THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 1198/Mum/2021 (A.Y. 2016-17)
I.T.A. No. 802/Mum/2022 (A.Y. 2017-18)

L'Oreal India Private Limited A-Wing, 8th Floor, Marathon Futurex, N.M. Joshi Marg Lower Parel, Mumbai-400013. PAN : AAACL0738K	Vs.	Addl./Joint/Deputy/ Assistant Commissioner of Income Officer National Faceless Assessment Centre Delhi
(Appellant)		(Respondent)

Assessee by	Shri Niraj Sheth
Department by	Dr. Yogesh Kamat
Date of Hearing	23.06.2022
Date of Pronouncement	29.06.2022

O R D E R

Per B.R.Baskaran (AM) :-

Both these appeals filed by the assessee are directed against the orders passed by the Assessing Officer for A.Ys. 2016-17 & 2017-18 under section 143(3) read with section 144C of the Act in pursuance of direction given by learned Dispute Resolution Panel (DRP).

2. Since one of the issue urged in these appeals are identical in nature, they were heard together and are being disposed of by this common order, for the sake of convenience.

3. L'Oreal India Pvt. Ltd., the assessee herein, is a wholly owned subsidiary of L'Oreal S.A., France. It has entered into license agreement with L'Oreal France, which awarded exclusive right to the assessee to import, manufacture by itself or through another L'Oreal affiliate, market, distribute and sell branded products of L'Oreal group.

4. The common issue urged in both the appeals relate to transfer pricing adjustment made in respect of "Advertisement, marketing and promotion expenses (AMP expenses). In A.Y. 2016-17, the TPO made primary adjustment in respect of AMP expenses to the extent of Rs.281.99 crore, which consisted of Rs. 119.97 crore relating to marking and sales segment and Rs. 162.02 crores relating to manufacturing segment. The above said adjustment is referred to as "Primary adjustment" in this order. The TPO also made secondary adjustment of Rs.3.51 crores on the AMP adjustment made in manufacturing segment of Rs. 162.05 on account of payment made for training to saloon customers and promotional goods treating the same as advance payments. In Assessment year 2017-18, the TPO made primary adjustment of Rs.120.81 crores.

5. At the outset, learned AR submitted that identical adjustments have been made by the TPO in the earlier years and those adjustments have been deleted by the Coordinate Bench of the Tribunal in various years. The Learned AR invited our attention to the order dated 27.7.2020 passed by the Coordinate Bench in assessee's own case in ITA No. 7204/Mum/2019 relating to A.Y. 2015-16 in support his submissions.

6. We have heard learned Departmental Representative and perused the record. We noticed that the issue of primary adjustment relating to AMP expenses and secondary adjustment on account of training, saloon, promotional goods have been deleted by the Coordinate Bench in assessee's own case with following observations :-

> "9. Ground No. 2 to 18 relates to adjustment on account of advertisement and marketing expenses (AMP). The ld. AR of the assessee submits that these grounds of appeal are covered in favour of assessee by the decision of Tribunal in A.Y. 2008-09 to 2014-15. The ld. AR of the assessee furnished the copy of consolidated decision of Tribunal for A.Y. 2008-09 to 2020-11, order of Tribunal for AYs 2011-12, 2012-13, 2013-14 & 2014-15 respectively.
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> 10.On the other hand, the ld. DR for the revenue relied upon the order of lower authorities. The ld. DR for the revenue further submits that revenue has already filed appeal against the order of Tribunal for various assessment

years before the jurisdictional High Court and the issue is sub-judice before the Honb'le High Court.

11.We have considered the rival submission of the parties and have gone through the orders of authorities below. We have also gone through the orders of Tribunal for various earlier years. We have noted that the TPO while passing the order under section 92CA basically followed the order for AY 2014-15. We have further noted that in appeal for AY 2014-15 in ITA No. 6448/Mum/2018, the Tribunal while considering the orders for earlier year passed the following order:

"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 Annexure1)

(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' 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.*
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> *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)*
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> *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.*
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> *[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."

12. Considering the consistent decision of Tribunal on identical set of fact on identical issue for earlier years, wherein no factual difference for the year under consideration is brought to our notice, nor any contrary law is shown to us, to take any other view, therefore, respectfully following the orders for earlier years the Ground No.2 to 18 are allowed.

13. Ground no.19 to 23 relates to alternate adjustment on account of payment for packaging design, cost, training to Saloon customers and promotional goods. The ld. AR of the assessee further submits that these grounds of appeal are also covered by the decision of Tribunal for AY 2014-15. The ld. AR for the assessee submits that the assessee has also filed an application for admission of additional evidence. The additional evidences furnished by the assessee have direct relevance with the issue under consideration. The lower authorities however, did not give due cognizance to those evidences and made adjustment by taking view of insufficient documentation. Accordingly, the assessee wishes to furnish additional explanation/supporting documents to supports assessee's contention that no adjustment should be made on account of payment made in lieu of support services received by it. The assessee has filed various documents in the form of Annexure-1 to Annexure-4, details of which is annexed along with the application for additional evidence. The assessee is also furnished copies of all those evidences running from page no. 3046 to 3312 of Paper book (PB). The ld. AR for the assessee prayed that additional evidences furnished by the assessee may be admitted and the issue may be restored to the file of assessing officer for considering the issue afresh.

14.On the other hand, the ld. DR for the revenue submits that assessee has not furnished sufficient evidence, thus, the assessee cannot find fault in the finding of lower authorities. The assessee is filing the alleged supporting evidences at this stage, which were not before the lower authorities. The ld. DR further submits that in case the Hon'ble Bench deems it appropriate to take additional evidence on record, in such eventuality issue may be restored to the file of AO/TPO for verification of evidence and consideration of issue afresh at their end.

15.We have considered the rival contention of both the parties and gone through the orders of authorities below. We have also gone through the additional evidences filed by assessee along with the application dated

04.02.2020. In the application for admission of additional evidence the assessee stated that TPO while making T.P. Adjustment made alternative T.P. Adjustment on account of payment of packaging, design cost, training to Saloon Customers and promotional goods by assessee to its AEs. It is further contended that the assessee furnished various information/documents vide its letter dated 22.10.2018 to substantiate the genuineness of payment made to AE containing need of services, benefit of services, evidence of receipt of services, cost allocation methodology, agreements with list of copies of invoices, the copies of which is at page no. 3046 to 3082 in the form of Appendix A to D. We have noted that the documentary evidences furnished by the assessee relates to the payment on account of packaging, design cost, training to Saloon Customers and promotion of various products and goods. Considering the nature of the evidences which has relevance with the issue under consideration, we admit the additional evidences furnished by the assessee. We have further noted that on alternate adjustment in AY 2014-15, Tribunal restored the similar issue(s) to the file of AO/TPO by passing the following order:

> *"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:-*
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> *"(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."

16.Considering the decision of Tribunal for earlier year on alternate adjustment and the fact that the assessee has filed the aforesaid additional evidence for the first time before the Tribunal and the fact that we have already held that the additional evidence furnished by the assessee has direct relevance qua the grounds of appeal, which required consideration and verification at the end of AO, therefore, we remit the issue to the file of AO for consideration and decision on the issue afresh. The AO/TPO is also directed to follow the order of Tribunal for AY 2014-15 as well. Needless to order that before deciding the issue, the AO shall grant opportunity to the assessee. In the result these grounds of appeal are allowed for statistical purpose."

7. We noticed that the Coordinate Benches are consistently taking the view that the primary and secondary adjustments made in the hands of the assessee in respect of AMP expenses are not sustainable. Since there is no change in the facts, following the decision rendered by the Coordinate Benches in the earlier years in assessee's own case, we direct the Assessing Officer/TPO to delete primary transfer pricing adjustment made in respect of AMP expenses in both AY 2016-17 and secondary adjustment made in AY 2016-17.

8. We shall now take up the individual issues urged by the assessee in AY 2016-17. The first individual issue relates to the disallowance of claim of depreciation on good will. The AO had disallowed the depreciation claimed by the assessee on the amount of good will in AY 2015-16. Following the

said order, the AO disallowed the depreciation claimed on the WDV of good will amounting to Rs.1,81,03,920/-. The Ld A.R submitted that the Tribunal has restored the issue relating to claim of depreciation on good will in AY 2015-16 (referred supra) to the file of AO. Accordingly he submitted that this issue may be restored to the file of AO in this year also to the file of AO.

9. We heard Ld D.R on this issue and perused the record. In AY 2015-16, the co-ordinate bench has restored the issue relating to claim of depreciation on good will to the file of AO with the following discussions:-

> 25. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. We have also deliberated on the various case laws and the voluminous paper book furnished by the assessee. During the relevant financial year involved in this case, the assessee entered into a business transfer agreement with Rahul Healthcare for purchase of Soap manufacturing unit of Rahul Healthcare as a going concern on the lump-sum basis. The business transfer agreement was amended vide agreement dated 8th July 2014 and again on 31st October 2014. As per agreement the parties agreed for a lump sum consideration for purchase of ongoing concern for a consideration of ₹ 12.94 crore. The sale transaction of Rahul Healthcare was completed on 3rd November 2014. The consideration of ₹ 12.94 crore was allocated over various assets and liabilities of the unit as per value based on the purchase price allocation report prepared by M/s SSPA & Co, Chartered Accountant. As per valuation the land and building was valued at ₹ 6.96 crore. All other fixed asset, current asset and current liabilities in the unit were taken over at their book value. The difference of ₹ 8.27 crore between the considerations paid and the fair value of the asset and liability was claimed by assessee as Goodwill. On the basis of aforesaid facts the assessee claimed depreciation of ₹ 1.03 crore on the goodwill of ₹ 8.27 crore at 25% of half of the year.
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> 26. The assessing officer while passing the draft assessment order issued show cause notice as to why net current asset were taken at a negative value of Rs. 3.14 crore and also why depreciation of Rs. 1.03 crore should not be disallowed. The assessee filed its reply dated 21st December 2018. In the reply the assessee stated that current assets of Rahul Healthcare were negative because of the liabilities of Rahul Healthcare were also purchased by the assessee. It was also contended that no value was assigned to non- compete and knowhow, while calculating the goodwill because the assessee"s core business activities was manufacturing, marketing and sales of cosmetic product and not Soaps and that the assessee and Rahul healthcare were not in competition in anyway.

27. The reply furnished by assessee was not accepted by the assessing officer. The assessing officer while passing the draft assessment order on 28th December 2018 treated the goodwill recorded by assessee is at ₹ 8.27 crore as an unexplained investment under section 69 of the Act. The assessing officer also took his view that amount of current liabilities and expenses payable by Rahul Healthcare was taken into account as on 30th September 2013 instead of taking into account the liability as on 31st October 2014 which is the date on which the balance sheet was actually drawn and the transaction was concluded on 3rd November 2014, consequently the depreciation claimed by assessee was also disallowed. On filing objections before DRP, the DRP directed the assessing officer to delete the addition under section 69 by holding that even if the payment represents excess payments by the assessee, is still these payments were made from the books of the assessee and there is no question of applicability of section 69 in this case. However, the disallowance of depreciation on goodwill was upheld holding that there is no proper documentation.

28. Before us the ld AR for the ld AR for the assessee vehemently argues that along with the acquisition of business of RHC the assessee also acquired the business of Rahul Healthcare was acquired on a slump sale basis, which included not only tangible assets but also bundle of intangible assets collectively called goodwill. The assessee claimed that reference of intangible assets includes permits, employee, and contracts. The contention of the ld. AR for the assessee is strongly contested by ld. DR for the revenue by making multiple submissions, which we have recorded above.

29.The Hon'ble Apex Court in CIT Vs Smifs Securities Ltd (supra) held that Goodwill is an asset under Explanation 3(b) to section 32(1) and, thus, it is eligible for depreciation. The Hon'ble Court observed that Explanation 3 to section 32(1) states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading of the words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial rights of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3 (b).

30.Hon'ble Delhi High Court in Triune Energy Services (P.) Ltd. vs DCIT (supra) also held that Goodwill is an intangible asset providing a competitive advantage to an entity. This includes a strong brand, reputation, a cohesive human resource, dealer network, customer base etc. The expression "goodwill" subsumes within it a variety of intangible benefits that are acquired when a person acquires a business of another as a going concern.

31. A perusal of draft assessment order shows that the assessee failed to discharge the source of "goodwill" (para 4.6). The ld. DRP while considering the objections of the assessee though deleted disallowance of cost of acquisition of goodwill, however, the depreciation claimed on goodwill was upheld. In our view the AO as well as ld. DRP have not considered the aforesaid submission of the assessee that the assessee

> acquired not only tangible assets but also bundle of intangible assets collectively called goodwill, which includes various permits, employee, and contracts, though the assessee in Annexure-2 of its reply dated 21.12.2018 has specifically contended about its claim of "goodwill" (page 2237 to 2245 of PB). Considering the facts that neither the AO nor the ld. DRP considered the aforesaid facts as placed before us, therefore, we remit these grounds of appeal to the file of AO to consider these issues afresh by considering the aforesaid submission of the assessee and the evidences and pass the order in accordance with law. The AO shall consider the decision of Hon"ble Apex Court in Smifs Securities Ltd (supra) and Delhi High Court in Triune Energy Services (P.) Ltd. Vs DCIT (supra). Needless to order that before passing the order the AO shall grant opportunity of hearing to the assessee. In the result these grounds of appeal are allowed for statistical purpose.

10. We notice that the issue relating to claim of depreciation on good will has been restored to the file of AO in the immediately preceding year and hence the decision taken by the AO in that year shall have bearing on this claim made during the instant year. Accordingly, we restore this issue to the file of AO for examining it in accordance with the decision taken by him in the immediately preceding year.

11. The next issue urged in AY 2016-17 relates to the disallowance of claim of Provision for expenses. The assessee had made "Provision for outstanding expenses" to the tune of Rs.96,28,68,265/- as per the requirement of mercantile system of accounting and claimed the same as deduction. Since it had not deducted tax at source from the above said provision claimed as deduction, the assessee voluntarily disallowed 30% of the above said claim u/s 40(a)(ia) of the Act. The AO treated the above said provision as 'unascertained liability' and accordingly took the view that the same is not allowable as deduction. The AO noticed that the assessee has voluntarily disallowed 30% of the expenses u/s 40(a)(ia) of the Act and further a sum of Rs.68,04,24,906/- has been included in the Transfer pricing adjustment. Accordingly, the AO deducted the above said amount of Rs.68.04 crores from the claim of Rs.96.28 crores and from the balance so arrived, he allowed further deduction of 30% (voluntarily disallowed u/s 40(a)(ia) of the Act) and accordingly disallowed net balance of Rs.19,77,10,351/-. The Ld DRP also confirmed the same.

12. We heard the parties on this issue and perused the record. The assessee has made provision for expenses for the services availed by it by the year end, for which bills have not yet been received. However, the tax authorities have noticed that the "liability to pay" the expense shall arise only when the bills are received by the assessee. Since the bills have not been received, there was no liability to pay the expenses. Accordingly, the tax authorities have taken the view that, in the absence of any liability to pay for these expenses as at the year end, the provision for expenses so created by the assessee shall fall under the category of "unascertained liability" and accordingly not allowable as deduction.

13. There is no dispute with regard to the fact that the assessee is following "mercantile system of accounting". Under the mercantile system of accounting and also as per the requirement of AS-29 issued by the Institute of Chartered Accountants of India (ICAI), a provision for expenses should be made when:-

a. an enterprise has a present obligation as a result of past event.

b. it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation, and

c. a reliable estimate can be made of the amount of obligation.

Hence it is imperative for a concern, following mercantile system of accounting, to provide for all known expenses and losses as at the year end, even if the relevant bills have not been received. As per standard accounting practices, not providing for known expenses/losses would, in fact, distort the operating results of the business concern and it would not reflect true and fair profit of the year. We have noticed that the assessee has provided for expenses for which services have been availed by it, meaning thereby, the liability towards those expenses has already accrued to the assessee. However, the actual liability to pay shall arise only upon on production of bills by the service provider. Thus, there is distinction between "accrual of liability" and "liability to pay for expenses". There should not be any dispute that the "accrued

liability" cannot be considered as "unascertained liability". Accrued liability is an ascertained liability, but the liability to pay it has not arisen. We notice that the the tax officials have been carried away by the fact that the liability to pay shall arise upon the assessee only after the receipt of the relevant bills and have not considered its accrual. The fact that there was an obligation upon the assessee to pay for the liability as a result of past event cannot be denied. By belated receipt of bills, the payment only gets postponed, but not the liability that has already accrued to the assessee. It is also fact that the assessee has been providing for known expenses and losses year after year and the said provision has been verified by the statutory auditors of the assessee company. The Ld A.R submitted that the provision for expenses so created has been accepted by the AO in the past. Accordingly, we are of the view that the tax authorities are not justified in holding that the Provision for expenses is an unascertained liability. As per the accounting principles discussed above, it is an ascertained liability and the same is eligible for deduction while computing total income. Accordingly, we direct the AO to delete the disallowance of Provision for expenses.

14. The next issue urged by the assessee in AY 2016-17 relates to the claim for deduction of "Education cess" paid during the year. At the time of hearing, the Ld A.R did not press this ground. Accordingly all grounds relating to the same are dismissed as not pressed.

15. All other grounds urged by the assessee in AY 2016-17 are consequential in nature or premature in nature.

16. We shall take up the individual issues urged in AY 2017-18. The first individual issue urged in Ground nos. 21 relates to the contention that the assessment order is time barred. In the preceding paragraphs, we have granted relief to the assessee with regard to the transfer pricing adjustment made in respect of AMP expenses, which was the only issue urged on merits.

Hence the legal issue cited above shall become academic in nature and accordingly, we leave it open without deciding the same.

17. All other grounds urged by the assessee in AY 2017-18 are consequential in nature or premature in nature.

18. In the result, the appeal filed by the assessee for AY 2016-17 is treated as partly allowed. The appeal relating to AY 2017-18 is treated as allowed.

Order pronounced in the open court on 29.06.2022.

Sd/-	Sd/-
(RAHUL CHAUDHARY)	(B.R. BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 29/06/2022

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