THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pawan Singh (JM)

I.T.A. No. 6848/Mum/2018 (Assessment Year 2014-15)

L'Oreal India Private Limited A-Wing, 8th Floor Marathon Futurex N.M. Joshi Marg Lower Parel Mumbai-400 013. PAN : AAACL0738K	Vs.	DCIT Circle-7(1)(2) Aayakar Bhavan M.K. Road New Marine Lines Mumbai-400 020.
(Appellant)		(Respondent)

Assessee by	Shri Niraj Sheth
Department by	Shri Sunil K. Jha
Date of Hearing	11.11.2019
Date of Pronouncement	17.01.2020

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of Assessing Officer dated 18.10.2018 passed pursuant to the order of learned Dispute Resolution Panel dated 11.9.2018 and pertains to A.Y. 2014-15.

2. Though the assessee has raised various grounds the issues arising out of the grounds are as under :-

A) Adjustment on account of Advertisement, Marketing and Promotion (AMP) expenses.

B1) Alternate adjustment on manufacturing segment on account of payment of royalty for use of technical know-how and trademark.

B2) payment made to AEs for use of trademark.

C) Alternate adjustment on the distribution segment – international transaction of import of finished goods from AEs for resale.

D) Alternate adjustment on the manufacturing segment- international transaction of transaction of payment for availing of marketing support services to AEs.

E) Alternate adjustment on the manufacturing segment- international transaction of payment for availing of consulting services.

3. L'Oreal India Pvt. Ltd. is engaged in the business of manufacturing, distribution and selling of cosmetics and beauty products. During the A.Y. 2014-15 L'Oreal India entered into the following international transactions its AEs and had reported the same to be at arm's length in its Form 3CEB.

Import of raw material/packing material for manufacture of finished goods	Royalty payments for use of technical know-how, brand name, trademarks etc.
Export of raw material for manufacture of finished products	Import of fixed assets from AEs
Export of finished goods manufactured by L'Oreal India	Availing international marketing support services
Import of finished goods for resale in India	Availing consultancy services
Rendering evaluation and technical testing services	Reimbursement/recovery of expenses

The TPO held that the assessee incurred AMP expenses with a view to enhance the brand image of L'Oreal and hence provided 'brand building services' to the AEs, for which it should be compensated. The AMP proposed for manufacturing segment was Rs. 198.18 crores. The TPO also made alternative adjustment in manufacturing segment with regard to payment for royalty for use of technical know-how and trademark amounting to Rs. 129.76 crores.

4. The TPO further held that the assessee has carried out development, exploitation, maintenance, protection and exploitation functions by incurring AMP expenses for which it should be remunerated by the AEs. However as suggested by BEPS report, since the intensity is very high as compared to comparables, it should be compensated. The TPO made adjustment for AMP expenses in distribution segment amounting to Rs. 125.78 crores.

5. In the alternative the TPO made alternative adjustment on ALP of the import/resale transaction by adjustment for intensity of AMP functions totalling to Rs. 41.68 crores.

6. Upon assessee's objection, DRP rejected the same and upheld the TPO's action on the issue of AMP adjustment.

7. As regards adjustment on account of payment of royalty for the use of technical know-how and trademark also DRP rejected the assessee's objection. Learned DRP also upheld the AMP adjustment in the distribution segment.

8. Against the above the assessee is in appeal before us.

9. We have heard both the counsel and perused the records. Learned Counsel of the assessee submitted that identical issues have been considered by the ITAT in assessee's own case for earlier year except for the alternative adjustment on manufacturing segment. Submission of learned counsel in this regard is summarised as under :-

(A) Adjustment on account of advertisement, marketing and brand promotion (AMP) expenses :-

(i) Covered by appellant's own ITAT order for A.Y. 2013-14 (page No. 31 para 18) (copy of aforesaid orders were submitted during the course of hearing).

(ii) Also appellant's own ITAT order for A.Y. 2008-09 to A.Y. 2010-11 (page 16-17 and para 2.4), A.Y. 2011-12 (page 13 and para 16) and A.Y. 2012-13 (page 23-24 and para 12) (copy of aforesaid orders were submitted during the course of hearing.

(B) Alternate adjustment on manufacturing segment on account of payment of royalty for use of technical know-how (Rs. 38.82 crores) and trademark (Rs. 25.16 crores) :-

(i) Appellant's own ITAT order for A.Y. 2013-14 :
Trademark royalty - page No. 35 para 23
Technical know-how royalty- page No. 37 para 25.

(ii) Also appellant's own ITAT order for A.Y. 2012-13 - page No. 29 para 18

(iii) Further the TPO in his order has not examined whether or not the method adopted by the appellant to determine the Arm's length price (ALP) is the most appropriate method and has instead concluded that the payments for trademark and technical know-how royalty are excessive in nature (page 176 of appeal memo)

(iv) Accordingly, the TPO has exceeded his jurisdiction by making an addition to the international transaction of payment of royalty for technical know-how and trademark. In this regard, the appellant relies on the Judgment of Bombay High Court in the case of CIT Vs. Lever India Exports Ltd. (78 taxmann.com 88) (copy enclosed as Annexure-1)

(v) Without prejudice to the above, it is submitted that the TPO has proposed the royalty adjustment, inter alia on the basis of AMP spend of the Appellant (page 141 and 142 of the appeal memo). Therefore, in the event it is held that AMP does not constitute an international transaction, then this adjustment would not survive.

(vi) In this connection, a reference may be made to Para 20 on Page 33 of ITAT order for AY 2013-14, wherein an alternate adjustment for the distribution segment (based on AMP) was deleted by the ITAT on the ground that once AMP was held not to be an international transaction, this adjustment which was based thereon, could not survive.

(vii) It is further submitted that L'Oreal SA, France (recipient of income) has offered the royalty income received from the Appellant and the said royalty income has been accepted to be at arm's length by the TPO in hands of L'Oreal SA.

In view of the above, the appellant prays that the adjustment on account of royalty should be deleted.

(C) Alternate adjustment on the distribution segment-international transaction of import of finished goods from AEs for resale.
Appellant's own ITAT order for A.Y. 2013-14 (page 33 and para 20).

(D) Alternate adjustment on the manufacturing segment- international transaction of payment for availing of marketing support services to AEs. (a brief description of marketing support services availed is described in Annexure 2 to this note).

1. The TPO in his order has instead of examining whether or not the method adopted to determine the ALP is the most appropriate method or whether the comparable companies selected are appropriate or not, has gone into the question of determining the need for such services, proof of rendition of such services, commercial expediency, basis of cost allocation etc. It is submitted that it is not part of the TPO's jurisdiction to consider the above aspects.

2. In this regard, the Appellant relies on the Judgment of Bombay High Court in the case of CIT vs. Lever India Exports Ltd. (supra)

3. In any extent, Appellant has submitted extensive evidences to TPO including advertising creative/concepts developed by AEs, sample story boards for Television Commercial conceptualized by AEs and adopted by the Appellant,

agreements, sample invoices, Organisation structure of Marketing support services team, sample email correspondences, product and marketing dossiers, public relationship guidelines, screenshot of global database and websites of AEs accessible to appellant, etc. along detailed write up on the nature of service/evidences and benefits of the services.
[Page 536-642 (Paper book Volume 1 and 2); Page No. 1092-1780 (Paper book Volume 3 and 4); Page 2174-3272 (Paper book Volume 5 and 6)].

Further, the Appellant submitted additional evidences to DRP comprising of cost allocation certificate and tables along copies of invoices [Page No. 3707-4536 (Volume 7 and 8)].

These have been examined by TPO in remand proceedings and no fault is found with the same [Refer remand report on Page No. 498 to 535 of Paper book (Volume 1)]

4. Accordingly, the Appellant submits that considering that no adverse comments are provided by the TPO as well as the DRP, the said transaction should not be remanded back to the file of the AO/DRP as it would tantamount to giving a second inning to the Department and taking advantage of its own wrong.

5. In this regard, reliance is placed on the following judicial precedents:
- Kansai Nerolac Paints Ltd. Vs Deputy Commissioner of Income-tax, [2014] 49 taxmann.com 208 (Bombay High Court) (Copy enclosed as Annexure 3);
- K. Rajiv v. Additional Commissioner of Income-tax, [2018] 98 taxmann.com 418 (Madras High Court) (Copy enclosed as Annexure 4).

6. Further, it may be noted that in AY 2011 -12, the ITAT has remanded the issue of marketing support services availed to the DRP since additional evidences were submitted before the ITAT. However, in the year under consideration, all evidences which are filed before the ITAT were filed before the lower authorities and the TPO has himself examined them in remand proceedings and not adversely commented thereon, thereby accepting the same.

7. Further, it is submitted that L'Oreal SA, France (recipient of income) has offered to tax the income received from the Appellant and the said service income has been accepted to be at an arm's length by the TPO in hands of L'Oreal SA.

Thus, the provision of services being availed by the Appellant, its rendition and benefits of services etc. stands accepted in the case of the income recipient, L'Oreal SA.

8. In light of the above, it is humbly submitted that the matter should not be remanded back since there were extensive evidences submitted before the lower authorities and the same was accepted by the TPO in remand proceedings.

E) Alternate adjustment on the manufacturing segment- international transaction of payment for availing of consulting services. (Brief description

1. The TPO in his order has instead of examining whether or not the method adopted to determine the ALP is the most appropriate method or whether the comparables selected are appropriate or not, has gone into the question of determining the need for such services, proof of rendition of such services, commercial expediency, basis of cost allocation etc. It is submitted that it is not part of the TPO's jurisdiction to consider the above aspects.

2. In this regard, the Appellant relies on the Judgment of Bombay High Court in the case of CIT vs. Lever India Exports Ltd. (supra)

3. In any event, the Appellant has submitted extensive evidences inter alia including agreements, sample invoices, evidences for technical/ consulting advise provided by AE through sample emails etc. in support of receipt of consultancy services and the benefits derived [Page 536-678 (Paperbook Volume 1 and 2); Page 1092-1193 (Paperbook Volume 3)].

Further, the Appellant submitted additional evidences before DRP comprising of agreement, certificate for costs allocated, evidences for technical/ consulting advise provided by AE through sample emails in relation to Packaging Services, Environmental, Health and Safety Services, Finance Services, Supply Chain Services, HR Services along with a list summarizing the evidences submitted and benefits derived thereof [Page No. 3707- 4536 (Volume 7 and 8)].

4. After verifying the evidences, the TPO in his remand report has accepted that the services were rendered, that they have benefited the Appellant and were necessary. He has only made a vague allegation that cost justification in a third-party situation needs to be established. (Refer remand report on Page No. 535 of Paperbook Volume 1)

5. Accordingly, the Appellant submits that the said transaction should not be remanded back to the file of the AO / DRP as it would tantamount to giving a second inning to the Department and taking advantage of its own wrong.

6. In this regard, reliance is placed on the following judicial precedents:
- Kansai Nerolac Paints Ltd. Vs Deputy Commissioner of Income-tax (supra);
- K. Rajiv v. Additional Commissioner of Income-tax (supra)

7. Further, it is humbly submitted that Transfer Pricing officer allowed identical expenses in earlier years and subsequent years of AY 2015-16 and AY 2016-17 after detailed scrutiny.

10 Per contra, learned Departmental Representative relied upon the orders of the authorities below.

11. Upon careful consideration we hold as under :-

As regards the adjustment on account of AMP expenses in manufacturing segment the ITAT has decided the issue in favour of the assessee. In this regard, we may refer to ITAT order in assessee's own case for A.Y. 2013-14 vide order dated 23.8.2019 for following concluding adjudication on this issue :-

> "8. We find that in the backdrop of our aforesaid observations that de hors any 'understanding' or an 'arrangement' or 'action in concert', as per which the assessee had agreed for incurring of AMP expenses for brand building of its AE, viz L'Oreal S.A., France, the provisions of Chapter-X could not have been invoked for undertaking TP adjustment exercise. Apart there from, we find that a similar view had been taken by the Tribunal while disposing off the appeals of the assessee for the preceding years viz. A.Ys 2008-09 to 2011-12. In fact, the Tribunal while disposing off the appeal of the assessee for A.Y 2012-13 in M/s L'Oreal India Pvt. Ltd. Vs. ACIT-7(1)(2), Mumbai [ITA No. 1417/Mum/2017; dated 30.01.2019], had followed the view earlier taken in the preceding years and had vacated the adjustment of 304.69 crores that was made by the TPO by alleging that the AMP expenses incurred by the assessee was an international transaction under Sec. 92B of the Act. The Tribunal while so concluding had observed as under:
>
> > "12. We have also perused the agreement of assessee with its AE dated 4th January 2011 executed between assessee and its AE. Clause 7 of the agreement descries about right of distribution of licensed product in the territory. As per Clause 8 of the said agreement the assessee is responsible for the advertising the licensed product in the territory. The territory is defined under clause 1.5 of the agreement, which means the territory of Nepal, Bhutan, Bangladesh, Maldives, Mauritius, India and Sri Lanka. However, it excludes any free trade zone, which may exist or may be created. Further it excludes duty free shops located in the duty free or travel retail area which is specialized in sales against foreign currency to foreigner or diplomatic corps, ship chlanders, airlines companies or shipping companies. Though the AE has reserves its right for the zones of excluded areas. The contentions of the ld. A.R for the assessee is that clause 8 of the agreement does not obligates the assessee to incur expenses on AMP so as to promote the brand owned by its AE's. And that the expenses are incurred by assessee in the normal course of its business. The perusal of the Clause 7 and 8 reveals that there is no agreement between the assessee and the AEs for sharing the expenses and the payments made by the assessee for the expenses of AMP. The TPO has also not brought any fact on record that there exist any agreement between the assessee and its AE to share or reimburse the AMP expenses. Moreover, we have seen that there is no material change in the facts for the year under consideration. Therefore, considering the above factual discussions and the decision of the coordinate bench of Tribunal for A.Y. 2008-09 to 2010-11, on the identical issue the ground No. 2 to 21 of the appeal is allowed."

> We thus in terms of our aforesaid observations, finding ourselves to be in agreement with the view taken by the Tribunal in the assesses own case for A.Y 2012-13 viz M/s L'Oreal India Pvt. Ltd. Vs. ACIT-7(1)(2), Mumbai [ITA No. 1417/Mum/2017; dated 30.01.2019],therefore, respectfully follow the same. Accordingly, being of the considered view that as the revenue had failed to discharge the onus that was cast upon it as regards proving that there was any 'understanding' or an 'arrangement' or 'action in concert' as per which the assessee had agreed for incurring of AMP expenses for brand building of its AE, viz. L'Oreal S.A., France, the TP adjustment of Rs. 354.73 crores in respect of AMP expenses cannot be sustained and is liable to be vacated."

12. Since the facts are identical we set aside the order of authorities below and direct that the TP adjustment of Rs. 198.18 crores is to be deleted.

13. As regards AMP adjustment of distribution segment of international transaction of import of finished goods of Rs. 125.78 crores, we find that the same is also covered in favour of the assessee by the aforesaid ITAT order. The ITAT adjudicated the issue as under:-

> "20. We have given a thoughtful consideration to the aforesaid TP adjustment of Rs. 60.03 crores made by the TPO on the basis of adjusted RPM on account of alleged differences in intensity of AMP functions performed by the assessee vis a vis the comparable companies. As observed by us hereinabove, the aforesaid adjustment was carried out by the TPO as per the adjusted RPM in order to align the functions, assets and risks profile of the assessee with that of the comparable companies. As the revenue had failed to establish the existence of any 'understanding' or an 'arrangement' or 'action in concert' as per which the assessee had agreed for incurring of AMP expenses for brand building of its AE, viz. L'Oreal S.A., France, therefore, the AMP expenses incurred by the assessee had been held by us as not having been incurred by the assessee for brand building of its AE. Accordingly, as no part of the AMP expenses are attributable to rendering of any DEMPE functions for the brands owned by the AE, therefore, the TP adjustment of Rs. 60.03 crore made by the TPO in respect of the distribution segment of the assessee on account of alleged differences in intensity of AMP functions performed by the assessee vis-a-vis the comparable companies in order to align the functions, assets and risks profile of the assessee with that of the comparable companies, cannot be sustained and are liable to be vacated."

14. Since facts are identical we set aside the order of authorities below and direct that this addition is to be deleted.

15. Alternative adjustment on the manufacturing segment - international transaction on account of payment for availing of marketing support services

to AEs. The Assessing Officer while making this adjustment has noted that the alternate benchmarking has been done by the adjusting payment for availing marketing support services of Rs. 45,25,05,164/- as the same is excessive in nature. The TPO has also held that the prime activity conducted by the AEs for the benefit of the assessee has been established. No evidence was produced services actually rendered.

16. In a similar manner alternative adjustment on manufacturing segment – international transaction for availing consultancy services amounting to Rs. 20,53,16,362/- was done by the TPO. The TPO's observation are as under :-

> "In this case it has been held that, although agreement entered into by the assessee and AE was provided, no cost allocation sheet and evidence of cost benefit analysis was provided. Also supporting evidence such as invoice, confirmation from parties to prove the same should also been given. It has also been held that when AEs transact with each other, for the purpose of transfer pricing they must replicate the dynamics of market forces, as there is no concept of free lunch in business dealing the benefit test have to be seen for allowing the payment in case of intra group services. The expected benefit must be sufficiently direct and substantiate so that an independent entity in similar circumstances would be prepared to pay for it. If, no benefits have been provided (or was expected to be provided), then the services cannot be charged for.
>
> In this case the emails provided by the assessee are not supported any with documentary evidence such as cost allocation sheet, confirmation from parties and the assessee has not demonstrated the benefit provided by the AE from the services.
>
> Accordingly, the ALP is taken at NIL and the arm's length value of payment made towards availing the said consulting services is considered as NIL. However, it is important to note that the said services are forming part of the AMP adjustment done by the undersigned above. Accordingly, it would only be fair to consider this adjustment as an alternative adjustment and to be considered only if the primary adjustment of AMP spend is not upheld by the appellate authorities."

17 In similar manner alternative adjustment on the manufacturing segment on account of royalty for use of technical knowhow Rs 38.82 crores and trademarks Rs. 25.16 crores was made.

18. DRP on these alternative adjustments has upheld the TPO's action.

19. Now in appeal before us, the assessee contends that it is beyond the TPO's jurisdiction to examine benefit aspect u/s. 37(1). In this regard the assessee has placed reliance upon Hon'ble Bombay High Court decision in the case of CIT Vs. Lever India Exports Ltd. (78 taxmann.com 88). Further the assessee contends that enormous additional evidence has been submitted to DRP and TPO has examined the same on remand proceedings and no adverse comment has been done by the TPO. The assessee has strongly objected again remanding the matter. The learned AR has submitted that TPO has not examined whether the method adopted by the assessee to determine the ALP is correct or not but instead concluded that the payment are excessive.

20. Upon careful consideration, we note that the reference to the excessive nature/benefit derived by the assessee by the TPO is not at all sustainable in the light of Hon'ble Jurisdictional High Court decision in the case of Lever India Exports Ltd. (supra). In the said decision it was expounded by Hon'ble Jurisdictional High Court that it is not for the TPO to apply benefit test. Hence, this limb of TPO's reasoning is not sustainable. Further it is clear that the assessee has submitted enormous additional evidence before the DRP and they have been remanded to the TPO also. The TPO has not made any adverse comment rather he has again reiterated that expenses are excessive and has justification aspect in third party situation. In other words, TPO's has again reiterated the issue of benefit test which has been held by Hon'ble Jurisdictional High Court to be not applied by TPO in his adjudication. The Hon'ble Jurisdictional High Court in CIT vs. Johnson & Johnson Ltd., ITA No. 1030/2014, dated 7th March 2017, while dealing with similar issue of determination of arm's length price of royalty by resorting to estimation by the Transfer Pricing Officer has held as under:-

> "(d) We find that the impugned order of the Tribunal upholding the order of the CIT(A) in the present facts cannot be found fault with. The TPO is mandated by law to determine the ALP by following one of the methods prescribed in section 92C of the Act read with Rule 10B of the Income Tax Rules. However, the aforesaid exercise of determining the ALP in respect of

> the royalty payable for technical knowhow has not been carried out as required under the Act. Further, as held by the CIT(A) and upheld by the impugned order of the Tribunal, the TPO has given no reasons justifying the technical know-how royalty paid by the Assessing Officer to its Associated Enterprise being restricted to 1% instead of 2%, as claimed by the respondent assessee. This determination of ALP of technical knowhow royalty by the TPO was ad-hoc and arbitrary as held by the CIT(A) and the Tribunal."

21. We find that ratio from the above Hon'ble Jurisdictional High Court decision is squarely applicable here. Hence transfer pricing adjustment at nil fails on both counts. Firstly on the account of benefit test which is not to be applied by the TPO and secondly none of the method of benchmarking the international transaction as specified in section 92C has been applied. Furthermore as rightly contended by the learned counsel of the assessee the ITAT in earlier year had remanded the issue as the issue of additional evidences was there, However ITAT was in principle of the view that application of benefit test by the TPO is not at all sustainable on the touchstone of honourable jurisdictional High Court decision in the case of Lever India Exports Ltd. (supra). In the present case we note that detailed evidences has been submitted before the DRP and the same have been examined by the TPO in remand proceedings, who has reiterated his reservations on the need and benefit to the assessee instead of applying any method of determining the arms length price. Accordingly in the background of aforesaid discussion and precedent from honourable jurisdictional High Court in the case of Lever India Exports Ltd. (supra) and Johnson & Johnson Limited (supra) we direct that these alternative adjustments as above are liable to be deleted. We order accordingly.

22. In the result assessee's appeal stands allowed.

Order has been pronounced in the Court on 17.01.2020.

SD/-	SD/-
(PAWAN SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 17/01/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
PS ITAT, Mumbai