



ITA No.137/Mum/2018
Kellogg India Private Limited
Assessment Year-2013-14

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

माननीय श्री विकास अवस्थी, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI VIKAS AWASTHY, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing through Video Conferencing mode)

आयकर अपील सं./ I.T.A. No. 137/Mum/2018
(निर्धारणवर्ष / Assessment Year: 2013-14)

Kellogg India Private Limited 1001-1002, 10th Floor Hiranandani Knowledge Park Hiranandani Business Park, Powai Mumbai-400 076	बनाम/ Vs.	ACIT-15(2)(1) Room No.357, 3rd Floor Aaykar Bhavan, M.K. Road, Churchgate Mumbai-400 020.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. AAACK-1748-K		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से/ Appellant by	:	Shri Dhanesh Bafna-Ld.AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Akhtar H. Ansari-Ld. DR
सुनवाई की तारीख/ Date of Hearing	:	02/09/2020
घोषणा की तारीख / Date of Pronouncement	:	07/09/2020

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member): -

1. Aforesaid appeal by assessee for Assessment Year (AY) 2013-14 contest certain additions and Transfer Pricing (TP) adjustments made by



Learned Assessing Officer (AO) in final assessment order dated 30/10/2017 passed u/s. 143(3) r.w.s. 144C(13) pursuant to the directions of Learned Dispute Resolution Panel-1, Mumbai [DRP] u/s 144C(5) dated 06/09/2017.

The grounds raised by assessee read as under: -

Ground No 1; Transfer Pricing

1.1 The learned Assessing Officer (AO) / Transfer Pricing Officer (TPO) / Dispute Resolution Panel (DRP) erred in law and on facts in making a Transfer Pricing adjustment of Rs.45,85,16,563 on account of reimbursement of advertisement, marketing and promotional (AMP) expenses incurred by the Appellant under the presumption that the Appellant has benefited the Associated Enterprises (AEs) by incurring the said expenses.

In doing so the learned DRP / TPO has grossly erred in:

- a) considering that AMP expenses of Kellogg India, which is incurred by way of payments to third parties for its domestic business operations, within the realm of international transaction based on his conjectures and surmises, violating section 926 and section 92(1) of the Income-tax Act, 1961 (the Act);
- b) disregarding that the issue of marketing intangibles is not relevant for licensed manufacturers as in the case of the Appellant, as the entire marketing spend is undertaken solely for the benefit of the Appellant;
- c) not appreciating that the Appellant is an entrepreneur and is solely responsible for its business operations / results and is entitled to residual business profits/ losses;
- d) presuming, without any direct or indirect evidence that the Appellant was performing Development, Enhancement, Maintenance, Protection and Exploitation (DEMPE) functions and that the AMP incurred by the Appellant benefited the AEs;
- e) failing to appreciate the fact that AMP expenses were incurred 'wholly and exclusively' for purpose of business of the Assessee in India and no benefit was passed on to the AE and hence, there should not any reimbursement of such expenses to the Assessee;
- f) presuming that the AMP expenses incurred by Kellogg India were on account of creation of brands and not towards promoting its products;
- g) alleging that there exists an arrangement between Kellogg India and Kellogg USA and thereby erred in contending that Kellogg USA needs to compensate Kellogg India towards AMP expenses;
- h) disregarding that the Appellant is the economic owner of the benefits of such AMP expenses; and
- i) not considering the directions of learned DRP for Assessment Year 2011-12 wherein the addition on account of AMP was deleted considering the decision in the case of Maruti Suzuki India Limited (ITA 110/2014).

The Appellant therefore prays that the addition made by the AO be deleted.

1.2 Without prejudice to the above, on the facts and in the circumstances of the case and in law, the learned TPO erred:



ITA No.137/Mum/2018
Kellogg India Private Limited
Assessment Year-2013-14

- a) in alleging that by incurring AMP expenses, the Applicant renders services to the AE;
- b) contending that AE is actively planning, supporting, intervening, guiding, directing Indian taxpayer as strategy of market development, brand positioning, communication strategy, growth of business and deriving profits;
- c) in making an arbitrary adjustment to the AMP to sales ratio of selected comparable companies to arrive at the percentage of AMP to sales of 12.33% as ordinary/routine AMP expenses to be considered for determining non-routine AMP expenditure and computation of compensation for DEMPE functions;
- d) in alleging this as a brand promotion, advertising, and marketing services transaction and thereby considering a markup at the rate of 11.74% along with reimbursement of AMP expenses.

The Appellant therefore prays that the action of the learned AO be held as bad in law and is liable to be quashed.

Ground No.2: Disallowance of payment towards cost of infrastructure development

2.1 On the facts and in the circumstances of the case and in law, the learned AO, under the directions issued by the Hon'ble DRP, erred in characterizing the payment of Rs 8,20,00,000 towards the cost of infrastructure development at Sri City as an upfront lease charge and thereby, allowing the same as deductible business expenditure over the period of lease.

2.2 The Appellant prays that the learned AO be directed to treat payment of Rs.8,20,00,000 towards the cost of infrastructure development as revenue expenditure.

Ground No.3: Interest income

3.1 On the facts and in the circumstances of the case and in law, the learned AO, under the directions issued by the Hon'ble DRP, erred in classifying interest income of Rs.2,72,84,483 under the head 'Income from Other Sources' without appreciating the fact that interest income earned is inextricably linked to the business.

3.2 The Appellant prays that the Learned AO be directed to classify the interest income of Rs. 2,72,84,483 under the head 'Profits and Gains from Business and Profession'.

Ground No.4: Set off of brought forward unabsorbed depreciation

4.1 On the facts and in the circumstances of the case and in law, the learned AO erred in not allowing set off of brought forward unabsorbed depreciation of Rs.4,62,00,217 pertaining to AY 1997-98.

4.2 The Appellant prays that the AO be directed to allow the set off of unabsorbed depreciation of Rs. 4,62,00,217.

Ground No.5:

5.1 On the facts and in the circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under section 271(1)(c) of the Act in respect of transfer pricing adjustment, payment towards cost of infrastructure development and set off of unabsorbed depreciation of AY 1997-98.

5.2 The Appellant prays that the learned AO be directed to drop the penalty proceedings.



Since ground No.-5 is premature at this stage, the same would not require any specific adjudication on our part.

2.1 The Learned Authorized Representative for assessee (AR), Shri Dhanesh Bafna, at the outset, submitted that substantial issues are covered by the earlier orders of the Tribunal in assessee's own case and therefore, facts being identical, same view may be taken in the matter. The copies of the order have been placed before us, the details of which are as follows: -

- (i) ITA Nos. 2866 & 2888/Mum/2014, AY 2009-10 order dated 19/07/2019
- (ii) ITA Nos. 2314/Mum/2017 & ors; AYs 2011-12 & 2012-13, common order dated 24/02/2020

2.2 On the other hand, Ld. DR, Shri Akhtar H. Ansari, supported the stand taken by lower authorities and pleaded for confirmation of the same. However, the applicability of the aforesaid orders of the Tribunal remain uncontroverted before us.

2.3 We have carefully heard the rival submissions and perused relevant material in record including the earlier orders of Tribunal as cited before us. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

Ground No.1: Transfer Pricing Adjustment

3.1 The material on record would show that the assessee being resident corporate assessee is stated to be engaged in manufacturing, packaging and marketing of ready-to-eat cereal products. The assessee e-filed its return of income for year under consideration on 29/11/2013 declaring total income at 'Nil' which was subjected to scrutiny assessment by revenue



authorities. The assessee's income has finally been assessed at Rs.5826.16 Lacs under normal provisions in final assessment order dated 30/10/2017. The assessee is stated to be subsidiary entity of Kellogg Company.

3.2 The assessee carried out certain international transactions with its Associated Enterprises (AE) which were subject matter of determination of Arm's Length price (ALP) before Ld. Transfer pricing Officer (TPO) vide order u/s 92CA (3) dated 28/10/2016. These transactions have already been enumerated in para-6 of Ld. TPO's order. During proceedings before Ld. TPO, the perusal of assessee's financial statements revealed that assessee incurred certain Advertisement, Marketing & Promotional (AMP) expenditure aggregating to Rs.11537.80 Lacs during the year under consideration. The turnover, net profit, selling expenses, AMP expenses and royalty payment data for 5 years has been tabulated in para-7 of Ld. TPO's order. The AMP expenditure was on account of Television Advertising, Agency fees, Radio, Newspaper, outdoor advertising production, expenditure, freebies, school promotions etc. Accordingly, the assessee was show caused as to why the adjustment should not be made on account of excess expenditure incurred for Development, Enhancement, Maintenance, Protection and Exploitation (DEMPE) functions in India, on behalf of its AE.

The assessee, *inter-alia*, pleaded that the aforesaid payment was made to third parties in India and therefore these transactions would not constitute



international transactions. Hence, these would not require determination of ALP on the part of Ld. TPO.

3.3 However, Ld. TPO opined that assessee's AE was actively planning, supporting, intervening, guiding, directing the assessee as to strategy of market development, brand positioning, communication strategy, growth of business etc. and deriving profits therefrom and hence, the assessee needed to be compensated for the same. To support the said opinion, Ld. TPO, referring to technical agreement between Kellogg Company and the assessee, observed the involvement of AE in managing the assessee's affairs to drive the sale of Kellogg products through strategy planning, preparing and implementing category development models, targeted brand messaging and other similar strategies. Therefore, the assessee was contractually required to promote the sale of Kellogg products in India. The efforts and expenditure incurred by the assessee on AMP and market development on the advice and guidance of its parent would constitute international transaction. In the above background, Ld. TPO proceeded to determine the ALP of the same using *other method* since the assessee could not submit benchmarking information as called for by Ld. TPO.

3.4 In working out TP adjustment, Ld. TPO computed mean AMP expenditure as percentage of sales of two comparable entity as 12.33% and applying the same to the assessee's turnover, proposed TP adjustment of Rs.4585.16 Lacs in its order dated 28/10/2016. In other words, the Ld. TPO chose to benchmark the same primarily by using *Bright Line Test* (BLT) method. The working of the adjustment has been provided in para-



ITA No.137/Mum/2018
Kellogg India Private Limited
Assessment Year-2013-14

18 of Ld. TPO's order. The TP adjustment, thus proposed, were incorporated in draft assessment order dated 29/12/2016 which were subjected to assessee's objections before Ld. DRP.

3.5 The Ld. DRP confirmed the TP adjustments primarily relying upon the directions given by predecessor DRP in AY 2012-13. It is evident from para 4.6 of Ld. DRP's order that facts of the case as well as the arguments raised by the assessee for the year under consideration are stated to be same as for AY 2012-13.

Aggrieved as aforesaid, the assessee is under further appeal before us by way of elaborate ground no.1 and assails the TP adjustments so made.

4.1 As rightly pointed out by Ld. AR, this issue stood covered in assessee's favor by the order of coordinate bench of this Tribunal in assessee's own case for AY 2009-10 (lead case on the issue), Cross appeals ITA Nos. 2866 & 2888/Mum/2014 common order dated 19/07/2019 wherein the issue has been decided in assessee's favor by observing 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



ITA No.137/Mum/2018
Kellogg India Private Limited
Assessment Year-2013-14

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



ITA No.137/Mum/2018
Kellogg India Private Limited
Assessment Year-2013-14

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.

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.

The aforesaid decision has subsequently been followed by another coordinate bench in assessee's own case for AY 2011-12 in revenue's appeal ITA No.1906/Mum/2016 and also in assessee's appeal for AY 2012-13 ITA No. 2314/Mum/2017; common order dated 24/02/2020.

4.2 It was observed by the bench in AY 2009-10 that the assessee was not merely a distributor of the products manufactured by its AE but the assessee itself was manufacturing its own products in India under license from the AE. Further, with a view to market and promote its own manufactured products, the assessee incurred AMP expenditure by making payments to third parties in India. There was no express arrangement / agreement between the assessee and the AE for incurring such expenditure to promote the brand of the AE and therefore, the said transactions would not constitute international transaction relating to AMP expenditure. It was also observed that BLT method as adopted by Ld. TPO was not a valid method to benchmark the transactions. The technical



collaboration agreement as referred to by Ld. TPO did not envisage any such express arrangement / agreement between the assessee and its AE and therefore, the same could not support the case of the revenue. Therefore, facts being pari-materia the same, respectfully following the aforesaid decisions of Tribunal in assessee's own case, we delete the impugned TP adjustment against AMP expenditure and allow ground no.1 of the appeal.

Ground No.2: Disallowance of cost of infrastructure development

5.1 Facts to the issue are that during the year under consideration, the assessee obtained lease of a plot of land for a period of 99 years from Sri City Private Limited ('Lessor' / 'Developer' / SCPL) for setting up a manufacturing facility. Further, the assessee also entered into an Infrastructure Development agreement on 06/06/2012 for the purpose of availing certain services to be provided by the Developer as common facilities. Under the terms of development agreement, in consideration for payment of Rs.820 Lacs (as assessee's contribution), the Developer agreed to develop certain common infrastructure facilities such as (i) Roads (ii) Water supply systems, pipeline, pumping stations (iii) Drainage, sewerage lines, sewerage treatment plants (iv) Electricity lines (v) Water treatment facilities, garbage disposal, telecommunication connectivity etc. outside and up to the plot of land as leased to the assessee. Such infrastructure facilities were stated to be owned by the lessor and the assessee did not have any ownership or similar rights over the same. The said facilities were stated to be essential for the functioning of the



assessee's factory on the leasehold land. The assessee paid one-time consideration of Rs.820 Lacs to SCPL towards infrastructure development. The infrastructure agreement was stated to be co-existed and co-terminus to the lease deed dated 06/06/2012 entered into by the assessee with M/s SCPL for lease of land.

5.2 During assessment proceedings, Ld. AO took a view that the said one-time expenditure would constitute capital expenditure which was rebutted by the assessee, *inter-alia*, by submitting that the facilities were essential for efficient running of the company's plant. The facilities were exclusively owned by SCPL and the assessee did not have any ownership rights / licence in the said infrastructural facilities. Since the payment was not for the purpose of acquiring any asset but essential for efficient running of the plant, the said expenditure would be revenue in nature. However, the said submissions / pleas were rejected by observing that the expenditure was towards fixed assets which were expected to be productive assets for a long period of time. Therefore, the expenditure was to be treated as capital expenditure and hence, not allowable to the assessee during the year under consideration.

5.3 Before Ld. DRP, the assessee supported its case by reiterating that the since the assets were not owned by the assessee, the expenditure would be revenue in nature. The assessee did not receive any enduring benefits and the expenditure was merely for facilitating efficient conduct of the business. The benefits received were not in capital field. Reliance was placed on various judicial pronouncements (as enumerated in Ld. DRP's



directions) in support of submission that the expenditure would be revenue in nature particularly when the expenditure did not result into any advantage to the assessee in capital field but which merely enabled the assessee to carry on business operations more efficiently. As an alternative, the assessee pleaded for allowance of the same over the period of agreement.

5.4 The Ld. DRP agreed that ownership of such rights belonged to the developer only and the assessee would not be entitled for depreciation on the same. Further, the expenditure would not become capital expenditure since no new asset was acquired by the assessee. The infrastructural facility only enabled the assessee to run its business properly and efficiently.

5.5 However, as per the SEZ / DTZ policy of the government, the aforesaid development activities would be the responsibility of SEZ / DTZ developer and the assessee as a lessee would not be normally required to spend huge amounts for infrastructural support. Another observation was that the assessee obtained lease for 20 years which was long term in nature. The infrastructure development would be essential and bare minimum to ensure that the assessee could utilise the plot of land for business activities. Such an expenditure would be the responsibility of the lessor and therefore, the aforesaid payment had direct connection to the obtaining of lease and essentially in the nature of upfront lease charges. Therefore, the expenditure should be amortized over the period of lease. Aggrieved aforesaid, the assessee is in further appeal before us. It appears that the revenue has not challenged the findings of Ld. DRP.



5.6 The Ld. AR, supporting the case of the assessee, advanced arguments which are more or less on similar lines as made before Ld. AO as well as before Ld. DRP. Reliance has been placed on certain judicial pronouncements in support of the submissions that the test of enduring benefit would not be conclusive to determine the allowability of the expenditure. Our attention has also been drawn to the fact that the period of lease agreement was 99 years and not 20 years, as wrongly noted by Ld. DRP. Per Contra, Ld. DR submitted that adequate relief has already been granted by Ld. DRP and therefore, the final assessment order would not require any interference on our part.

6.1 We have carefully considered the rival submissions and perused relevant material on record. We have gone through the terms of infrastructure development agreement dated 06/06/2012 entered into by the assessee with M/s SCPL, as placed before us. As per the recitals of the agreement, the developer has given on lease 20 acres of land to the assessee in certain DTZ out of large parcel of land situated in the state of Andhra Pradesh. The lease deed is stated to be co-existent, co-terminus and integral part and parcel of infrastructure development agreement. The agreement obligates the developer to create /provide certain infrastructure facility for and on behalf of the assessee against certain consideration. These facilities are enumerated in clause-3 of the agreement and would, *inter-alia*, include construction of access road, creation of power infrastructure, water & sewage facilities etc. The cost of the said facilities was to be borne by the assessee. In case of default by the developer to



carry out the stated obligations, the assessee had the option to negotiate with developer for completion of infrastructure facilities or terminate the agreement along with lease agreement and the developer was to refund the entire amounts paid under this agreement as well as under lease agreement.

6.2 Upon perusal of the terms of the agreement, it is quite discernible that the payment made by the assessee was not towards acquisition of any asset but towards provision of infrastructure facilities which would enable the assessee to run its business operations more efficiently and without any hinderance. The benefit may be enduring in nature and the same would have benefitted the assessee over several years but nevertheless, the nature of expenditure was revenue in nature as is evident from the terms of the agreement. To rechristened the same as upfront lease payments as done by Ld. DRP was beyond the scope of terms of the agreement and the said conclusion was bereft of any material evidence on record. Quite clearly, the facilities were obtained on plot of land under lease and the assessee was not the owner of said infrastructural facilities. In such a scenario, the expenditure being incurred wholly and exclusively for the purpose of business and being revenue in nature, was allowable as deduction u/s 37(1).

6.3 The Hon'ble Supreme Court in the case of **Empire Jute Co. Ltd. V/s CIT (3 taxman 69)** held that there may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may breakdown. It is



ITA No.137/Mum/2018
Kellogg India Private Limited
Assessment Year-2013-14

not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's business operations or enabling management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. Considering the same, Hon'ble Supreme Court in the case of **L.H.Sugar Factory & Oil Mills P. Ltd. V/s CIT 125 ITR 293** held that construction of approach roads to the factory were undoubtedly advantageous to the business of the assessee as they facilitated the transportation of goods from factory to market and *vice versa*. Therefore, there could be no doubt that the construction of roads facilitated the business operations of the assessee and enabled the management and conduct of the assessee's business to be carried on more efficiently and profitably. Further, there could be no doubt that the advantage secured for the business of the assessee was of a long duration inasmuch as it would last so long as the roads continued to be in motorable condition, but it was not an advantage in the capital field, because no tangible or intangible asset was acquired by the assessee, nor was there any addition to or expansion of the profit-making apparatus of the assessee. Therefore, the expenditure would be for the purpose of facilitating the conduct of the



business of the assessee and making it more efficient and profitable and therefore, clearly an expenditure on revenue account.

6.4 Another aspect is that The Income Tax Act, unless specifically provided in the provisions, do not recognise the concept of deferred revenue expenditure. If the expenditure qualifies for deduction u/s 37(1), the same would be an allowable expenditure in its entirety in the year in which it has been incurred, if the assessee chooses to claim the same at one go. The said proposition stem from another decision of Hon'ble Apex Court in **Taparia Tools Limited V/s JCIT 372 ITR 605.**

6.5 Viewing from any angle, we are of the considered opinion that the aforesaid expenditure, being revenue in nature would be an allowable expenditure in its entirety during this year. Accordingly, the ground raised stand allowed.

Ground No.3: Treatment of interest income

7.1 During assessment proceedings, it transpired that the assessee earned interest income of Rs.272.84 Lacs and offered the same as *business income*. The reasoning adduced was that the assessee received favorable credit period from the vendors of raw material and packaging material. The surplus funds generated out of income received from sale to distributors and not immediately required in the business were invested in short terms deposits with the Bank. Since interest income had immediate nexus with the business of the company, the same was to be treated as business income. However, Ld. AO opined that earning of interest was not the business of the assessee and therefore, the interest income was to be



ITA No.137/Mum/2018
Kellogg India Private Limited
Assessment Year-2013-14

taxed as *income from other sources*. The Ld. DRP, relying upon predecessor DRP's direction in AY 2009-10, confirmed the stand of Ld.AO. Aggrieved, the assessee is in further appeal before us.

7.2 We find that this issue, following the orders for AYs 2007-08 & 2008-09, has been restored back by the Tribunal in AY 2009-10, ITA Nos. 2866 & 2888/Mum/2014 order dated 19/07/2019 by observing as under: -

47. We have considered rival submissions and perused material on record. It is observed that while deciding identical issue in assessee's own case for the assessment year 2007-08 and 2008-09 (supra), the Tribunal has held as under: -

"6.2 AO noted that the impugned interest income was earned by the assessee and considering the nature of assessee's business, the same was assessable under the head 'Income from other sources' against which set-off of brought forward business losses was not permissible. The assessee attributed the same to the 'credit float' enjoyed by the assessee. The surplus funds out of business operations were invested in short term deposits with the bank. Reliance was placed on the judgment of Bombay High Court in Lok Holdings 309 ITR 356. However, the same got rejected by AU on the premise that such interest income was not derived from the business activity of the assessee. CIT(A) allowed the issue in favour of assessee by relying upon various judicial pronouncements. Aggrieved, the Revenue is in appeal before us. AR has contended that there is complete nexus of interest income with the business activity of the assessee and the same has accrued only due to parking of surplus funds in normal course of business in short term Bank deposits. Per query from the Bench, the Ld. AR placed a note on interest income qua its nexus with business activity of the assessee. The assessee is engaged in the business of manufacturing and distribution of ready to eat cereals. It procures raw material and necessary ingredients from vendors and sells manufactured products to distributors. The AR has contended that the assessee collects sales proceeds within a week's time whereas it enjoys credit period of more than 45 days from its vendors. It enjoys a longer credit period from its vendors as against shorter credit period given to its customers. The resultant float is parked in short term bank deposits. The period of these deposits ranges from 30 to 90 days. Reliance has been placed on the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Lok Holdings 308 ITR 356. It is also observed that no details of bank deposits could be provided by AR despite specific request being made by the bench due to which we are unable to ascertain the fact that whether these deposits have direct nexus with the business of the assessee, The Ld. AR has attributed the parking of funds to general credit float enjoyed by the assessee without bringing anything on record to substantiate the same. Hence, we deem it fit to restore the matter back to the file



ITA No.137/Mum/2018
Kellogg India Private Limited
Assessment Year-2013-14

of AO to examine the nature of Bank FDR particularly the tenure of the deposit and also verify the fact of 'credit float' enjoyed by the assessee and decide the issue afresh in accordance with law. The assessee is directed to cooperate with the lower authorities forthwith to substantiate his submissions. The ground of revenue's appeal is allowed for statistical purposes.”

48. Facts being identical, respectfully following the aforesaid decision of the Co-ordinate Bench, we restore the issue to the Assessing Officer. Ground is allowed for statistical purposes.

Similar directions have been given for AYs 2011-12 & 2012-13. Therefore, facts being pari-materia the same, the issue stand restored back to the file of Ld. AO on similar lines. This ground stand allowed for statistical purposes.

Ground No.4: Set-off of brough forward unabsorbed depreciation

8.1 It transpired that the assessee claimed set-off of depreciation of Rs.462 Lacs pertaining to AY 1997-98. The said adjustment, as per the amendment to Sec.32(2) as made by Finance Act 1996, could be carried forward only up-to a maximum period of 8 years from the year in which it was first computed. The same was in line with CBDT circular No. 762 dated 18/02/1998 which stated that depreciation of earlier years would be added to deprecation for AY 1997-98 and the period of 8 years would begin from AY 1997-98 onwards. The subsequent amendment made by Finance Act 2001 w.e.f. AY 2002-03 restored the position and the period of 8 years was done away with. The said amendment was stated to be effective from AY 2002-03. Accordingly, a view was taken by Ld.AO that the subsequent amendment was not applicable to carry forward of unabsorbed depreciation of 5 years from AYs 1997-98 to 2001-02 which was allowed to be carried forward for 8 succeeding years only. Although the assessee relied upon the



ITA No.137/Mum/2018
Kellogg India Private Limited
Assessment Year-2013-14

decision of Hon'ble Gujrat High Court in **General Motors Private Limited V/s DCIT**, the same was stated to be not applicable due to difference in jurisdiction. Finally, the adjustment of the same was denied to the assessee.

8.2 The Ld. DRP, relying upon predecessor DRP's direction in AY 2012-13, rejected the objections raised by the assessee. Aggrieved, the assessee is in further appeal before us.

8.3 We find that this issue has been decided in assessee's favor by the Tribunal in AY 2012-13, ITA No. 2314/Mum/2014 by observing as under: -

22. The Ground No.3 of the appeal is qua set off of brought forward unabsorbed depreciation of Rs.7,15,99,575/- pertaining to assessment year 1997-98. The DRP in assessment year 2011-12 has decided this issue in favour of the assessee. The DRP in the assessment year under appeal has decided this issue against the assessee merely to keep the issue alive as after the amendment, the Department cannot file appeal against the directions of DRP. We find that the Hon'ble Bombay High Court in the case of CIT vs. Hindustan Unilever Ltd. (supra) following the decision of the Hon'ble Gujarat High Court in the case of General Motors India Ltd. (supra) has allowed the assessee to set off unabsorbed depreciation in accordance with the amended provisions of section 32(2) of the Act. As per amended provision of section 32(2), the unabsorbed depreciation can be carry forward and set off without any time limit. Thus, in the light of the settled position we find merit in the contentions of the assessee and direct the Assessing Officer to allow set off of brought forward unabsorbed depreciation pertaining to assessment year 2007-08 against the profits of the current year's assessment.

Facts being identical, we direct Ld. AO to allow the set-off of the same. This ground stand allowed.



ITA No.137/Mum/2018
Kellogg India Private Limited
Assessment Year-2013-14

Conclusion

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

Order pronounced on 07th September, 2020.

Sd/-
(Vikas Awasthy)
न्यायिक सदस्य / **Judicial Member**

Sd/-
(Manoj Kumar Aggarwal)
लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 07/09/2020
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त/ CIT– concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai.