment of service fees to Cadbury Schweppes Asia Pacific Pte Limited, Singapore.

8. Erred on the facts and circumstances of the case and in law, in determining the value of the services received from Cadbury Schweppes Asia Pacific Pte Limited, Singapore at NIL, without undertaking any comparability analysis for the same under one of the five prescribed methods.

Service fees to Cadbury Holdings Limited

9. Erred on the facts and circumstances of the case and in law, in disallowing the service fees of Rs 20,702,500 paid to Cadbury Holdings Limited stating the Appellant does not satisfy the benefit test, without appreciating the submissions made by the Appellant on the nature of services availed and the benefits received by the Appellant.

10. Erred on the facts and circumstances of the case and in law, in not accepting the economic analysis undertaken by the Appellant using the TNMM method, in accordance with the provisions of the Act read with the Rules, for the determination of the arm's length price in connection with the international transaction of payment of service fees to Cadbury Holdings Limited.

11. Erred on the facts and circumstances of the case and in law, in questioning the commercial wisdom/reasoning of the Appellant for availing the services from its AE.

Corporate tax adjustment

12. Erred on the facts and circumstances of the case and in law in making an adjustment of Rs.264,625,015 to the total income of the Appellant on account of disallowance of depreciation on marketing know-how, disallowance under section 14A of the Act and reduction of deduction claimed under section 80-IC of the Act.

Denial of the depreciation on marketing know-how

13. Erred in law and in facts in disallowing depreciation of Rs 1,279,972 on marketing know-how under section 32(1) of the Act.

Disallowance under section 14A of the Act

14. Erred in disallowing a sum of Rs 23,304,902 under section 14A of the Act.

Allocation of expenses in respect of the unit of the Appellant in Baddi

15. Erred in arbitrarily allocating the following common expenses incurred by the Appellant to the factory of the Appellant at Baddi for determining the profits eligible for deduction under section 80-IC of the Act and reducing the deduction claimed under section 80-IC of the Act to Rs.546,757,710 as against the deduction claimed by the Appellant amounting to Rs.786,797,851:

- Direct marketing expenses;
- Expenses incurred on other employees at Head Office;
- Indirect expenses relating to directors;
- Sales and distribution expenses;
- Interest;
- Increase / (Decrease) in the stock.

2. Briefly stated, the assessee being resident corporate assessee is stated to be engaged in the business of manufacturing and marketing of malted foods, drinks and chocolates. The assessment was framed on 18/10/2012 pursuant to the directions of Ld. DRP determining the income at Rs.139.98 Crores, after certain additions / disallowances / adjustments as against returned income of Rs.85.49 Crores e-filed by the assessee on 30/09/2008. As evident from grounds of appeal, the following quantum additions made in final assessment order are the subject matter of present appeal before us: -

No.	Nature of Addition	Amount (Rs.)
(A)	**Transfer Pricing Adjustments**	
1.	Trademark Royalty paid to Cadbury Schweppes Overseas Limited	Rs.1300.22 Lacs
2.	Technology Royalty paid to Cadbury Adams USA LLC	Rs.87.61 Lacs
3.	Technology Royalty paid to Cadbury Enterprises Pte Limited	Rs.142.51 Lacs

4.	Service Fees paid to Cadbury Schweppes Asia Pacific Pte Limited, Singapore	Rs.1073.14 Lacs
5.	Service fees paid to Cadbury Holdings Limited	Rs.207.02 Lacs
(B)	**Corporate Tax Adjustments**	
6.	Depreciation on Marketing Know how	Rs.12.79 Lacs
7.	Disallowance u/s 14A	Rs.233.04 Lacs
8.	Reduction in deduction u/s 80-IC by reallocating expenditure of Baddi Unit	Rs.2400.40 Lacs

(A) Transfer Pricing Adjustment

3.1 Certain international Transactions carried out by the assessee during the year and as reported in Form No. 3CEB were referred to Ld. Transfer Pricing Officer u/s 92CA(1) for determination of Arm's Length Price (ALP). It was noted that the assessee was subsidiary of Cadbury Schweppes Overseas Ltd. UK with shareholding of 54.85% whereas Cadbury Schweppes Mauritius Ltd. was holding 42.74% of the assessee's shareholdings. The remaining 2.41% was held by Indian Public. The assessee was stated to be incorporated in the year 1948 as Cadbury Fry (India) Pvt. Ltd. for processing of chocolates and Bournvita. Over the years, it expanded to cover a range of products in the chocolate, sugar confectionery and malted food drinks segment. The chocolate business contributes about 75% of assessee's turnover whereas malted food drinks contribute remaining 25%. Cadbury India was operating in food segment of fast-moving consumer goods (FMCG). It has manufacturing units at Thane, Induri, Malanpur etc. and it exports its products to various other countries like Bangladesh, Sri Lanka, Middle East, Nigeria, South Africa, USA, Malaysia, West Indies etc. The assessee reflected a sale of Rs.1351.55 Crores during the year under consideration.

3.2 The determination of ALP of following international transactions are the subject matter of present appeal before us: -

	Transfer Pricing Adjustments	**Amount (Rs.)**
1.	Trademark Royalty paid to Cadbury Schweppes Overseas Limited, London, UK (CSOL)	Rs.1300.22 Lacs
2.	Technology Royalty paid to Cadbury Adams USA LLC (CAUSA)	Rs.87.61 Lacs
3.	Technology Royalty paid to Cadbury Enterprises Pte Limited (CEPT)	Rs.142.51 Lacs
4.	Service Fees paid to Cadbury Schweppes Asia Pacific Pte Limited, Singapore (CSAPL)	Rs.1073.14 Lacs
5.	Service fees paid to Cadbury Holdings Limited (CHL)	Rs.207.02 Lacs

The assessee, in its Transfer Pricing Study report, benchmarked the stated transactions using entity level Transactional net margin Method (TNMM) and contended that the transactions were at Arm's Length and therefore, no adjustment would be required for the aforesaid transactions.

<u>Trademark Royalty paid to Cadbury Schweppes Overseas Limited, London, UK (CSOL)</u>

3.3.1 The Ld. TPO disallowed royalty payment on trademark paid by the assessee to SCOL @1% while allowing the royalty payment on technical knowhow at 1.25% of net sales on the reasoning that as per earlier agreement approved by Government, the assessee could pay royalty for technical knowhow at the maximum rate of 2%. However, in the year under consideration, the assessee paid aggregate royalty of 2.25%. Forming an opinion that royalty for technical know-how subsumes royalty for trademark and therefore, the separate royalty for trademark paid at 1% would not be allowable to the assessee.

3.3.2 It is admitted position that the issue stood squarely covered in assessee's favor by the decision of this very bench in assessee's own case for AY 2006-07 wherein the matter has been concluded in the following manner: -

> 7. We have considered rival submissions and perused materials on record. As could be seen from the order of the Transfer Pricing Officer, he has determined the arm's length price of royalty payment on trademark to SCOL at zero. In other words, he has disallowed royalty payment on trademark at 1% while allowing royalty payment on technical knowhow at 1.25% of net sales. The reasoning on which the Assessing Officer has denied royalty payment on trademark are basically that as per the terms of earlier agreement approved by the Government, the assessee can pay royalty for technical knowhow at the maximum rate of 2%, whereas, the assessee has paid royalty both for technical knowhow and trademark aggregating to 2.25%. He has also referred to the Press Note issued by the Government clarifying that royalty payment cannot exceed 2% and further the royalty payment for technical knowhow subsumes royalty payment for trademark. In this context, the Transfer Pricing Officer has also referred to similar dispute arising in the preceding assessment years. It is evident that the learned Commissioner (Appeals) has upheld the disallowance of royalty payment of trademark simply relying upon the order passed by him in assessee's own case for assessment year 2005–06. As could be seen from the material available on record, the assessee has entered into agreement with its current company in the year 1993, for availing technical knowhow for which it was required to pay royalty @ 2%. Subsequently, the assessee has entered into fresh agreements with the parent company for transfer of technical knowhow as well as use of trade mark for which assessee is required to pay royalty @ 1.25% and 1% of the net sales respectively. As could be seen from the materials placed on record, the payment of royalty for technical knowhow @ 1.25% has been approved by the Ministry of Commerce and Industry, Government of India, vide letter dated 14th September 2000 (copy is placed at Page–85 of the paper book). Similarly, payment of royalty for trademark @ 1% has been approved by the Reserve Bank of India, vide letter dated 25th June 2001, copy at Page–119 of the paper book. Thus, as could be seen, payment of royalty for trademark at 1% over and above the royalty paid at 1.25% for technical knowhow has been approved by the Reserve Bank of India. Though, the Transfer Pricing Officer has relied upon Press Note dated 3rd January 2002, to observe that in case of technology transfer payment of royalty subsumes the payment for royalty for use of trademark, however, in a subsequent Press Note issued by the Ministry of Commerce and Industry, Government of India, vide no.5(5)/2003–FC, dated 24th June 2003, has permitted royalty payment up to 8% on export sales and 5% on domestic sales. It is also relevant to note, the fact that the royalty paid by the assessee @ 2.25% both for technical knowhow and trademark is lesser than the royalty paid by other comparables and even group companies has not

been disputed either by the Transfer Pricing Officer or by the learned Commissioner (Appeals). It is also relevant to note, identical dispute relating to payment of royalty for trademark at 1% over and above royalty paid for technical knowhow at 1.25% and its allowability came up for consideration before the Tribunal in assessee's own case for assessment year 2002–03 to 2005–06. While deciding the issue in the aforesaid assessment years, the Tribunal held that the payment of royalty on trademark to CSOL at 1% of sales is allowable and at arm's length. In fact, decision of the Tribunal has also been accepted by the Revenue. In this context, we may refer to the relevant observations of the Tribunal while deciding identical issue in assessee's own case for assessment year 2005–06, in ITA no.5470/Mum/2012, dated 18th May 2016, which is as under: –

> "2.3. We have heard the rival submissions and perused the material before us. We find that while deciding the appeal for AY 2002-03(supra) the Tribunal has decided the issue as under:-
>
> > "37. We have heard the detailed arguments from both the sides. The basic issue is the correctness of ALP on the royalty payments made by the assessee company to its parent AE on account of technical knowhow and trademark usage.
> >
> > 38.From the arguments of the DR, made on behalf of the TPO, the agreement for paying royalty on technical know-how at 1.25% and trademark usage at 1.25%, were overlapping and thus, TNMM method used by the assessee was incorrect. According to the TPO, the best method to ascertain ALP in the interest case was CUP, as the transactions were controlled. This was reasonable, as no data was available from independent source to benchmark the transactions.
> >
> > 39.On going through the records and the orders of the revenue authorities, we find that in so far as the payment of royalty on technical knowhow concerned, the assessee has been paying to its parent AE right from 1993, as, other group companies are paying across the globe. It has been accepted by the TPO that the payment does not effect the profitability of the assessee, if we are to examine the issue from that angle as well. In any case the payment of royalty on technical knowhow is at par with the similar payments from the group companies in other countries & region. Besides this, the payment is made as per the approval given by the RBI and SIA, Government of India. Hence there cannot be any scope of doubt that the royalty payment on technical knowhow is not at arm"s length.
> >
> > 40.Coming to the issue of royalty payment on trademark usage, we find that the assessee, in fact is paying a lesser amount, if the payments are compared with the payments towards trademark usage, by the other group companies using the Brand Cadbury in other parts of the world. On the other hand, if we examine the argument taken by the TPO with regard to OECD guidelines. On this point the assessee"s payment is coming to a lesser figure, as discussed in detail by the CIT(A).

> 41.We are not going into the arguments advanced by the DR/TPO on geographical differences, and payments made to Harshey, as these arguments gets merged in the interpretation and details available in the table supplied by the assessee and taken note of by the TPO and the CIT(A).
> 42.We are also not referring to the case of Maruti Suzuki Ltd. as we find that in so far as the instant case is concerned, there is really no relevance.
> 43.On the basis of the above observations, we are of the opinion that the royalty payment on trademark usage is within the arms" length and does not call for any adjustment."
>
> Respectfully, following the above order, and the order for subsequent AY.s we decide the Ground of Appeal No.1 in favour of the assessee."
>
> 8. There being no difference in factual position in the impugned assessment year, respectfully following the consistent view of the Tribunal on identical issue in assessee's own case as referred to above, we hold that the royalty payment on trade mark to SCOL @ 1% of net sales is at arm's length, hence, no further adjustment is required. Accordingly, we delete the disallowance made by the Assessing Officer. Ground raised is allowed.

Respectfully following the aforesaid view of Tribunal in assessee's own case, we delete the impugned adjustment of Rs.1300.22 Lacs as made by Ld. AO in the final assessment order. Nothing has been shown to us that the aforesaid ruling is not applicable to the year under consideration. Ground No.3 stand allowed.

Technology Royalty paid to Cadbury Adams USA LLC (CAUSA)

3.4.1 The Ld. TPO noted that as per trademark license agreement dated 01/06/2006, CAUSA was authorized to sub-license the rights of the trademark only and there was no reference to presume that the same included the right to sub-license the technology and know-how. Since the maximum rate of trademark royalty prescribed by the Government was 1%, the royalty of 2.7% paid by the assessee to CAUSA was to be allowed to

the extent of 1% only. The same resulted into TP addition of Rs.87.61 Lacs. The Ld. DRP confirmed the stand of Ld. TPO, against which the assessee is under appeal before us.

3.4.2 We find that this issue is covered by the decision of this Tribunal for AY 2006-07 wherein it has been held as under: -

> 22. We have considered rival submissions and perused materials on record. Undisputedly, the assessee has paid royalty to CAUSA @ 2.7% of net sales as per the agreement executed on 1st June 2006. It is the claim of the assessee that the payment of royalty is for use of trademark as well as technical knowhow. However, the Transfer Pricing Officer after examining the agreement between the assessee and CAUSA has opined that the agreement only provided for use of trademark and it does not provide for use of technical knowhow. It is the say of the Transfer Pricing Officer that since as per the Government guidelines, payment of royalty on trade mark under the automatic route is fixed at the maximum rate of 1%. Royalty paid for trademark at 2.7% is not at arm's length. Accordingly, he has allowed payment of royalty for trademark at 1%. While doing so, the Transfer Pricing Officer has also observed that the agreement executed in December 2007, amending the terms of the original agreement having come in to existence after expiry of relevant financial year would not be applicable for a transaction undertaken in the relevant financial year. The learned Commissioner (Appeals) has also endorsed the aforesaid view of the Transfer Pricing Officer. No doubt, on a perusal of the agreement dated 1st June 2006 between the assessee and CAUSA it appears that the said agreement has been termed as trademark license agreement. However, reading the agreement as a whole and more particularly, Clause–7(b) of the said agreement, it becomes clear the licensee (the assessee) shall manufacture licensed product using any technology of the licensor provided to the licensee in accordance with all specifications and instructions provided by the licensor from time to time. It is not the case of the Revenue that in the relevant previous year assessee has neither manufactured nor sold 'Halls' brand products in India. Thus, it is necessary to ponder whether in absence of necessary technical knowhow/knowledge it would have been possible for the assessee to manufacture the aforesaid products? In our view, the answer would be–No. Further, the assessee and CAUSA have entered into one more agreement on 24th December 2007, amending the terms of the original agreement. As per the aforesaid agreement, certain terms of the original agreement was amended to include licensing / sub–licensing of technology. It is the contention of the learned Sr. Counsel for the assessee that the amendment agreement executed on 24th December 2007, shall operate retrospectively from 1st January 2006, to emphasize this fact, the learned Sr. Counsel for the assessee has sought to produce letter dated 26th April 2016, issued by Mondelez International as additional evidence. From a perusal of the aforesaid letter, it appears that it has been issued to clarify that as per the original

agreement executed on 1st June 2006, effective from 1st January 2006, the parties to the agreement intended to transfer and avail technical knowhow / knowledge relating to the licensed product along with trademark. Considering the submissions of the learned Sr. Counsel for the assessee that in subsequent assessment years royalty paid by the assessee @ 2.7% of sales was accepted by the Transfer Pricing Officer, the letter dated 26th April 2016, sought to be produced by the assessee as additional evidence, in our view, is of much significance since it will have a crucial bearing in determining whether CAUSA has authorised the assessee to use technical knowhow along with trademark, hence, is admitted as additional evidence. Even, without taking cognizance of the aforesaid additional evidence, the original as well as amended agreement make it abundantly clear that assessee has also availed technical knowhow from CAUSA. Further, the Departmental Authorities don dispute the genuineness or authenticity of the amended agreement. What they are disputing is the date from which the amended agreement is effective. If the departmental authorities in the subsequent assessment years have allowed payment of royalty both for trademark and technical knowhow, there is no reason why it should not be allowed in the impugned assessment year, since, it cannot be said that the assessee was manufacturing 'Halls' brand products without obtaining the required technical knowhow. Accordingly, we hold that payment of royalty to CAUSA is at arm's length. The ground is allowed.

Respectfully following the same, we delete the impugned addition of Rs.87.61 Lacs. Ground No.4 stand allowed.

Technology Royalty paid to Cadbury Enterprises Pte Limited (CEPT)

3.5.1 It was noted that the assessee entered into Technical collaboration Agreement dated 28/06/2007 with CEPT to avail the benefits of Technical Know-how, trade secrets etc. for mixed fruit flavored and strawberry flavored sugar non-coated center filled bubble gums / chewing gums. Another agreement was entered into with the same entity for Trademarks and copyright licenses in respect of products *Bubbaloo, Bubba the Cat & Adams.* As per agreement, the assessee paid Technical royalty @4% and Trademark Royalty @1%. Applying the same reasoning, it was

held that CEPT was authorized to sub-license the rights of the Trademark only and there was no reference to presume that the same included the right to sub-license the Technology and know-how related to the products, an adjustment of Rs.142.51 Lacs was proposed by Ld. TPO. The Ld. DRP, finding the adjustment quite similar to as made for royalty payment to CAUSA, endorsed Ld. TPO's action.

3.5.2 Since facts as well as reasoning of lower authorities are quite similar as in the case of royalty payment made by assessee to CAUSA, applying the same analogy, we delete the impugned addition. One more reason to delete the adjustment is that the assessee has entered into two separate agreement for payment of Trademark Royalty & Technical royalty and therefore, the matter would stand on a better footing. Hence, Ground No. 5 stand allowed.

Service Fees paid to Cadbury Schweppes Asia Pacific Pte Limited, Singapore (CSAPL)

3.6.1 Ground Nos. 6 to 8 are related with Transfer Pricing (TP) adjustment on account of service fees paid to another AE viz. CSAPL. The assessee is stated to have entered into service agreement with the said entity on 21/10/2005 valid w.e.f. 01/04/2005 to avail certain services in the areas of Business Strategy, Value Based Management, financial planning and accounting, supply chain coordination & planning, Human Resources, Legal, Marketing etc. The consideration under the agreement was fixed fee

of SGD of 3.6 million per annum chargeable on quarterly basis. The assessee benchmarked the same using entity level TNMM, the assessee being the tested party. The assessee submitted that operating margin of 10.20% earned by the assessee were higher than average margin of 4.72% reflected by comparable entities and therefore, all international transactions would be at Arm's Length. However, Ld. TPO opined that for intra-group transactions, CUP method or CPM was a recommended method as per OECD guidelines. Further, the assessee has not given any valuation of the services, it is benefitted by. Further the assessee failed to establish the necessity of such transaction supported by proper documentation for justification of Arm's Length Prices. In other words, the documentation provided by assessee neither help in understanding the justification for Arm's Length Prices nor the determination thereof. At para (g) of Ld. TPO's order, it was observed that the assessee did not provide evidence in support of the cost incurred by AE while providing the services. Further, the assessee failed to establish whether the services so agreed to be rendered by the AE has been rendered at the requisite amount. It was also noted that although the assessee submitted several documents to substantiate the receipt of the services which was not submitted in the preceding year, however, considering the fact that similar adjustment was made by Ld. TPO in earlier years, the ALP of the transactions was considered as *Nil* and TP adjustment of Rs.1073.14 Lacs was proposed. The Ld. DRP confirmed the stand of Ld. TPO, *inter-alia,* by observing that the assessee was not able to

justify and demonstrate the scale and nature of the benefit derived and also could not demonstrate the cost incurred by AE while providing the services. Aggrieved, the assessee is in further appeal before us.

3.6.2 The Ld. Sr. Counsel sought to distinguish the facts of this year vis-à-vis earlier years by submitting that similar issue in earlier years was remitted back for want of requisite documentary evidences and in view of the fact that additional evidences were submitted during appellate proceedings. The Ld. Sr. Counsel contested the determination of ALP as Nil by submitting that no fault has been found in assessee's methodology and Ld. TPO could not question the benefit test. However, Ld. CIT-DR submitted that the view taken in earlier years should be followed since OECD guidelines mandate assessee to demonstrate that benefits accrued to the assessee by availing intra-group services. It was further submitted that basis of cost allocation along with justification thereof was not provided by the assessee.

3.6.3 Upon careful consideration, it is noted that this transaction has not been separately benchmarked by the assessee rather entity level TNMM method has been used to determine the ALP of all the international transactions. We are of the considered opinion that the initial onus was on assessee to furnish the requisite details viz. nature of services availed, cost allocation keys, justification of costs and establish that the services were actually availed by the assessee. Thereafter, the onus would be on revenue to dislodge assessee's claim by bringing on record evidences to establish

that the said payment, under normal circumstances between unrelated parties, would not have been exchanged between the respective entities. Therefore, with a view to enable the revenue to take consistent stand in the matter, we would be inclined to follow the directions given in AY 2006-07, which could be extracted in following manner: -

> 27. We have considered rival submissions and perused materials on record. The dispute is with regard to payment of ` 13.02 crore to one of the A.Es towards availing of various services under an agreement executed with the A.E. On a perusal of the order passed by the Transfer Pricing Officer and the learned Commissioner (Appeals) it is evident, assessee's claim that aforesaid payment was made to the A.E. for services availed was disbelieved and the arm's length price was determined at nil basically on the allegation that assessee failed to furnish necessary and relevant documentary evidences to prove that services were actually rendered by the A.E. and any benefit in economic and commercial terms accrued to the assessee as a result of such services. Even, there is an allegation by the Transfer Pricing Officer that the assessee did not justify the bench marking under TNMM by offering comparables. Of–course, the learned Sr. Counsel for the assessee has submitted before us that various documentary evidences were furnished before the Transfer Pricing Officer as well as learned Commissioner (Appeals) to demonstrate that services were availed from the A.E. under the terms of the agreement. The learned Sr. Counsel, however, fairly submitted that the details of cost incurred by the A.E. were not furnished before the Assessing Officer, since, he never called for it. It is necessary to observe, in the course of hearing before us the learned Sr. Counsel has filed an affidavit obtained from CSAPL, the A.E., asserting that various services were rendered to the assessee on cost plus mark–up basis. Admittedly, the aforesaid additional evidence was not before the Transfer Pricing Officer or the learned Commissioner (Appeals). Considering the fact that the affidavit produced before us may have a crucial bearing on deciding the issue one way or the other, though, we admit the additional evidence produced by the assessee, however, since the aforesaid additional evidences has not been examined either by the Transfer Pricing Officer or the learned Commissioner (Appeals), in our view, it would be fair and reasonable to allow an opportunity to the Assessing Officer to consider the additional evidence and decide the issue. Moreover, there is also allegation and counter allegation with regard to production of evidences. While the departmental authorities have alleged that relevant documentary evidences were not produced, the assessee claims that all evidences were produced. Without entering into the controversy as to whether assessee has produced the evidences or not, we are of the opinion that evidences brought on record, as contained in the paper books filed before us, deserve to be examined on their own merit before deciding the issue one way or the other. More so, when as per assessee's claim in the subsequent assessment years the Transfer Pricing

> Officer himself has allowed a part of the service charges paid by the assessee to CSAPL, though, the quantum is in dispute. If in the subsequent assessment years the Transfer Pricing Officer has accepted the fact that the assessee has availed services from CSAPL under the very same agreement, there is no reason to dispute assessee's claim of availing services in the impugned assessment year if the assessee can demonstrate such fact by furnishing proper documentary evidences. In that event, the Transfer Pricing Officer certainly cannot determine the arm's length price at nil by applying the benefit test. Therefore, on overall consideration of facts and circumstances of the case, we are inclined to restore the issue to the Assessing Officer for de novo adjudication after due opportunity of being heard to the Assessing Officer. The Assessing Officer / Transfer Pricing Officer must pass a speaking and well reasoned order dealing with all the submissions of the assessee. Accordingly, this ground is allowed for statistical purposes.

Accordingly, the matter stand restored back to the file of Ld. TPO / Ld. AO on similar lines. The Grounds of appeal stands allowed for statistical purposes.

Service fees paid to Cadbury Holdings Limited (CHL)

3.7.1 In Ground Nos. 9 to 11, the assessee is similarly aggrieved by TP adjustment of Rs.207.02 Lacs stated to be paid as service fees to another AE viz. CHL. The assessee is stated to have received technical services from CHL which was similarly benchmarked using entity level TNMM. The Ld. TPO, on more or less same reasoning, reached a conclusion that the assessee failed to establish that the services so agreed have been rendered by AE and rendered at requisite amount. Therefore, the assessee failed benefit test. Accordingly, the ALP of the transactions was considered as *Nil* resulting into adjustment of Rs.207.02 Lacs. The Ld. DRP confirmed the adjustment on same logic, against which the assessee is in further appeal before us.

3.7.2 Since facts as well as observations of lower authorities are pari-materia the same as made by services fees paid by the assessee to CSAPL, taking similar view, we restore the matter back to the file of Ld. TPO / Ld. AO for re-adjudication on similar lines. These grounds may be treated as allowed for statistical purpose.

(B) Corporate Tax Adjustments

Depreciation on Marketing Know-how

4. The facts are that during previous year relevant to AY 2002-03, the assessee acquired on-going chocolate confectionary business of Warner Lambert (I) Pvt. Ltd. pursuant to the world-wide stock and asset purchase agreement between Pfizer and Cadbury Schweppes PLC of UK (their respective parent company). As a part of sale consideration, the assessee allocated certain amount to marketing know-how and claimed depreciation on the same, treating the same to be intangibles. The allocation was based on valuation report of an independent valuer. However, the claim was not accepted by the department in AY 2003-04 and accordingly, following the same, similar depreciation of Rs.12.79 Lacs claimed during the year was disallowed. The Ld. DRP, observing that the issue under earlier years was being contested before Tribunal, the asset could not be categorized as an asset eligible for depreciation u/s 32 and therefore, upheld the stand of Ld. AO. We find that Tribunal, in AY 2003-04, at para-17 allowed depreciation claim applying the ratio of decision of Hon'ble Supreme Court rendered in

M/s Smifs Securities Ltd. [2012 348 ITR 302]. Similar view has been taken in subsequent years. Therefore, respectfully following the consistent view of the Tribunal on this issue in assessee's own case, we allow assessee's claim of depreciation. Ground No. 13 stands allowed.

Disallowance u/s 14A

5.1 During assessment proceedings, it transpired that the assessee earned exempt income of Rs.16.18 Crores which mainly comprised-off of dividend on mutual funds. The assessee, *inter-alia,* submitted that Rule 8D was not applicable to year under consideration. It was also submitted that assessee's surplus funds were invested in Liquid Mutual Fund and the same were withdrawn as per business requirements. The attention was also drawn to the fact there were two persons in the Treasury department to manage mutual funds investment on regular basis and the total salary paid to them was Rs.9.20 Lacs therefore, a part of the same could be disallowed. The arguments were also raised to submit that investments were made out of reserves and surplus. However, not satisfied, Ld. AO, applying Rule 8D, worked out aggregate disallowance of Rs.233.04 Lacs which comprised-off of direct disallowance u/r 8D(2)(i) for Rs.9.20 Lacs, interest disallowance u/r 8D(2)(ii) for Rs.80.56 Lacs and indirect expense disallowance u/r 8D(2)(iii) for Rs.143.28 Lacs. The direct expense disallowance u/r 8D(2)(i) for Rs.9.20 Lacs is the same disallowance which has been offered by the assessee against Treasury department expenses.

The disallowance, upon confirmation by learned DRP, is under appeal before us.

5.2 The arguments of Ld. Sr. Counsel are two-fold viz. (i) Ld. AO has not recorded requisite satisfaction before proceeding to compute disallowance as per Rule 8D; (ii) The assessee had surplus funds to make the investments and therefore, the presumption that the investments were out of surplus funds stood in assessee's favor by the judgments of Hon'ble Bombay High Court rendered in in **HDFC Bank Ltd. V/s CIT (2016 95 CCH 61)** & **CIT V/s HDFC Bank Ltd. (2014 366 ITR 505)**.

5.3 We have considered the same. Upon perusal of financial statements, we find that own funds in the shape of share capital & free reserves at year-end stood at Rs.46266.97 Lacs as against investment of Rs.31228.98 Lacs. Nothing has been brought on record by Ld. AO to establish the nexus of investments with borrowed funds. In fact, opening investments stood at Rs.26663.91 Lacs and the assessee earned profit after tax for Rs.15094.68 Lacs during the year under consideration which is more than incremental investments. Therefore, applying the ratio of cited decisions, we hold that no interest disallowance would be justified on the facts and circumstances. We order so. So far as the disallowance of direct / indirect expenses is concerned, we are of the view that since Rule 8D was applicable to this AY, the findings given in earlier orders of Tribunal would not apply to this year and the disallowance has to be worked out in terms of the Rule 8D. The Ld. AO, in draft assessment order, at para 6.4, has noted that the submissions

made by assessee in defense of suo-moto disallowance could not be accepted as against the submissions of the Ld. Sr. Counsel that the requisite satisfaction was not recorded by Ld. AO before proceeding to apply Rule 8D. We are of the considered opinion that there was no particular method of recording satisfaction in the quantum assessment order and therefore, unable to accept this specific plea of Ld. Sr. Counsel. However, keeping in view the factual matrix as well as submissions made before us, we deem it fit to restore the matter of direct / indirect expense disallowance to the file of Ld. AO for re-adjudication in the light of suo-moto disallowance offered by the assessee. As held earlier, no interest disallowance would be justified, keeping in view the assessee's financial parameters. Ground No. 14 stand partly allowed.

Reduction in deduction u/s 80-IC by reallocating expenditure of Baddi Unit

6.1 It transpired that the assessee claimed deduction u/s 80-IC for Rs.78.67 Crores in respect of manufacturing unit situated at *Baddi*, *Himachal Pardesh*. It was the observation of Ld.AO that expenses claimed against sale of Baddi Unit in comparison to the expenses claimed against sale of remaining units was disproportionate. The said observation was sought to be fortified by the fact that net profit of Baddi worked out to be 23.13% as against net profit of 8.74% for remaining units. On comparison of sale and expenses in respect of 80-IC and non-80-IC units, it was found that the expenses shown were disproportionate to the sales made by these

units. In the above background, Ld. AO proceeded to re-allocate the expenditure. In defense, the assessee submitted that it had factories at 5 places – Thane, Malanpur, Induri, Baddi and Bangalore. At all factories, it manufactured chocolates whereas another product namely Bournvita was being manufactured only at Baddi unit. At other places, Bournvita was stated to be manufactured by third parties on the basis of job work. It was submitted that all the direct expenses incurred for a particular factory were directly debited to that factory whereas indirect expenses were allocated in a particular manner which has been elaborated in para-4 of assessee's submissions as extracted on page no. 16 of the quantum assessment order. The Sales, Distribution, Marketing expenses & Brand License fees of Bournvita & Chocolates were stated to be allocated in the ratio of sales. The employee expenses were stated to be allocated on the basis of number of employees in each of the factories whereas expenses relating to directors were said to be distributed on the basis of type of manufacturing done at various factories. The attention was drawn to the fact that raw material cost in case of Baddi factory was 38% of sales as against 40% at other factories which was due to product mix since the cost of raw material to manufacture Bournvita was lower than the cost of manufacturing Chocolates. In Bournvita, the material used was malt, extract, dairy fat, skimmed milk powder, liquid glucose, sugar powder etc. while in chocolates, the material used would be crumb, cocoa, sugar, dry fruits, wafers etc. depending on the quality of chocolates. The production of

Bournvita and chocolates at Baddi unit was stated to be in the proportion of 62:38. In the similar manner, the assessee justified lower costs under other heads which favored Baddi unit and hence, more profitability for Baddi unit. However, the aforesaid method of allocation could not find favor with Ld. AO who formed an opinion that apportionment need to be based on uniform and reasonable principles which were fair and transparent and enable the determination of true profits of each individual unit. Therefore, the indirect expenses of Rs.451.54 Crores were uniformly allocated in the ratio of sale of Baddi units and remaining units which reduced the profits of Baddi Unit to Rs.57.55 Crores and the same after adjustment of depreciation, expenses disallowed u/s 40(a)(ia), Donations, cess on royalty us 43B, expenses disallowed in earlier years etc. got further reduced to Rs.54.67 Crores. In other words, the reallocation of expenditure by Ld. AO resulted into reduction of 80-IC deduction from Rs.78.67 Crores to Rs.54.67 Crores. The same, upon confirmation by Ld. DRP, is under challenge before us.

6.2 Upon careful consideration, we find that identical issue of expense allocation arose in assessee's own case for AY 2007-08, wherein the matter was concluded in the following manner: -

> 30. Learned Counsel of the assessee submitted that the Assessing Officer has allocated following items to Baddi unit on the basis of sales ratio as under: -
> (i) Interest
> (ii) Operation and Establishment expenses
> (iii)Voluntary retirement expenses
> (iv) Decrease in stock
> 31. As regards decrease in stock, learned Counsel of the assessee submitted that this is actually change in inventory at Baddi unit and it is submitted that there is no question of any allocation of sales ratio. As regards voluntary retirement scheme expenses, learned counsel contended that Baddi unit was a new unit and none of the employee at

Baddi unit has opted for VRS, hence he submitted that there cannot be any allocation. However, learned counsel agreed that for actually verifying this aspect this matter can be remitted to the file of the Assessing Officer. As regards interest expenditure learned counsel submitted that there are no financial charges attributable to Baddi Unit. He submitted that financial charges comprise majority of bill discount, letter of credit charges, bank charges etc. They cannot be allocated to Baddi unit since Baddi unit is a cash surplus unit. As regards allocation of operation and establishment cost, learned counsel made following written submissions: -

Cost	As per MIFPL's allocation keys
Direct expenses such as Power & Fuel, freight, consumable repairs and other similar direct factory costs	Actual expenditure incurred at Baddi
Direct marketing costs	Proportion of sale value of Bournvita and Cadbury diary milk manufactured at Baddi to Total sales of the company
Selling and distribution expenditure	Proportion of sales volume of Bournvita and Cadbury milk manufactured at Baddi to Total sales of the Company
Royalty and technical fees Royalty	percentage of sales of Bournvita and Cadbury milk manufactured at Baddi to Total sales of the Company
Other overheads (which includes direct related expenses)	Based on sales ratio, production ratio, full time equivalent

- MIFPL manufactures Bournvita and Cadbury Dairy milk at its Baddi factory while it manufactures only chocolates at other factories. Because of the product mix, cost of the material for Bournvita is lower than the cost of the materials for manufacturing chocolates. In Bournvita, the materials used are malt extract, dairy fat, skimmed milk powder, liquid glucose, sugar, cocoa powder etc. while in chocolates the materials used are crumb (which is an extract of cocoa, milk and sugar of which is higher) cocoa, sugar, dry fruits, wafers etc. depending on the quality of chocolate.
- The employee cost in Baddi factory is lesser than other units since Baddi factory is situated in backward area and therefore, labour cost is cheaper. Further, new staff and labour are appointed in Baddi while in other units, old staff and labour are working since long and have proportionately higher salary.
- Excise exemption is available to Baddi unit under excise law. Accordingly, the sale price at Baddi Unit is total sale price while in other factories, sale price is sale price minus excise duty and thereby, the ratio of cost on sale is lower at the Baddi factory. Due to the excise exemption, the net profit at Baddi unit is greater by approximately 10-12% than other units (after considering the CENVAT credit which is available only to other units).

- The cost of packing materials of chocolates is higher than packing materials for Bournvita since different types of wrappers are required for chocolates.
- The operation and establishment expenses are lesser at Baddi as compared to Warna due to the following reasons :-

  i) The Baddi factories are situated in backward areas and operation and establishment cost are comparatively lower as compared to Warna.

  ii) The factories located at other units are old. Hence, the operation and establishment expenses increase on year on year basis.

  iii) Further, Baddi unit enjoys a scale benefit since the production of Bournvita at Baddi unit is much higher than production of Bournvita in Warna. Therefore the unit fixed cost at Baddi is mower resulting in higher profit percentage.

  iii) Thus the ratio of establishment expenses has decreased due to increase in sales at Baddi factory leading to higher margin at Baddi unit.

32. Upon hearing both the counsel and perusing the record, we agree with the submissions of the learned counsel of the assessee, as regards allocation of interest, voluntary retirement scheme and decrease in stock. As agreed by learned counsel above the fact that no VRS expenditure pertains to the employees of Baddi unit may be checked by the Assessing Officer.

33. As regards operation/establishment expenses, we find considerable cogency in the allocation key used by the assessee for direct expenses, direct marketing cost and selling and distribution expenditure, royalty and technical fees. We approve the same subject to factual verification by the Assessing Officer. We find that the method of allocation of other overhead as mentioned above appears to be opaque. We remit the same to the Assessing Officer for verification.

It is evident that the matter has been restored back to the file of Ld. AO with certain observations. Since the matter is identical, we direct Ld. AO to adopt the same methodology as finally adopted for AY 2007-08 to apportion the expenditure pursuant to the directions of the Tribunal. Therefore, without delving much deeper into the issue, we restore the matter back to the file of Ld. AO on similar lines. Ground No. 15 may be treated as allowed for statistical purposes.

7. The other grounds, being general in nature, would not require any specific adjudication on our part.

8. The appeal stands partly allowed in terms of our above order.

Order pronounced in the open court on 14th October, 2019.

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

मुंबई Mumbai; दिनांकDated : 14/10/2019
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

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