



IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.4074/Mum./2012
(Assessment Year : 2007-08)

Dy. Commissioner of Income Tax
Range-8(2), Mumbai

..... Appellant

v/s

India Medtronic Pvt. Ltd.
919/2, GIDC Industrial Estate
Makarpura, Baroda 390 010
PAN - AAACI4227Q

..... Respondent

ITA no.3993/Mum./2012
(Assessment Year : 2007-08)

India Medtronic Pvt. Ltd.
919/2, GIDC Industrial Estate
Makarpura, Baroda 390 010
PAN - AAACI4227Q

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-1(2), Mumbai

..... Respondent

Revenue by : Shri Jayant Kumar
Assessee by : Shri Rajan R. Vora a/w
Shri Nikhil Tiwari

Date of Hearing - 18.07.2019

Date of Order - 16.10.2019

ORDER**PER SAKTIJIT DEY, J.M.**

Captioned cross appeals arise out of order dated 30th March 2012, passed by the learned Commissioner of Income Tax (Appeals)- I, Baroda, for the assessment year 2007-08

ITA no.3993/Mum./2012
Assessment Appeal

2. Ground no.1, is general in nature, hence, does not require adjudication.

3. In grounds no.2 to 5, the assessee has basically challenged the rejection of Transactional Net Margin Method (TNMM) as the most appropriate method and further, rejection of comparables selected while benchmarking the transaction relating to import of finished goods from the Associated Enterprises (AE). Pertinently, the issue raised by the Revenue in its appeal is also against certain observations of learned Commissioner (Appeals) while deciding this particular issue. Therefore, while disposing off this issue, we will also render our finding on the arguments advanced by the learned Departmental Representative contesting certain findings of learned Commissioner (Appeals) on this issue.

4. Brief facts are, the assessee, an Indian company, was incorporated in the year 1993. The assessee is a subsidiary of Medtronic International Ltd., Hong Kong, which in turn, is a subsidiary of Medtronic USA Inc., a USA based company. As stated by the Transfer Pricing Officer, the parent company in USA is a global leader in medical technology and is engaged in developing and manufacturing of wide range of products and therapies, mostly, patented or intellectual property (IP) protected items. The assessee, on its part, is engaged in the business of distributing life saving medical devices, such as, stents, pace makers, etc. For the assessment year under dispute, the assessee filed its return of income on 29th October 2007, declaring total income of ₹ 8,09,15,807, under the normal provisions of the Act. During the assessment proceedings, the Assessing Officer noticed that the assessee had entered into various international transactions with its AE. Accordingly, he made a reference to the Transfer Pricing Officer for determining the arm's length price of such transactions. In the course of transfer pricing proceedings, the Transfer Pricing Officer on examining the audit report filed by the assessee in Form no.3CEB as well as the transfer pricing study report, found that for benchmarking the international transactions, the assessee had adopted TNMM as the most appropriate method with operating profit / operating revenue as the Profit Level Indicator (PLI).

While benchmarking the transaction under TNMM, the assessee had selected four comparable companies with arithmetic mean of 3.47% as against the margin shown by the assessee @ 6.86%. Accordingly, the transaction with the AE with regard to purchase of finished goods was claimed to be at arm's length. After examining the transfer pricing study report of the assessee, the Transfer Pricing Officer found various defects and deficiencies in it. He observed, though the assessee considers itself as a distribution company, however, it is carrying out marketing and distribution activities in India. He observed, while comparing assets, the assessee had taken into account only intangibles of the parent company instead of considering the assets of the companies from whom it had made purchases. Similarly, the assessee had considered risk of the whole Group vis-a-vis its own risk factor, whereas, it should have been confined to the parties to the transaction. Thus, he observed, there are various flaws in the analysis carried out by the assessee. Further, the Transfer Pricing Officer also pointed out defect in accepting TNMM as the most appropriate method to benchmark the transaction. He also observed, out of 107 companies, assessee had rejected 103 companies on account of unavailability of financial data/ information and ultimately has selected four companies. Further, the assessee had used multiple year data relating to the financial years 2004-05 and 2005-06. He also observed

that four companies selected by the assessee also cannot be treated as comparables. Thus, ultimately, the Transfer Pricing Officer not only rejected the transfer pricing study report but also held that TNMM is not the most appropriate method to benchmark the transaction. Having done so, the Transfer Pricing Officer held that since the assessee is engaged in the activity of marketing and distribution, Resale Price Method (RPM) would be the most appropriate method to benchmark the import of finished goods. Accordingly, he compared the resale discount percentage for the F.Y.2006-07 projected @ 42% with the actual gross margin at 31.65% and determined the arm's length price of the imported finished goods. Thus, considering the gross profit margin of 42%, the Transfer Pricing Officer proposed an adjustment of ₹ 23,60,70,527. The aforesaid adjustment proposed by the Transfer Pricing Officer was added back to the income of the assessee while completing the assessment. The assessee challenged the addition before the first appellate authority. Learned Commissioner (Appeals), after considering the submissions of the assessee in the context of facts and material on record, though, agreed with the Transfer Pricing Officer that TNMM cannot be the most appropriate method to benchmark the transaction but RPM is the most appropriate method, however, he observed, application of RPM was hindered due to non-furnishing of required information by the assessee. Further, accepting

assessee's contention learned Commissioner (Appeals) held that 42% re-sale price margin used by the Transfer Pricing Officer is incorrect because the said margin was a target gross margin for compliance purpose and it was not based on any comparable transaction, controlled or uncontrolled. Accordingly, he deleted the addition made on account of adjustment proposed by the Transfer Pricing Officer in respect of import of finished goods.

5. Shri Rajan Vora, learned Counsel for the assessee submitted, the Transfer Pricing Officer committed a fundamental error in considering Medtronic International Ltd., Malaysia, as comparable company in respect of import price of goods purchased from the AE. He submitted, Medtronic International Ltd., Malaysia, not only had significant related party transactions but all its transactions are controlled transactions. Besides, there are significant difference between the activities, economic factors, competition, position in the market, turnover, debt structure in which the assessee and Medtronic International Ltd., Malaysia, operate. Further, he submitted, as per the statutory provisions as well as OECD guidelines, controlled transactions cannot be used as comparable for benchmarking international transaction with AE. In this regard, he relied upon the following decisions:–

- i) *ADIT v/s Technimond ICB India Pvt. Ltd., ITA no.5085/Mum./2010;*

ii) *ACIT v/s Bilag Industries, ITA no.1441 & 1670/Ahd./2006 dated 05.08.2016; and*

iii) *Audco India Ltd., ITA no.1829/2016 (Bom.).*

6. He submitted, 42% gross margin adopted by the Transfer Pricing Officer was only a target provided by the company to the Group. Therefore, using a target as benchmark is in violation of the fundamental principles of India transfer pricing regulations. Without prejudice to the aforesaid submission, the learned Counsel submitted, in the transfer pricing study report, the assessee had made a proper analysis on scientific basis to show that TNMM and not RPM is the most appropriate method. He submitted, while benchmarking the transactions with the AE under TNMM, the assessee has considered uncontrolled comparable companies. He submitted, TNMM has been accepted as the most appropriate method to benchmark the import of finished goods in assessee's own case from assessment year 2008-09 onwards. He submitted, even the comparables selected by the assessee in the impugned assessment year were also accepted by the Transfer Pricing Officer as a good comparables. Thus, he submitted, learned Commissioner (Appeals) was not justified in upholding the Transfer Pricing Officer's decision in rejecting TNMM.

7. Shri Jayant Kumar, the learned Departmental Representative submitted, when the first appellate authority has agreed with the

Transfer Pricing Officer that TNMM is not the most appropriate method and accepted that RPM is the most appropriate method, he could not have deleted the addition made on account of Transfer pricing adjustment by saying that sufficient information for applying RPM is not available. He submitted, in the given circumstances, learned Commissioner (Appeals) should not have left the issue relating to applicability of most appropriate method un-resolved. He submitted, if learned Commissioner (Appeals) was not agreeable to the gross re-sale margin applied by the Transfer Pricing Officer, he could have himself carried out a fresh benchmarking under RPM. In support of such contention, he relied upon the Special Bench decision of Tribunal, Bangalore Bench, in Aztec Software and Technologies Services Ltd. v/s ACIT, [2007] 107 ITD 141 (Gang.)(SB). Thus, he submitted, the issue has to be restored back to the Assessing Officer / Transfer Pricing Officer for undertaking a fresh benchmarking by applying RPM. Without prejudice, he submitted, the comparables selected by the assessee under TNMM are not good comparables. Therefore, if TNMM is accepted as the most appropriate method, the issue relating to selection of comparables should be restored back to the Assessing Officer / Transfer Pricing Officer for fresh analysis.

8. In rejoinder, the learned Counsel for the assessee submitted, in absence of information / data relating to similar uncontrolled

transaction, RPM cannot be applied as the most appropriate method. He submitted, when the Transfer Pricing Officer has failed to bring on record any similar gross profit margin relating to a comparable uncontrolled transaction, certainly, the method cannot be applied. In such circumstances, TNMM can be applied as the most appropriate method as a last resort. He submitted, even otherwise also, the transaction between Medtronic International Ltd., Malaysia, and the parent company cannot be considered for comparability analysis under RPM as not only it is a controlled transaction, but it is in a different geographical location. Thus, he submitted, in such circumstances, no purpose would be served by restoring the issue to the Assessing Officer / Transfer Pricing Officer for fresh benchmarking. Further, he submitted, the comparable selected by the assessee in the impugned assessment year have been accepted by the Transfer Pricing Officer as functionally similar in the subsequent assessment years. Therefore, it cannot be said that they are not good comparables.

9. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Undisputedly, the assessee has benchmarked the transaction relating to import of finished goods from AE by applying TNMM as the most appropriate method. Whereas, the Transfer Pricing Officer after rejecting TNMM has held that RPM is the most appropriate method.

While doing so, he has applied the gross profit margin of 42% to make the adjustment. It is evident, the adoption of gross profit margin of 42% is on the basis of projected re-sale discount percentage for the financial year 2002-03 to 2006-07 furnished by the assessee in the course of transfer pricing proceedings. Applying the re-sale discount percentage of 42% of financial year 2006-07 the Transfer Pricing Officer has ultimately determined the gross margin of the assessee. However, the facts on record reveal that for the financial year 2006-07, assessee's gross margin was 31.65%. In this regard, the contention of the assessee that the re-sale discount margin of 42% is only a target margin provided by the assessee's group and is not the actual margin. The aforesaid contention of the assessee has been accepted by the learned Commissioner (Appeals). No material has been brought on record by the Revenue to demonstrate that gross profit margin of 42% is the actual margin of the assessee and is not a target margin. Moreover, the Transfer Pricing Officer while applying RPM has referred to the gross margin earned by the Medtronic International Ltd., Malaysia, for adopting gross profit margin of 42%. On examination of the provisions of rule 10B(1)(b), it is clear that even under RPM only the gross margin derived on an uncontrolled transaction can be considered for comparability analysis. Therefore, under no circumstances, the margin earned in a controlled transaction

can be considered for comparability purpose. That being the case, the margin earned by Medtronic International Ltd., Malaysia, could not have been considered by the Transfer Pricing Officer not only because it is a case of controlled transaction, but it is situated in a different geographical location. In this context, we may refer to the decision of the Hon'ble Jurisdictional High Court in Audco India Ltd. (supra). Though, we do not discount the proposition that in case of distribution/resale of goods imported from A.E., RPM could be a proper method to benchmark the ALP, however, when both the assessee as well as the Transfer Pricing Officer admit that sufficient information relating to gross margin in uncontrolled transaction is not available, no useful purpose would be served in restoring the issue to the Assessing Officer for fresh benchmarking under RPM. At this stage, we must observe, in view of the decision of the Hon'ble Jurisdictional High Court in Audco India Ltd. (supra), the contention of the Revenue that learned Commissioner (Appeals) having accepted RPM as the most appropriate method should have undertaken a fresh benchmarking under RPM cannot be accepted. In such circumstances, when no other method is applicable, as a method of last resort, TNMM has to be applied as most appropriate method. It is further noticed, in subsequent assessment years, not only the assessee has benchmarked the import of finished goods from the AE by applying TNMM, but the

Transfer Pricing Officer has also accepted it as the most appropriate method. Even the very same comparables, as selected in the impugned assessment year, have been accepted as good comparables in the subsequent assessment years. For the aforesaid reasons, we do not feel the necessity to restore the issue to the Assessing Officer/Transfer Pricing Officer for fresh adjudication. Accordingly, we uphold the decision of learned Commissioner (Appeals) in deleting the addition, though, on our own reasoning.

10. In grounds no.6 to 19, the assessee has challenged the addition made on account of transfer pricing adjustment in respect of advertisement, marketing, promotion (AMP) expenditure.

11. Pertinently, while suggesting the adjustment to the arm's length price of imported finished goods from the AE by applying RPM, the Transfer Pricing Officer had alternatively justified the adjustment by holding that any AMP expenditure over and above 5% of the sales was to be considered to have been incurred by the assessee on behalf of the AE for promoting the brand resulting in creation of marketing intangibles. However, since the Transfer Pricing Officer made adjustment to the arm's length price of imported finished goods from the AE, he did not suggest any separate adjustment on account of AMP expenditure.

12. Before the first appellate authority, the assessee had raised specific ground challenging the Transfer Pricing Officer's observation with regard to the transfer pricing adjustment on AMP expenditure. While pursuing the said ground, the assessee had submitted that firstly, the incurring of AMP expenditure in India cannot be brought within the purview of international transaction. It was submitted, the Transfer Pricing Officer made an error in including the entire salary cost while computing marketing spend. It was submitted, the salary cost comprised of salary paid to employees in various Departments besides marketing. It was submitted, marketing spend by the assessee is less than that of the comparable companies identified in the transfer pricing study report which ranges from 0.52% to 21.65% of sales. Further, it was submitted, determination of arm's length price of AMP expenditure by applying the bright line test (BLT) is without any basis.

13. After considering the submissions of the assessee, the learned Commissioner (Appeals) finally concluded that by incurring the AMP expenditure, the assessee had promoted the brand of its parent company. Further, he held, for incurring non-routine AMP expenditure of ₹ 16,24,83,784 for brand promotion/creation of marketing intangible on behalf of the A.E. no reimbursement has been received by the assessee. Therefore, adding a mark-up of 10% to the AMP

expenditure of ₹ 16,24,83,784, learned Commissioner (Appeals) quantified the adjustment on account of AMP expenditure at ₹ 17,87,32,162, and directed the Assessing Officer to add it to the income of the assessee. Being aggrieved, the assessee has raised the issue in the present appeal.

14. The learned Authorised Representative submitted, the AMP expenditure was incurred in India in respect of payment made to third parties. Hence, it will not come within the purview of international taxation as per section 92B of the Act. He submitted, there is no arrangement or agreement between the assessee and the AE towards incurring of AMP expenditure for promoting the brand of the AE. Thus, he submitted, in absence of any such arrangement or agreement, no adjustment on account of AMP expenditure can be made. He submitted, The Tribunal while deciding identical issue in assessee's own case for the assessment year 2010-11, in ITA no.1600/Mum./2015, dated 17th January 2018, has held that in the absence of any agreement for sharing AMP expenditure, it cannot be held to be an international transaction. In this context, he drew our attention to the relevant observations of the Tribunal in the said order. Further, he submitted, the same view was reiterated by the Tribunal while deciding the issue in the assessment years 2008-09, 2011-12, 2012-13 and 2013-14. To further substantiate assessee's claim that AMP

expenditure was not incurred on behalf of the AE, he sought the permission of the Bench to furnish a certificate / declaration issued by the parent company certifying that no AMP expenditure was incurred for promoting the brand of the parent company. Thus, he submitted, consistent view expressed by the Tribunal in assessee's own case in other assessment years has to be followed as there is no difference in facts.

15. The learned Departmental Representative, though, agreed that the issue is covered in favour of the assessee by the decisions of the Tribunal in the preceding assessment years, however, he relied upon the order of learned Commissioner (Appeals).

16. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Undisputedly, the Transfer Pricing Officer has observed that a part of AMP expenditure incurred by the assessee is towards promoting the brand of the AE, though, he did not propose any separate adjustment on account of AMP expenditure, since, such adjustment was subsumed in the adjustment proposed by him in respect of arm's length price of imported finished goods from the AE. However, the learned Commissioner (Appeals) while deleting the transfer pricing adjustment in respect of imported finished goods directed the Assessing Officer to

add the adjustment on account of AMP expenditure quantified at ₹ 17,87,32,162. It is evident, the quantification/determination of the arm's length price of AMP expenditure was not by following any of the prescribed methods. Undisputedly, the assessee is a distributor of finished products, imported from the AE. The assessee sells these products to third parties in India. The entire AMP expenditure incurred by the assessee was spent in India and have been paid to third parties. No material has been brought on record by the Departmental Authorities to even remotely suggest that there is an agreement or arrangement between the assessee and its AE to incur AMP expenditure for promoting the brand of the AE. That being the case, the expenditure incurred by the assessee on AMP would not come within the purview of international transaction as per section 92B of the Act. Pertinently, identical issue arising in assessee's own case came up for consideration before the Tribunal in assessment year 2010-11. The Tribunal, while deciding the issue in ITA no.1600/Mum./2015, dated 17th January 2018, held that incurring of AMP expenditure does not come within the purview of international transaction. The same view was expressed by the Tribunal while deciding the issue in assessee's own case in the assessment years 2008-09, 2011-12, 2012-13 and 2013-14, in the orders noted below:-

- i) India Medtronic Pvt. Ltd. v/s DCIT, ITA no.7555/Mum./2012, dated 04.05.2018;*
- ii) India Medtronic Pvt. Ltd. v/s DCIT, ITA no.1246/Mum./2016, dated 02.05.2018;*
- iii) India Medtronic Pvt. Ltd. v/s ACIT, ITA no.601/Mum./2018, dated 08.05.2019; and*
- iv) India Medtronic Pvt. Ltd. v/s ACIT, ITA no.2160/Mum./2017, dated 27.05.2019;*

17. Nothing has been brought to our notice by the Revenue to indicate that the facts on the basis of which the Tribunal decided the issue in favour of the assessee in the orders referred to above are in any way different from the facts involved in the impugned assessment year. That being the case, respectfully following the consistent view of the Tribunal on identical issue in assessee's own case, we delete the addition made of ₹ 17,87,32,162.

18. In grounds no.19 to 23, the assessee has challenged the transfer pricing adjustment on account of direct sales made by the AE to third parties in India.

19. Brief facts are, apart from the sales of finished goods to the assessee who acts as a distributor in India, the AEs have also effected direct sales to third party customers in India. In the course of the transfer pricing proceedings, the Transfer Pricing Officer called upon the assessee to furnish the details of direct sales made by the AEs to

third parties in India. In response, the assessee furnished the details as per which only one of the AEs had effected direct sales to third parties in India. The Transfer Pricing Officer was of the view that net profit on such sale should have been taxed in India as the assessee is the distributor of Medtronic products in India. Further, he observed, in the preceding assessment years, notional profit on such direct sale was added to the income of the assessee. Accordingly, he proceeded to compute the notional profit on the direct sales made by the AEs to third parties in India at ₹ 1,51,90,344, and suggested for addition of the said amount. Being aggrieved with such addition, the assessee challenged it before the first appellate authority.

20. The learned Commissioner (Appeals), after considering the submissions of the assessee, sustained the notional addition made by the Assessing Officer / Transfer Pricing Officer. However, accepting assessee's contention, he granted partial relief by directing the Assessing Officer/Transfer Pricing Officer to re-calculate the adjustment made considering the actual commission received instead of commission at notional rate of 13.1%.

21. The learned Counsel for the assessee submitted, the assessee did not perform any marketing functions for the direct sales made by the AE to third party customers in India. Therefore, no notional

commission income can be added at the hands of the assessee. Further, he submitted, while proposing the adjustment on account of notional commission income, no prescribed method has been used either by the Transfer Pricing Officer or by the learned Commissioner (Appeals). Therefore, the addition made is in contravention to the statutory provisions. Finally, he submitted, identical issue has been decided by the Tribunal in favour of the assessee in its own case for the assessment years 2002-03, 2003-04, 2004-05. In this context, he placed reliance upon the following orders passed by the Tribunal:-

- i) *India Medtronic Pvt. Ltd. v/s ACIT, ITA no.811/Ahd./2008, dated 25.10.2016;*
- ii) *India Medtronic Pvt. Ltd. v/s ACIT, ITA no.1245/Ahd./2008, dated 25.05.2017; and*
- iii) *India Medtronic Pvt. Ltd. v/s ACIT, ITA no.812/Ahd./2008, dated 25.05.2017.*

22. In addition, the learned Counsel for the assessee relied upon the following decisions as well.

- i) *C.A. Computers Association Pvt. Ltd., v/s DCIT, [2010] 37 SOT 306; and*
- ii) *Kodak India Pvt. Ltd. v/s ACIT, [2013] 155 TTJ 697.*

23. The learned Departmental Representative relied upon the observations of the Transfer Pricing Officer and learned Commissioner (Appeals).

24. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. The disputed addition on account of commission on direct sales made by the AE to third customer in India was made on notional basis. Notably, identical dispute arising in assessee's own case for the assessment year 2002-03 (supra), came up for consideration before the Tribunal and while deciding the issue, the Tribunal held that no such addition on account of notional commission can be made without using any prescribed method. Accordingly, the Tribunal restored the issue back to the Assessing Officer / Transfer Pricing Officer to verify whether there was any involvement of the assessee in the direct sales made by the AE in India. Similar view was expressed by the Tribunal while deciding the issue in assessment years 2003-04 and 2004-05. Following the consistent view of the Tribunal cited supra, we restore the issue to the Assessing Officer for fresh adjudication in terms with the directions of the tribunal in the preceding assessment years as referred to above. Grounds are allowed for statistical purposes.

25. Ground no.24, is not pressed, hence, dismissed.

26. In grounds no.25 and 26, the assessee has challenged disallowance of ₹ 1,60,911, being expenditure incurred on gift articles.

27. Brief facts are, in the course of assessment proceedings, the Assessing Officer noticing that the assessee has claimed deduction on account of expenditure incurred towards gift articles given to customers called upon the assessee to justify the claim. After rejecting the explanation of the assessee, he disallowed the amount of ₹ 1,60,911, on the reasoning that it was not for the purpose of assessee's business. Assessee challenged the disallowance before the first appellate authority.

28. Learned Commissioner (Appeals), after considering the submissions of the assessee, noticed that similar disallowance was also made in the assessment years 2004-05 to 2006-07. Accordingly, he sustained the disallowance made by the Assessing Officer.

29. The learned Authorised Representative submitted, being a distributor dealing with life saving medical devices which require education and awareness programme to be conducted in order to be able to create a market which is highly competitive, the assessee has to incur expenditure in providing gift to valued customers during product launches. Thus, he submitted, the expenditure incurred being purely and exclusively for the purpose of assessee's business has to be allowed. He submitted, while deciding identical issue in assessee's own case for the assessment years 2003-04 and 2004-05, the Tribunal

being satisfied that the expenditure incurred is wholly and exclusively for the purpose of assessee's business has allowed the claim. He submitted, facts being identical, the decisions of the Tribunal in the preceding assessment years would squarely apply to the facts of the present case.

30. The learned Departmental Representative relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

31. We have considered rival submissions and perused material on record. There is no dispute with regard to the factual aspect involved in the issue. It is the claim of the assessee that the expenditure incurred towards gift items given to the customers is wholly and exclusively for the purpose of assessee's business. It is also evident, learned Commissioner (Appeals) as well as the Assessing Officer have disallowed the expenditure following the decision taken by the Departmental Authorities in the past years. Notably, while deciding identical issue in assessment years 2003-04 and 2004-05, in the orders referred to above, the Co-ordinate Bench has held that the expenditure incurred on gift items being wholly and exclusively for the purpose of assessee's business, is an allowable expenditure. Following the consistent view of the Tribunal in assessee's own case, we delete

the addition made by the Assessing Officer. These grounds are allowed.

32. In ground 27, the assessee has challenged disallowance of expenditure incurred in respect of foreign trip of doctors.

33. Brief facts are, during the assessment proceedings, the Assessing Officer noticing that the assessee has claimed deduction of ₹ 40,95,984, on account of foreign trip of doctors, called upon the assessee to justify its claim. In response, it was submitted by the assessee that the expenditure had to be incurred for foreign trip of doctors to attend seminars, meetings, conferences etc. so as to enable them to use the products sold by the assessee. The Assessing Officer observed, while dealing with identical issue in the assessment year 2006–07, the Assessing Officer had disallowed assessee's claim on the reasoning that the benefit derived from such foreign trip is by the medical professionals and not by the assessee as they are not working exclusively for the advancement of assessee's business. Accordingly, he disallowed assessee's claim of expenditure. Assessee challenged the aforesaid disallowance before the first appellate authority.

34. Learned Commissioner (Appeals), however, confirmed the disallowance made by the Assessing Officer.

35. We have considered rival submissions and perused material on record. As could be seen from the facts placed before us, identical issue arose in assessee's own case in preceding as well as subsequent assessment years. While deciding the issue, the Tribunal has consistently held that the expenditure having been incurred for the purpose of assessee's business, is allowable under section 37(1) of the Act. While doing so, the Tribunal also held that the Medical Council of India (MCI) Regulations would not be applicable to the assessee. In this context, we may refer to the following orders of the Tribunal passed in assessee's own case.

- i) *India Medtronic Pvt. Ltd. v/s ACIT, ITA no.812/Ahd./2008, etc., dated 25.05.2017 (A.Y. 2004-05);*
- ii) *India Medtronic Pvt. Ltd. v/s DCIT, ITA no.7555/Mum./2012, dated 04.05.2018 (A.Y. 2008-09);*
- iii) *India Medtronic Pvt. Ltd. v/s DCIT, ITA no.1600/Mum./2015, dated 17.01.2018 (A.Y. 2010-11);*
- iv) *India Medtronic Pvt. Ltd. v/s DCIT, ITA no.1246/Mum./2016; dated 02.05.2018 (A.Y. 2011-12);*
- v) *India Medtronic Pvt. Ltd. v/s ACIT, ITA no.601/Mum./2018, dated 08.05.2019 (A.Y. 2013-14); and*
- vi) *India Medtronic Pvt. Ltd. v/s ACIT, ITA no.2160/Mum./2017, dated 27.05.2019.*

36. The other decisions relied upon by the learned Authorised Representative also expresses similar view. Therefore, following the consistent view of the Tribunal in assessee's own case as well as the

other decisions cited before us, we delete the addition made by the Assessing Officer. Ground raised is allowed.

37. In ground no.28, the assessee has challenged the disallowance of depreciation on goodwill amounting to ₹ 1,73,035.

38. Brief facts are, the assessee entered into an agreement with Medtech Devices on 31st July 2001, towards purchase of goodwill for a consideration of ₹ 25 lakh. In the return of income filed for the impugned assessment year, the assessee claimed depreciation @ 25% on the written down value (WDV) of goodwill by treating it as an intangible asset. However, both, the Assessing Officer as well as learned Commissioner (Appeals) disallowed assessee's claim by holding that goodwill is not an intangible asset under section 32(1)(ii) of the Act.

39. The learned Counsel for the assessee submitted, while deciding identical issue in assessee's own case for assessment years 2002-03, 2003-04 and 2008-09, depreciation has been allowed.

40. The learned Departmental Representative relied upon the observations of learned Commissioner (Appeals) and the Assessing Officer.

41. We have considered rival submissions and perused material on record. The issue relating to depreciation on goodwill by treating it as an intangible asset under section 32(1)(ii) of the Act is no more res integra in view of the decision of the Hon'ble Supreme Court in CIT v/s Smifs Securities Ltd., [2012] 348 ITR 302 (SC). In this decision the Hon'ble Supreme Court has held that goodwill is in the nature of any other business or commercial right or similar in nature, hence, is to be treated as intangible asset. Following the aforesaid decision, the Tribunal in assessee's own case for the assessment years 2002-03, 2003-04 and 2008-09, as referred to above, decided the issue in favour of the assessee. Therefore, following the consistent view of the Tribunal in assessee's own case, we allow assessee's claim of depreciation on goodwill. Ground raised is allowed.

42. In addition to the aforesaid grounds, the assessee has raised an additional ground being ground no.29, seeking allowance of depreciation on non-compete fee.

43. Brief facts are, during the financial year relevant to the assessment year 2002-03, the assessee had paid non-compete fee amounting to U.S. dollar one million (equivalent to ₹ 4.73 crore) to the Directors of Medtech Devices Ltd. In the return of income filed for the assessment year 2002-03, the assessee claimed the aforesaid

payment as revenue expenditure under section 37(1) of the Act. However, the deduction claimed by the assessee was disallowed by the Assessing Officer and sustained by the learned Commissioner (Appeals). While deciding the appeal, though, the Tribunal upheld the decision of the Departmental Authorities in holding that the payment made towards non-compete fee is capital expenditure, however, it also held that the assessee is eligible to claim depreciation on such expenditure as it is an intangible asset. Accordingly, depreciation was allowed to the assessee on the expenditure incurred towards non-compete fee. Consequential effect in terms of depreciation on the WDV of non-compete fee was allowed to the assessee in the assessment year 2003-04 and 2004-05. Even, while deciding the appeals for the assessment years 2008-09, 2011-12, 2012-13 and 2013-14, assessee's claim of depreciation on non-compete fee was allowed while entertaining the additional ground raised by the assessee.

44. We have considered rival submissions and perused material on record. At the outset, we must observe that the issue raised in the additional ground can be decided without making investigation into fresh facts. Therefore, we are inclined to admit the additional ground raised by the assessee. Undisputedly, in the year of payment of non-compete fee i.e., A.Y. 2002-03, the assessee had claimed it as revenue expenditure. However, the Departmental Authorities as well

as the Tribunal held that the expenditure incurred by the assessee is capital in nature. Of course, the Tribunal allowed depreciation on non-compete fee by treating it as an intangible asset. Notably, in subsequent assessment years i.e., 2003-04, 2004-05, 2008-09, 2011-12, 2012-13 and 2013-14, the Tribunal has allowed assessee's claim of depreciation on non-compete fee while entertaining additional ground raised by the assessee. Therefore, following the consistent view of the Tribunal, we direct the Assessing Officer to allow depreciation on the opening WDV of the non-compete fee. This ground is allowed.

45. In the result, assessee's appeal is partly allowed.

ITA no.4074/Mum./2012
Revenue's Appeal

46. The effective ground raised by the Revenue is on the issue of determination of arm's length price of imported finished goods from the A.E. under RPM.

47. We have dealt with this issue while deciding corresponding grounds being grounds no.2 to 5, in assessee's appeal in ITA no. 3993/Mum./2012, in the earlier part of the order. That being the case, no separate adjudication in respect of the aforesaid grounds is required at this stage. Accordingly, grounds are dismissed.

48. In the result, Revenue's appeal is dismissed.

49. To sum up, assessee's appeal is partly allowed and Revenue's appeal is dismissed.

Order pronounced in the open Court on 16.10.2019

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 16.10.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai