IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI NABIN KUMAR PRADHAN, ACCOUNTANT MEMBER

IT(TP)A no.5228/Mum./2016
(Assessment Year : 2007–08)

Income Tax Officer
Ward–14(1)(4), Mumbai ……. Appellant

v/s

General Mills India Pvt. Ltd.
902, Ventura, Hiranandani Business Park
Powai, Mumbai 400 076
PAN – AAACG1773B ……. Respondent

IT(TP)A no.249/Mum./2017
(Assessment Year : 2011–12)

Dy. Commissioner of Income Tax
Circle–14(1)(2), Mumbai ……. Appellant

v/s

General Mills India Pvt. Ltd.
902, Ventura, Hiranandani Business Park
Powai, Mumbai 400 076
PAN – AAACG1773B ……. Respondent

ITA no.5668/Mum./2017
(Assessment Year : 2012–13)

Dy. Commissioner of Income Tax
Circle–14(1)(2), Mumbai ……. Appellant

v/s

General Mills India Pvt. Ltd.
902, Ventura, Hiranandani Business Park
Powai, Mumbai 400 076
PAN – AAACG1773B ……. Respondent

Revenue by : Shri Satya Pinisetty
Assessee by : Shri M.P. Lohia a/w
Shri Hemen Chandariya

Date of Hearing – 18.11.2019	Date of Order – 14.02.2020

O R D E R

PER SAKTIJIT DEY. J.M.

The captioned appeals filed by the Revenue concerning the same assessee arise out of three separate orders passed by the learned Commissioner of Income Tax (Appeals)–56, Mumbai, pertaining to the assessment years 2007–08, 2011–12 and 2012–13.

IT(TP)A no.5228/Mum./2016
Assessment Year 2007–08

2. At the outset, the leaned Counsel for the assessee submitted before us that the tax effect on the amount disputed by the Revenue in the present appeal is below the monetary limit of ₹ 50 lakh, applicable to appeals before the Tribunal, as per CBDT Circular no.17 of 2019, dated 8th August 2019. Further, it was submitted that none of the exceptions provided in CBDT Circular no.3 of 2018, dated 11th July 2018 r/w circular F.no.279/Misc./142/2007–ITJ–(Pt.) dated 20.08.2018, would apply to Revenue's appeal. Thus, learned Counsel for the assessee submitted that Revenue's appeal being covered under the aforesaid Circulars is not maintainable.

3. The learned Departmental Representative agreed that the tax effect on the amount disputed by the Revenue is below the monetary limit of ₹.50 lakh.

4. Having considered rival submissions and perused the material on record, we are of the view that the tax effect on the amount disputed by the Revenue in the present appeal is below the revised monetary limit of ₹ 50 lakh, as per CBDT Circular no.17/2019, dated 8th August 2019, r/w CBDT Circular no.3/2018, dated 11th July 2018. It also stands clarified by the CBDT that the revised monetary limit of ₹ 50 lakh as per the aforesaid CBDT Circulars would also apply to all pending appeals. In view of the aforesaid, Revenue's appeal deserves to be dismissed. However, the Revenue is given liberty to seek recall of this order, if, at a later point of time it is found that the appeal is protected under any of the exceptions provided in the Circulars referred to above.

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

IT(TP)A no.249/Mum./2017
Assessment Year 2011–12

6. The first issue arising in the present appeal relates to deletion of addition made on account of transfer pricing adjustment made in respect of advertisement, marketing and promotion (AMP) expenditure.

7. Brief facts are, the assessee, a resident company, is engaged in the business of manufacturing of atta, semiya (vermicelli), pizza kits, dry cake mix and Indian frozen breads and is also trading in canned

corn niblets, cream style sweet corn and asparagus spears sold under the brand name 'Green Giant'. The assessee also provides software development service to its overseas Associated Enterprises (AE), General Mills Mauritius Inc. In the course of proceedings under section 92CA of the Income Tax Act, 1961 (for short *"the Act"*), the Transfer Pricing Officer (TPO) on verifying the transfer pricing study report furnished by the assessee found that during the year under consideration, the assessee had imported food products from the AEs for re–sale. He also found that the assessee has procured atta from third parites outside India and exported to the AEs. Food products procured from the AEs were also sold to third parties. To benchmark the international transactions, the assessee has selected Transactional Net Margin Method (TNMM) as the most appropriate method with Operating Profit/Operating Income (OP/OI) as the Profit Level Indicator (PLI). Further, the assessee had selected eight companies as comparables with arithmetic mean of 4.02%. Since the assessee had shown margin of 13.75%, the transaction with the AEs was claimed to be at arm's length. In the course of proceedings, the TPO found that while computing margin, the assessee had made adjustment of ₹ 3,59,78,534 towards AMP expenditure incurred to promote certain products which are in initial product life cycle. He noticed that as a result of such adjustment, the operating profit margin of the assessee has increased to 13.75%, which otherwise would have been a negative

figure of 7.20%. He, therefore, called upon the assessee to justify the arm's length nature of AMP expenditure. In reply, it was submitted by the assessee that the AMP expenditure was incurred on promotion and marketing of three new products, namely, Green Giant Product, Natural Valley Granule Bar, Haagen Daz Ice Cream. Further, it was submitted, three products, namely, Corn Niblet, Cream Style Sweet Corn and asparagus spears which are sold under the brand name Green Giant products were imported for the purpose of re–sale in India. It was submitted by the assessee that it had to incur such expenditure to penetrate target market segment as the products are in initial years, therefore, margin cannot be compared with other established players in the market. After considering the submissions of the assessee, the TPO observed that AMP expenditure incurred by the assessee works out to 21%, whereas, that of comparables is 0.87%. Further, the Transfer Pricing Officer observed, since the assessee has incurred the AMP expenditure for promotion and marketing of branded products of the AEs, it tantamount to providing service to foreign AEs. In this context, he referred to the Special Bench decision of the Tribunal in LG Electronics India Pvt. Ltd. v/s ACIT. The Transfer Pricing Officer observed, incurring of AMP expenditure to promote the brand of AE is an international transaction, therefore, the apportionment of AMP expenditure between the assessee and the AE has to be computed by applying Bright Line Test (BLT). Having held so, the

Transfer Pricing Officer referred to the average margin of two comparables in advertisement and marketing activity and applying the said average margin as a mark–up to the AMP expenditure incurred by assessee, he made an adjustment of ₹ 3,97,49,084, towards AMP expenditure. Without prejudice, the Transfer Pricing Officer observed, the AMP expenditure of ₹ 3.59 crore not being capital expenditure cannot be excluded for computing the operating profit. Accordingly, he determined the PLI of the assessee at (–)7.20% as against the PLI of comparables worked out a @ 3.29%. Thus, he suggested an adjustment of ₹ 1,80,14,542, on without prejudice basis. However, since the adjustment on account of AMP expenditure was more than adjustment made to the arm's length price of the price paid for import of goods, the Transfer Pricing Officer stuck to the adjustment made of ₹ 3,97,49,084. On the basis of the aforesaid, the Assessing Officer made addition while computing the income of the assessee. Against the addition so made, the assessee preferred appeal before the first appellate authority.

8. After considering the submissions of the assessee and relying upon the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. v/s CIT, [2016] 381 ITR 117 (Del.), learned Commissioner (Appeals) held that incurring of AMP expenditure towards payment made to third parties in India cannot be considered as international

transaction. Accordingly, he deleted the addition made on account of transfer pricing adjustment.

9. The learned Departmental Representative submitted, the assessee has imported products of the AE for re–sale in India. Therefore, the assessee is merely a distributor for AE products. That being the case, the AMP expenditure incurred by the assessee is certainly for promoting the brand of AE. Hence, has to be treated as part of international transaction with the AE. The learned Departmental Representative submitted, the first appellate authority is not correct in deleting the adjustment by simply relying upon the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). He submitted, while coming to this conclusion, learned Commissioner (Appeals) has observed that there is no arrangement or contract between the assessee and its AE for incurring AMP expenditure. He submitted, the aforesaid finding of learned Commissioner (Appeals) is without any factual basis as neither the Transfer Pricing Officer nor learned Commissioner (Appeals) have properly examined the agreement between the assessee and the AE. Therefore, he submitted, the issue may be restored back to the Assessing Officer for fresh examination.

10. The learned Authorised Representative strongly relying upon the decision of the first appellate authority submitted, the Transfer Pricing

Officer has treated the AMP expenditure incurred in India as international transaction without establishing whether there is an agreement/arrangement between the assessee and the AEs for incurring such expenditure. He submitted, the assessee has imported products from the AE for re–sale in Indian market. Since these products were new as compared to similar products manufactured by other established companies, the assessee for the purpose of penetrating the market devised a strategy to promote the products vigorously. He submitted, since the products were in their initial lifecycle, the assessee had to incur substantially more expenditure towards AMP compared to similar expenditure incurred by the other established companies. He submitted, the AMP expenditure incurred by the assessee is purely for its own benefit and not for the benefit of the AEs. Thus, he submitted, learned Commissioner (Appeals) was justified in deleting the adjustment made by the Transfer Pricing Officer. In support of his contention, learned Authorised Representative relied upon the following decisions:–

i) *Maruti Suzuki India Ltd. v/s CIT, {2016] 381 ITR 117 (Del.);*

ii) *Mondelez India Foods Pvt. Ltd. v/s ACIT, ITA no.1512/Mum./ 2013, dated 28.11.2018;*

iii) *L'Oreal India Pvt. Ltd. v/s DCIT, ITA no.7714/Mum./2012, dated 04.05.2016; and*

iv) *Kellogg India Pvt. Ltd. v/s DCIT, ITA no.2866/Mum./2014, dated 19.07.2019.*

11. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. On a perusal of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer, it is evident, he has treated the AMP expenditure incurred by the assessee as a part of international transactions with the AEs primarily on the reasoning that by incurring such expenditure, the assessee has promoted the brand of the AEs. For adopting such line of action, the Transfer Pricing Officer has heavily relied upon the Special Bench decision of the Tribunal in LG Electronics India Pvt. Ltd. (supra). Further, following the said decision, the Transfer Pricing Officer has held that the arm's length price of AMP expenditure has to be determined by applying BLT method. On a careful perusal of the order passed by the Transfer Pricing Officer, we have not found any factual finding by him that there is any arrangement/agreement between the assessee and its AEs for incurring AMP expenditure to promote the brand of AEs. As revealed from the facts on record, the assessee has imported certain products from the AEs for reselling to third parties in India. It is also not disputed that the entire AMP expenditure has been incurred in India by making payment to unrelated parties. It is the claim of the assessee that the products imported by the assessee for re–sale in India is comparatively new products in their initial lifecycle and for promoting such products, the assessee had to adopt aggressive marketing strategy to penetrate the targeted market

segment, hence, has to incur huge expenditure. It is the claim of the assessee that it is the sole beneficiary of the entire AMP expenditure incurred by it and if there is any benefit to AEs, it is only incidental. It is also the claim of the assessee that the entire purpose of incurring expenditure is to increase the sale and not to create any marketing intangible of the AEs. Further, it is evident, the assessee has also explained the nature of expenditure incurred by furnishing supporting evidences. On a perusal of the facts on record, it is noticed that the AMP expenditure was incurred for giving incentives, free samples, etc. Thus, from the aforesaid facts, it is very much clear that the AMP expenditure was incurred for penetrating the market and increasing the sales. In any case of the matter, no material has been brought on record by the Transfer Pricing Officer to demonstrate that there is an agreement/arrangement with the AEs for incurring AMP expenditure to promote the brand of the AEs. Further, the entire AMP expenditure has been incurred in India and paid to third parties in India. Thus, keeping in perspective the aforesaid factual position, we have to hold that the AMP expenditure incurred by the assessee cannot come within the purview of international transaction.

12. Further, it is evident, the Transfer Pricing Officer has treated the AMP expenditure as part of international transaction following the Special Bench decision of the Tribunal in LG Electronics India Pvt. Ltd.

(supra) and has also applied BLT method for computing arm's length price. It is relevant to observe, the aforesaid Special Bench decision of the Tribunal in LG Electronics India Pvt. Ltd. (supra) has been disapproved by the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). The Hon'ble High Court has held that the BLT method is invalid as it is not prescribed in the statute. Various Benches of the Tribunal following the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra), have consistently held that AMP expenditure incurred by the assessee in India cannot come within the purview of international transaction. In this context, we may refer to the decisions cited by the learned Authorised Representative. In fact, the Co–ordinate Bench in Kellogg India Pvt. Ltd. (supra) while deciding identical issue has held as under:–

> *"6. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Undisputed facts are, the assessee is not merely a distributor of the products manufactured by the AE but the assessee itself manufactures its own products in India under license from the AE. It is also a fact that for marketing and promotion of its manufactured products in India, assessee has incurred AMP expenditure by making payments to third parties in India. Therefore, the basic issue which arises for consideration is, whether the AMP expenditure incurred by the assessee in India can come within the purview of international transaction as defined under section 92B of the Act. In this regard, the contention of the assessee before the Transfer Pricing Officer was, since the assessee has incurred the AMP expenditure for products manufactured and sold by it in India, it does not come within the purview of international transaction. Further, the assessee has also submitted that since there is no arrangement/agreement between the assessee and the AE for incurring such expenditure to promote the brand of the AE, it cannot be said that there is an international transaction relating*

to AMP expenditure. It is worth mentioning, the Transfer Pricing Officer has also agreed with the assessee that the AMP expenditure was incurred with the third parties in India, hence, do not constitute international transaction. Having held so, the Transfer Pricing Officer has still proceeded to determine the arm's length price of the AMP expenditure on the reasoning that the compensation required in the arrangement between the assessee and the AE for improving the brand intangible of the owner has to be determined. Further, he has observed that the AMP expenditure incurred by the assessee not only benefits the assessee but also the AE in terms of increase in the brand value of Kellogg. Thus, the Transfer Pricing Officer has inferred that there is an arrangement between the assessee and the AE with regard to promotion of the brand of the AE by incurring AMP expenditure. However, he has not provided any factual basis on which he has drawn such inference. By merely stating that there is an arrangement between the assessee and the AE, the Transfer Pricing Officer cannot bring the AMP expenditure within the purview of international transaction. If the Transfer Pricing Officer alleges that the AMP expenditure comes within the purview of international transaction by virtue of an arrangement between the related parties, the burden is entirely upon the Transfer Pricing Officer to demonstrate the existence of such arrangement. A careful reading of the impugned order of the Transfer Pricing Officer does not reveal any such factual basis which can demonstrate the existence of an arrangement between the assessee and the AE for incurring AMP expenditure to promote the brand of the AE. That being the case, the entire approach of the Transfer Pricing Officer in determining the arm's length price of AMP expenditure is fallacious.

7. Moreover, there is no doubt that the Transfer Pricing Officer has determined the arm's length price of AMP expenditure by applying BLT method. While doing so, he has heavily relied upon the Special Bench decision of the Tribunal, in LG Electronics India Pvt. Ltd. (supra). Now, it is fairly well established that determination of arm's length price of AMP expenditure by applying BLT method is not valid.In a catena of decisions, the Hon'ble Delhi High Court while disapproving the decision of the Tribunal in L.G. Electronics India Pvt. Ltd. (supra) have held that BLT method is invalid as it is not prescribed in the statute. In this context, we may refer to the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). Following the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra) and various other decisions, different Benches of the Tribunal have also held that in absence of an express arrangement/agreement between the assessee and the AE for incurring AMP expenditure to promote the brand of the AE, AMP expenditure incurred by making payment to third parties for

promoting and marketing the product manufactured by the assessee, does not come within the purview of international transaction.

8. At this stage, it is relevant to observe, while deciding identical nature of dispute in assessee's own case for the assessment year 2011–12, learned DRP in direction dated 28th December 2015, have deleted the adjustment made by the Transfer Pricing Officer on account of AMP expenditure by recording a factual finding that the Transfer Pricing Officer has failed to demonstrate that there is an agreement/arrangement between the assessee and the AE for incurring AMP expenditure. While doing so, learned DRP has relied upon the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). Thus, viewed in the light of the ratio laid down in the decisions cited by the learned Authorised Representative, including the decision of the Hon'ble Delhi High Court in Martuti Suzuki India Ltd. (supra), it has to be concluded that the AMP expenditure incurred by the assessee in India cannot come within the purview of the international transaction. Hence, the Transfer Pricing Officer has no jurisdiction to determine the arm's length price of AMP expenditure.

13. 9. Having held so, it is now necessary to deal with the contention of the learned Departmental Representative to restore the issue to the Assessing Officer for keeping it pending till the issue is settled by the Hon'ble Supreme Court. In our view, the aforesaid contention of the learned Departmental Representative is not acceptable. As per the prevailing legal position, the AMP expenditure incurred by the assessee in India cannot come within the purview of international transaction. That being the case, the adjustment made by the Transfer Pricing Officer cannot survive. Therefore, we do not find any necessity to restore the issue to the Assessing Officer. Grounds are allowed."

14. Thus, keeping in view the ratio laid down in the decisions referred to above, we have to agree with the conclusion arrived at by learned Commissioner (Appeals) with regard to the taxability of AMP expenditure. Accordingly, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground raised.

15. The next issue raised by the Revenue is on the adjustment proposed by the Transfer Pricing Officer while determining the arm's length price of the price paid towards import of goods from the AEs.

16. As discussed earlier, the assessee had imported goods from the AEs. for re–sale to third parties in India. The assessee had benchmarked such transaction by applying TNMM as the most appropriate method. Since the margin shown by the assessee was higher than the margin shown by the selected comparables, the assessee claimed the transaction to be at arm's length. While verifying the transfer pricing study report, the Transfer Pricing Officer noticed that while computing the margin, the assessee had excluded the AMP expenditure. However, the Transfer Pricing Officer was of the view that the AMP expenditure being revenue in nature has to be included for computing the margin. After including the AMP, the Transfer Pricing Officer worked out the margin of the assessee at (–)7.20% as compared to the average margin of comparables worked out @ 3.29%. Therefore, he suggested an adjustment of ₹ 1.8 crore. The aforesaid decision of the Transfer Pricing Officer was challenged before the first appellate authority.

17. Learned Commissioner (Appeals) having found that the Transfer Pricing Officer in assessee’s own case in assessment year 2007–08, has allowed 50% of the AMP expenditure towards economic

adjustment for computing the margin followed the same and allowed 50% of the AMP expenditure towards economic adjustment.

18. The learned Departmental Representative relying upon the observations of the Transfer Pricing Officer submitted that no further economic adjustment on account of AMP expenditure should be allowed to the assessee.

19. The learned Authorised Representative submitted, the decision of learned Commissioner (Appeals) in allowing 50% of the AMP expenditure towards economic adjustment is consistent with the view taken by the Transfer Pricing Officer himself in assessee's own case in assessment year 2007–08. Further, he submitted, in assessment year 2012–13, though, learned Commissioner (Appeals) has expressed identical view with regard to the economic adjustment, the Revenue has not preferred any appeal before the Tribunal. Therefore, he submitted, there is no reason to interfere with the decision of learned Commissioner (Appeals).

20. We have considered rival submissions and perused the material on record. As could be seen from the facts on record, while computing its margin with regard to the international transaction relating to import of goods from the AEs, the assessee has claimed economic adjustment towards the AMP expenditure incurred by it. It is the claim

of the assessee that compared to the comparables whose marketing expenditure worked out to 0.87% of operating income, assessee's marketing expenditure worked out to 21% of the operating income. Thus, it is the claim of the assessee that necessary adjustment has to be given on account of marketing expenditure while computing the margin. It is observed, while considering similar claim made by the assessee in assessment year 20007–08, the Transfer Pricing Officer has allowed 50% of the adjustment claimed. In fact, in Assessment Year 2012–13, though, learned Commissioner (Appeals) had granted similar relief on account of economic adjustment, however, the revenue has not contested the relief granted by the first appellate authority. Considering the above, we uphold the decision of learned Commissioner (Appeals) on the issue. Grounds raised are dismissed.

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

ITA no.5668/Mum./2017
Assessment Year 2012–13

22. The only issue involved in the present appeal is with regard to the adjustment made on account of AMP expenditure incurred by the assessee in India.

23. This issue is identical to the first issue raised by the Revenue in its appeal being IT(TP)A no.249/Mum./2017. While dealing with the aforesaid issue in the said appeal, we upheld the decision of learned

Commissioner (Appeals) by holding that AMP expenditure incurred by the assessee does not come within the purview of international transaction. Facts being identical, our aforesaid decision will apply mutatis mutandis to the present appeal also. Accordingly, grounds raised are dismissed.

24. In the result, appeal is dismissed.

25. To sum up, all the appeals are dismissed.

Order pronounced in the open Court on 14.02.2020

Sd/-	**Sd/-**
NABIN KUMAR PRADHAN	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 14.02.2020

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.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai