

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, PUNE

**BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER**

**आयकर अपील सं. / ITA No.507/PUN/2015
निर्धारण वर्ष / Assessment Year : 2010-11**

Kimberly-Clark Lever Private Limited,
GE Plaza, Yerawada,
Pune - 411006

PAN : AAACK4647E

.....अपीलार्थी / Appellant

बनाम / V/s.

The Asst. Commissioner of Income-tax,
Circle - 14, Pune

.....प्रत्यर्थी / Respondent

**आयकर अपील सं. / ITA No.576/PUN/2015
निर्धारण वर्ष / Assessment Year : 2010-11**

The Asst. Commissioner of Income-tax,
Circle - 14, Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

Kimberly-Clark Lever Private Limited,
GE Plaza, Yerawada,
Pune - 411006

PAN : AAACK4647E

.....प्रत्यर्थी / Respondent

Assessee by : Shri Percy Pardiwalla
Revenue by : Shri J.P. Chandraker

सुनवाई की तारीख / Date of Hearing : 24-06-2022

घोषणा की तारीख / Date of Pronouncement : 20-07-2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

These are cross appeals filed by the assessee and Revenue directed against final assessment order dated 11.02.2015 passed u/s 143(3) r.w.s.

144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for the assessment year 2010-11.

2. Briefly, the facts of the case are as under:

The appellant is a company incorporated under the provisions of the Companies Act, 1956. It is a joint venture between Hindustan Unilever Limited (HUL) and Kimberly Clark Corporation, a USA based company. It is engaged in the business of manufacturing of Infant Care and Feminine Hygiene Care Products. The return of income for the assessment year 2010-11 was filed on 14.10.2010 declaring loss of Rs.2,23,45,387/-. The appellant company also reported the following international transactions within the meaning of section 92B of the Act:

<i>Sr. No.</i>	<i>Nature of Transactions</i>	<i>Amount of Transactions</i>	<i>MAM</i>
1	<i>Purchase of raw materials, spare parts & consumables</i>	57,28,75,077	<i>Not benchmarked at the time of filing of 3CEB TNMM as additional analysis with AE as tested party for Rs.6,80,99,978</i>
2	<i>Purchase of finished goods</i>	2,91,82,458	<i>Not benchmarked at the time of filing of 3CEB TNMM as additional analysis with AE as tested party</i>
3	<i>Payment of Royalty</i>	3,24,29,757	<i>CUP</i>
4	<i>Payment of Global licence fees</i>	80,45,943	<i>Not benchmarked</i>
		64,25,33,235	

3. Noticing the above international transactions, the Assessing Officer (AO) referred the matter to Transfer Pricing Officer (TPO) u/s 92CA(1) of the

Act for the purpose of benchmarking the above international transactions reported by the appellant company in Form No.3CEB. The TPO vide order dated 20.01.2014 passed u/s 92CA(3) of the Act suggested the TP adjustments on account of Advertising & Marketing (A&M) expenses of Rs.36,07,83,298/-. While doing so, the TPO computed the expenditure incurred on account of advertisement at Rs.46.82 crores which works out to 0.25% of the sales. According to the TPO, the mean ratio of the routine advertisement expense of the comparables is only 0.05%. Accordingly, the TPO adopted the difference between both to benchmark the international transactions on account of A&M with its foreign AE. The TPO computed the A&M expenses in his order as under:

		Overall
Sales	A	Rs.186.57 Crs
A&M Spend	B	Rs.46.82 Crs
A&M Spend to Sales Ratio	$C=B/A$	0.2509
A&M to Sales Ratio of the peers	D	0.0576
Diff	$E=CIT(A)-D$	0.1933
Compensation to be received from AE	$F=A*E$	Rs.36.08 Crs

Accordingly, the TPO proposed an upward adjustment of Rs.36,07,83,298/- on account of A&M expenditure.

4. As regards to the addition of transfer pricing adjustment in respect of international transaction of import of raw materials of Rs.57,28,75,077/-, it is stated that for the qualitative supply of raw materials at lower price, AE of appellant company had entered into an agreement with third party vendors for supply of raw materials for all group entities including the appellant at an agreed price. The aforesaid arrangement with third parties results in standard of quality in raw materials under reduced price of raw materials due to collective buying. During the previous year relevant to the

year under consideration, the appellant company had imported raw materials from third party vendors under the above said arrangement with its AE as under:

Name of the parties	Amount (in Rs.)
<i>Third party vendors under global sourcing arrangement</i>	50,28,99,455
<i>Yuhan-Kimberly Limited</i>	3,55,61,891
<i>Kimberly Clark Global Sales LLC</i>	3,25,38,087

5. The appellant in its TP study report has adopted a transaction level approach and benchmarked the transaction by selecting AEs as tested parties. It was claimed that the transaction of import of raw materials from its third parties is at arm's length price by demonstrating that the rates charged by the appellant company are lower than the market price by providing the certificate obtained from third party vendors. The appellant also provided the following documents to substantiate that the transaction of import of raw materials is at arm's length price:

- *Benchmarking analysis considering the AEs as a tested party taking foreign companies as a comparable;*
- *Accept Reject Matrix and Annual reports of the comparable companies*
- *Confirmation from the AE certifying the mark-up charged on supply of raw material*
- *Certificate issued by Independent Cost Accountant certifying the mark-up charged by the AE to the Appellant on supply of raw material.*

6. However, the TPO rejected the TP study submitted by the appellant company on the international transaction of import of raw materials by stating that the (i) certificates submitted by the appellant company are self certified evidences as the same are signed by the AEs, (ii) the certificate issued by third party vendors cannot be considered as evidences as the

said third party vendors are considered to be an AE of the appellant company, (iii) Certificates obtained from third party vendors do not fit under CUP method requires comparison of controlled transaction with uncontrolled transaction under CUP method, (iv) the appellant has not provided the details i.e. Annual reports, RPT calculation and calculation of the margins of the foreign comparables therefore, the arm's length price charged by the AEs cannot be examined and (v) considering intrinsic connection of international transaction with manufacturing activity, TNMM gives a better result as it captures below the line international transactions and smoothen out minor differences. GP Comparison would be a better indicator when the sales and imports are constituting significant amount of the AE transactions. However, the TPO rejected the above TP analysis submitted by the appellant company by citing the above reasons and proceeded to benchmark the international transaction of import of raw materials by adopting TNMM as most appropriate method at entity level and selecting the comparables whose average profit margin was computed at 7.49% as compared to negative margin of (-) 6.68% of the appellant company and the TP adjustment is worked out as below:

<i>Single Year margins for the Comparables</i>	=	<i>11.74%</i>
<i>Margins for the Manufactured Products</i>	=	<i>-7.66%</i>
<i>Operating Costs</i>	=	<i>Rs.200.86 Crs</i>
		<i>11.74-(-7.66) x 200.86</i>
<i>TP adjustment</i>	=	<i>Rs.38.96 Crs</i>

Accordingly, the TP adjustment was made by subsuming the TP adjustment on account of A&M expenditure and accordingly suggested TP adjustment of sum of Rs.38.96 crores.

On receipt of TPO's order, a draft assessment order u/s 143(3) r.w.s. 144C(1) of the Act was passed on 31.03.2014 after making (i) TP adjustment on account of international transaction of Rs.38.96 crores; (ii) disallowance of payments made to Hindustan Unilever Limited (HUL) on account of A&M expenses for non-deduction of TDS of Rs.9,72,31,464/-; (iii) disallowance of payments to HUL on account of Cost on Employee deputation for non-deduction of tax of Rs.1,84,43,055/-; and (iv) disallowance of payments to HUL on account of Selling discount for non-deduction of TDS of Rs.5,13,20,724/-.

On receipt of draft assessment order, the appellant company has chosen to file objections before the Hon'ble Dispute Resolution Panel (DRP) contesting the above disallowances. The Hon'ble DRP on due consideration of submissions made before it, had sustained the addition on account of TP adjustment of international transaction of A&M expenditure. However, in respect of TP adjustment on account of international transaction of import of raw materials, while sustaining the addition made by the TPO directed the AO / TPO to restrict the TP addition to the extent of international transaction alone and also held that the addition on account of international transaction of A&M expenditure subject to subsuming the same with the addition on account of import of raw materials. However, directed the AO to allow the claim of appellant in respect of items of additional discount to HUL and reimbursement of salary, cost of employees deputed by the appellant to HUL and the trade discount offered to HUL of Rs.5,13,20,724/-, subject to verification of certificate in Form No.26A in accordance with rule 3ACB. On receipt of directions from the DRP, the AO passed final assessment order vide order

dated 11.02.2015 passed u/s 143(3) r.w.s. 144C(13) of the Act making addition on account of international transaction of import of raw materials of Rs.36,07,83,298/- without complying with directions of DRP to restrict TP adjustment only to the extent of AE transactions.

7. Being aggrieved, the appellant is in appeal before us in the present appeal.

8. The ground of appeal no.1 & 2 challenges the addition on account of Transfer Pricing adjustment of Rs.36,07,83,298/- in respect of A&M expenses incurred by the appellant . The TPO as well as the Hon'ble DRP inferred the existence of international transactions on noticing that the appellant had incurred excess expenditure on A&M expenses as compared to the expenses incurred by the comparables chosen by the TPO and then proceeded to make adjustments of difference in order to determine the value of such A&M expenses incurred by the AE. In the process, the TPO as well as the Hon'ble DRP presumed that the benefit of this expenditure had enured to its foreign AE.

9. Before us, ld. Sr. Counsel submitted that the TPO/DRP ought not to have re-characterized the A&M expenses by itself as international transaction. He further argued that the inference of benefit to its foreign AE is purely based on the surmises and conjectures and there is no explicit of arrangement or agreement between the assessee and its foreign AE to incur the A&M expenditure for the benefit of its foreign AE. The sum and substance of the argument of the ld. Sr. Counsel as to whether there is an international transaction is that the very existence of international

transactions cannot be presumed by deducing the difference of expenditure incurred by the assessee and comparable chosen by the TPO. The next submission made on behalf of the appellant is that even for argument sake that there is an international transaction, in the absence of any machinery provision to compute the ALP of such transactions, the provisions of Chapter X cannot be invoked in order to make a TP adjustment, he took us extensively through the decision in the case of Maruti Suzuki India Ltd. vs. CIT, 381 ITR 117 wherein the Hon'ble Delhi High Court after undertaking the analysis of the provisions of Chapter X had held that in the absence of any explicit arrangement between the assessee and its foreign AE, it cannot be said that the benefit of the expenditure incurred on A&M expenses would also enure to the foreign AE, so as to, infer the existence of an international transaction. The Hon'ble High Court further held that a Transfer Pricing adjustment cannot be made by deducing the difference between the excess A&M expenses incurred by the assessee and the A&M expenses incurred by comparable entities chosen by the TPO. Finally, the Hon'ble High Court referring to the judgement of the Hon'ble Apex Court in the case of CIT vs. B. C. Srinivasa Setty, 128 ITR 294 and PNB Finance Ltd. vs. CIT, 307 ITR 75 held that in the absence of any machinery provisions to compute the arm's length price of transactions the provisions of Chapter X cannot be invoked for the purpose of making the TP adjustments.

10. On the other hand, the ld. CIT-DR submitted that the issue of computation of TP adjustments should be remanded back to the file of the Assessing Officer/TPO in the light of the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson India Pvt. Ltd. (supra).

11. In the rejoinder, the ld. Sr. Counsel vehemently opposed the remand to the Assessing Officer/TPO placing reliance on the decision of Hon'ble Delhi High Court in the case of Valvoline Cummins Pvt. Ltd. (supra). He also relied on the decisions of this Tribunal passed in assessee's own case for AYs 2008-09 and 2009-10, orders dated 22.02.2021 and 01.11.2021 in ITA Nos.2481/PUN/2012 and 576/PUN/2014, respectively.

12. We have heard the rival contentions and perused the record. The issue in these grounds of appeal is no more *res integra* as decided by the Tribunal in assessee's own case for earlier assessment years 2008-09 and 2009-10. It is agreed by both the sides that subsequent to the decisions of this Tribunal in assessee's own case, there was no change in law and fact warranting a different decision on the issue, wherein it was held as under:

33. We heard the rival submissions and perused the material on record. By this ground of appeal no.5, the appellant challenges the TP adjustments made by the TPO/Assessing Officer as confirmed by the Hon'ble DRP on account of A&M expenses. The TPO inferred the existence of international transactions by deducing the difference between the expenditure incurred by the appellant company on account of A&M expenses and expenditure incurred by the comparables chosen by the TPO. The lower authorities had inferred that the benefit had enured its foreign AE on account of excesses expenditure incurred by the assessee on account of A&M. The main contention advanced by the appellant is that the existence of international transaction cannot be inferred by the TPO in the absence of any actual transactions and the presumption by the lower authorities that the benefit had enured to its foreign AE is merely based on the conjectures. In the absence of any agreement between the assessee and its foreign AE to incur any A&M expenses to the benefit of its foreign AE, the presumption of existence of international transaction is incorrect. The identical issue was dealt with by the Co-ordinate Bench of the Tribunal, Bangalore Bench in the case of Essilor India Pvt. Ltd. vs. DCIT (supra) which is authored by one us i.e. Accountant Member wherein the Co-ordinate Bench of the Tribunal after referring to the decision of the Special Bench of the Tribunal in the case of L.G. Electronics India Pvt. Ltd. vs. ACIT, 22 ITR 1 and the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson India Pvt. Ltd. (supra) and in the case of Maruti Suzuki India Ltd. vs. CIT, 381 ITR 117 and held as under :-

"19. In the present case, the assessee-company imports the lens from its foreign AE and after some processing, sells the products on its own. However, the amount of value addition on account of processing

in terms of total revenue is not clear from the material on record. That apart, the assessee-company has been throughout contesting before all the authorities the very existence of international transaction on account of incurring AMP expenditure between assessee-company and its AE and therefore, the contentions that the law laid down by the Hon'ble Delhi High Court in Sony Ericsson Mobile Communication India (P) Ltd. (supra) should be applied to the case on hand, is not correct. Therefore, the submission of the learned Departmental Representative that the matter be remanded to the file of TPOD for fresh decision in the light of law laid down by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India (P) Ltd.(supra), cannot be acceded to.

20. Subsequent to the decision in the case of Sony Ericsson Mobile Communication India (P) Ltd.(supra), the Hon'ble Delhi High Court had rendered five decisions on the same issue. Those decisions are:

- (i) Maruti Suzuki India Ltd. Vs. CIT (282 CTR 1),*
- (ii) CIT vs. Whirlpool of India Ltd. (129 DTR (169),*
- (iii) Bausch & Lomb Eyecare (India) (P) Ltd. Vs. Addl.CIT (129 DTR 201) and (iv) Yum Restaurants (India) Pvt. Ltd. Vs. ITO (ITA No.349/2015 dated 13/01/2016) and (v) Honda Seil Products*

In the above-mentioned decisions, the issue of the very existence of international transaction on incurring AMP expenditure and the method of determination of ALP was the subject matter of appeal before the Hon'ble Delhi High Court. The Hon'ble Delhi High Court had categorically held that in the absence of agreement between Indian entity and foreign AE whereby the Indian entity was obliged to incur AMP expenditure of a certain level for foreign entity for the purpose of promoting the brand value of the products of the foreign entity, no international transaction can be presumed. It was further held that the fact that there was an incidental benefit to the foreign AE, it cannot be said that AMP expenditure incurred by an Indian entity was for promoting brand of foreign AE. One more aspect highlighted by the Hon'ble High Court is that in the absence of machinery provisions, bringing an imagined transaction to tax was not possible. While coming to this conclusion, the Hon'ble High Court had placed reliance on the decisions of the Hon'ble Apex Court in the cases of CIT vs. B.C.Srinivasa Setty (128 ITR 294) and PNB Finance Ltd. Vs. CIT (307 ITR 75). The Hon'ble Delhi High Court after referring to its earlier decision in the case of Maruti Suzuki India Ltd (supra) and Whirlpool of India (P) Ltd.,(supra) had considered the question of existence of the international transaction and computation of ALP thereon in the case of Bausch & Lomb Eyecare (India) (P) Ltd.(supra) vide para 51 to 65 as under:

“51. The central issue concerning the existence of an international transaction regarding AMP expenses requires the interpretation of provisions of Chapter X of the Act, and to determine whether the Revenue has been able to show prima facie the existence of international transaction involving AMP between the Assessee and its AE.

52. At the outset, it must be pointed out that these cases were heard together with another batch of cases, two of which have

already been decided by this Court. The two decisions are the judgement dated 11th December 2015 in ITA No. 110/2014 (*Maruti Suzuki India Ltd. v. Commissioner of Income Tax*) and the judgment dated 22nd December 2015 in ITA No. 610 of 2014 (*The Commissioner of Income Tax-LTU v. Whirlpool of India Ltd.*) and many of the points urged by the counsel in these appeals have been considered in these two judgments.

53. A reading of the heading of Chapter X ["Computation of income from international transactions having regard to arm's length price"] and Section 92 (1) which states that any income arising from an international transaction shall be computed having regard to the ALP and Section 92C (1) which sets out the different methods of determining the ALP, makes it clear that the transfer pricing adjustment is made by substituting the ALP for the price of the transaction. To begin with there has to be an international transaction with a certain disclosed price. The transfer pricing adjustment envisages the substitution of the price of such international transaction with the ALP.

54. Under Sections 92B to 92F, the pre-requisite for commencing the TP exercise is to show the existence of an international transaction. The next step is to determine the price of such transaction. The third step would be to determine the ALP by applying one of the five price discovery methods specified in Section 92C. The fourth step would be to compare the price of the transaction that is shown to exist with that of the ALP and make the TP adjustment by substituting the ALP for the contract price.

55. Section 92B defines 'international transaction' as under:
"Meaning of international transaction. 92B.(1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. (2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise."

56. Thus, under Section 92B(1) an 'international transaction' means- (a) a transaction between two or more AEs, either or both of whom are non-resident (b) the transaction is in the nature of purchase, sale or lease of tangible or intangible

property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, incomes or losses of such enterprises, and (c) shall include a mutual agreement or arrangement between two or more AEs for allocation or apportionment or contribution to the any cost or expenses incurred or to be incurred in connection with the benefit, service or facility provided or to be provided to one or more of such enterprises.

57. Clauses (b) and (c) above cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of BLI is "any other transaction having a bearing" on its "profits, incomes or losses", for a 'transaction' there has to be two parties. Therefore for the purposes of the 'means' part of clause (b) and the 'includes' part of clause (c), the Revenue has to show that there exists an 'agreement' or 'arrangement' or 'understanding' between BLI and B&L, USA whereby BLI is obliged to spend excessively on AMP in order to promote the brand of B&L, USA. As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i) (a) to (e) to Section 92B are described as an 'international transaction'. This might be only an illustrative list, but significantly it does not list AMP spending as one such transaction.

58. In Maruti Suzuki India Ltd. (supra) one of the submissions of the Revenue was: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for the same has been paid or remains payable or there is a mutual agreement to not charge any compensation for the service or benefit." This was negated by the Court by pointing out: "Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to Section 92F (v) which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means' part and the 'includes' part of Section 92B (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC."

59. In Whirlpool of India Ltd. (supra), the Court interpreted the expression "acted in concert" and in that context referred to the decision of the Supreme Court in Daiichi Sankyo Company Ltd. v. Jayaram Chigurupati 2010(6) MANU/SC/0454/2010, which arose in the context of acquisition of shares of Zenotech Laboratory Ltd. by the Ranbaxy Group. The question that was examined was whether at the relevant time the Appellant, i.e., Daiichi Sankyo Company and Ranbaxy were "acting in concert" within the meaning of Regulation 20(4) (b) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. In para 44, it was observed as under:

“The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares etc. of a certain target company. There can be no “persons acting in concert” unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares etc. of the target company. For, de hors the element of the shared common objective or purpose the idea of “person acting in concert” is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of “persons acting in concert” is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition of substantial acquisition of shares etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sine qua non for the relationship of “persons acting in concert” to come into being.”

60. The transfer pricing adjustment is not expected to be made by deducing from the difference between the ‘excessive’ AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceeding to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE. In any event, after the decision in Sony Ericsson (supra), the question of applying the BLT to determine the existence of an international transaction involving AMP expenditure does not arise.

61. There is merit in the contention of the Assessee that a distinction is required to be drawn between a ‘function’ and a ‘transaction’ and that every expenditure forming part of the function cannot be construed as a ‘transaction’. Further, the Revenue’s attempt at re- characterising the AMP expenditure incurred as a transaction by itself when it has neither been identified as such by the Assessee or legislatively recognised in the Explanation to Section 92 B runs counter to legal position explained in CIT v. EKL Appliances Ltd. (supra) which required a TPO “to examine the ‘international transaction’ as he actually finds the same.”

62. In the present case, the mere fact that B&L, USA through B&L, South Asia, Inc holds 99.9% of the share of the Assessee will not ipso facto lead to the conclusion that the mere increasing of AMP expenditure by the Assessee involves an international transaction in that regard, with B&L, USA. A similar contention by the Revenue, namely, that even if there is no explicit arrangement, the fact that the benefit of such AMP expenses would also enure to the AE is itself sufficient to infer the existence of an international transaction has been

negatived by the Court in *Maruti Suzuki India Ltd.* (supra) as under:

"68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an exercise. The Court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions". Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negatived by the Court in *Sony Ericsson*. Therefore, the existence of an international transaction will have to be established de hors the BLT.

.....

70. What is clear is that it is the 'price' of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment."

71. Since a quantitative adjustment is not permissible for the purposes of a TP adjustment under Chapter X, equally it cannot be permitted in respect of AMP expenses either. As already noticed hereinbefore, what the Revenue has sought to do in the present case is to resort to a quantitative adjustment by first determining whether the AMP spend of the Assessee on application of the BLT, is excessive, thereby evidencing the existence of an international transaction involving the AE. The quantitative determination forms the very basis for the entire TP exercise in the present case.

.....

74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to Section 92B of the Act. The problem does not stop here. Even if a transaction involving an

AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?

63. Further, in *Maruti Suzuki India Ltd. (supra)* the Court further explained the absence of a 'machinery provision qua AMP expenses by the following analogy:

"75. As an analogy, and for no other purpose, in the context of a domestic transaction involving two or more related parties, reference may be made to Section 40 A (2) (a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the AO "is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods." In such event, "so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction." The AO in such an instance deploys the 'best judgment' assessment as a device to disallow what he considers to be an excessive expenditure. There is no corresponding 'machinery' provision in Chapter X which enables an AO to determine what should be the fair 'compensation' an Indian entity would be entitled to if it is found that there is an international transaction in that regard. In practical terms, absent a clear statutory guidance, this may encounter further difficulties. The strength of a brand, which could be product specific, may be impacted by numerous other imponderables not limited to the nature of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on. A simplistic approach using one of the modes similar to the ones contemplated by Section 92C may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance."

64. *In the absence of any machinery provision, bringing an imagined transaction to tax is not possible. The decisions in CIT v. B.C. Srinivasa Setty (1981) 128 ITR 294 (SC) and PNB Finance Ltd. v. CIT (2008) 307 ITR 75 (SC) make this position explicit. Therefore, where the existence of an international transaction involving AMP expense with an ascertainable price is unable to be shown to exist, even if such price is nil, Chapter X provisions cannot be invoked to undertake a TP adjustment exercise.*

65. *As already mentioned, merely because there is an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of the foreign AE. As mentioned in Sassoon J David (supra) "the fact that somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being allowed by way of a deduction under Section*

10 (2) (xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law”.

21. Respectfully following the ratio of the decision of the Hon’ble Delhi High Court in the above cases, we hold that no TP adjustment can be made by deducing from the difference between AMP expenditure incurred by assessee-company and AMP expenditure of comparable entity, if there is no explicit arrangement between the assessee-company and its foreign AE for incurring such expenditure. The fact that the benefit of such AMP expenditure would also enure to its foreign AE is not sufficient to infer existence of international transaction. The onus lies on the revenue to prove the existence of international transaction involving AMP expenditure between the assessee-company and its foreign AE. We also hold that in the absence of machinery provisions to ascertain the price incurred by the assessee-company to promote the brand.

22. Applying the above legal position to the facts of the present case, it is not a case of revenue that there existed an arrangement and agreement between the assessee-company and its foreign AE to incur AMP expenditure to promote brand value of its products on behalf of the foreign AE, merely because the assessee-company incurred more expenditure on AMP compared to the expenditure incurred by comparable companies, it cannot be inferred that there existed international transaction between assessee-company and its foreign AE. Therefore, the question of determination of ALP on such transaction does not arise. However, the transaction of expenditure on AMP should be treated as a part of aggregate of bundle of transactions on which TNMM should be applied in order to determine the ALP of its transactions with its AE. In other words, the transaction of expenditure on AMP cannot be treated as a separate transaction. In the present case, we find from the TP study that the operating profit cost to the total operating cost was adopted as Profit Level Indicator which means that the AMP expenditure was not considered as a part of the operating cost. This goes to show that the AMP expenditure was not subsumed in the operating profitability of the assessee-company. Therefore, in order to determine the ALP of international transaction with its AE, it is sine qua non that the AMP expenditure should be considered as a part of the operating cost. Therefore, we restore the issue of determination of ALP, on the above lines, to the file of the AO/TPO. The grounds of appeal raised by the assessee-company on this issue are partly allowed.”

34. Thus, the ratio laid down by the Hon’ble Delhi High Court in the case of Maruti Suzuki India Ltd. (supra) is reiterated in series of decisions like Bausch and Lomb Eyecare (India) Pvt. Ltd., 381 ITR 227 and the Hon’ble Rajasthan High Court followed the decision in the case CIT vs. Gillette India Ltd. (2019) 411 ITR 459 and the Hon’ble High Court had categorically ruled out the applicability of bright line test on advertising and marketing promotion expenditure. The ratio that can be culled out in all the decisions cited above is that (1) In the absence of any agreement between the assessee and its foreign AE to incur the advertising and marketing expenses to the benefit of foreign AE, no inference can be drawn as to existence of international transaction on mere incurring excess expenditure on those items as compared to expenditure incurred by comparables. (2) Furthermore, in the absence of any machinery provisions to compute the arm’s length provision, the provision of Chapter X cannot be invoked. (3) The initial burden lies upon the revenue to show the evidence of international transaction with

reference to material on record. (4) The bright line test method cannot be used either to determine the existence of international transaction or arm's length price of international transaction. (5) Merely because, on account of expenditure incurred by an assessee, third party also benefits thereby, expenditure cannot be disallowed. Keeping in view the above legal principles, we proceed to decide the issue on the other hand.

35. The Revenue had failed to discharge the initial burden upon it with regard to showing the existence of international transactions between the assessee and its AE and apparently there is no material referred to by the lower authorities to show that the assessee had incurred the expenditure in advertising and marketing expenses in order to promote the brand value of the foreign AE. The reference made in clause 15 of the agreement is misplaced as rightly submitted by the ld. Sr. Counsel, the incurring of expenditure on advertising is only with regard to the protection of patent and trade mark of the AE and not to promote brand value of foreign AE. In the absence of existence of international transaction, the question of determination of arm's length price of the transactions does arise. Accordingly, this ground stands allowed."

13. Respectfully following the decision of this Tribunal (both of us are parties), we allow grounds of appeal No.1 and 2 filed by the assessee. However, we make it clear that we are conscious of the fact that in the final assessment order passed by the AO, no addition on account of A&M expenditure was made, as this addition was subsumed in the addition made on account of international transaction of import of raw materials. Therefore, the findings on A&M expenditure shall become academic, in view of the addition made by TPO / AO on account of TP adjustment in respect of international transaction of import of raw materials is sustained.

14. The ground No.3 challenges TP adjustment on account of international transaction of import of raw materials with AEs.

15. As regards to the addition of transfer pricing adjustment in respect of transaction of import of raw material of Rs.7,77,82,397/-, the objection raised before the DRP is that the TPO was not justified in using TNMM as most appropriate method for the purpose of benchmarking the transaction

of import of raw materials as against CUP method used by the assessee. It was further submitted that for the purpose of determining the arm's length price of cost of import of raw materials the transactional level analysis submitted by the assessee should be considered as well as the profitability of AE's and the appellant also filed additional evidence in the form of certificates from the deemed AE's in an attempt to demonstrate the cost of raw materials imported is at arm's length price. It is submitted that the Appellant submits that the global sourcing arrangement with the third party has resulted in the Appellant purchasing the raw materials at a lower price. If the Company were to independently purchase the raw materials from the third party vendors, it would have incurred a higher cost. Under the global sourcing agreement, the third party vendors have supplied raw material to all the group entities at the same price and, due to the collective buying by all the group entities the cost of the raw material has reduced. In this regard, the Appellant relies on the certificates issued by the third party vendors wherein they have confirmed that discount of 10%-20% had been given to the Appellant on the raw material supplied during the year. The certificates also confirm that the price that they have charged to the Appellant is lower than the price it would have charged if the Appellant had not purchased the raw material under the global sourcing arrangement. Therefore, it is submitted that the raw material has been purchased from third party vendors at arm's length price and the adjustment made by lower authorities is unsustainable and bad in law.

16. The Appellant also submits that the lower authorities have erred in rejecting the certificates and other evidence produced by the Appellant to substantiate the arm's length price of raw material purchased from the

third party vendors on the footing that the third party vendors are deemed AEs of the Appellant. It is submitted that the transactions with the third party vendors are required to be benchmarked since they are considered as “deemed international transactions” under section 92B(2) of the Act, as the price for such transactions is agreed by the AEs under the global pricing arrangement. However, by virtue of the provisions of section 92B(2) of the Act, the third party vendors do not become AEs or deemed AEs of the Appellant under section 92A of the Act as neither the Appellant nor any of the group entities participate in the capital or management of the third party vendors from whom raw material had been purchased during the year under consideration. Therefore, it is submitted that the lower authorities erred in rejecting the evidence, furnished by the Appellant, on the basis that the third party vendors are deemed AEs of the Appellant.

17. It is further submitted that it believed that the aforementioned pricing details should be considered sufficient documentary evidence to demonstrate the appropriateness of the pricing of the international transaction of import of raw materials from third party vendors, however, the Appellant further attempted to substantiate the arms’ length price of the raw materials purchased from third party vendors with the help of Industry report and Annual report of supplier available in the public domain. The summary of the same is given below for ease of reference:

<i>Sr. No.</i>	<i>Name of the third-party vendor</i>	<i>Material purchase</i>	<i>Amount (in Rs.)</i>	<i>% to total imports</i>	<i>Source of price level information</i>	<i>Appellant's price</i>	<i>Comparable price</i>
1	Toyota Tsusho Corporation	Super Absorbent Material	9,43,75,319	18.77%	HIS Chemical Report (refer page 508 to 558 of paperbook)	\$1,590	\$2,000-\$3,000
2	Fibertex Malaysia	Nonwoven fabric	4,64,98,272	9.25%	Polypropylene (PP) Nonwoven Fabric Industry	\$2.35	\$2.51

					Report (refer page 559 to 767 of paperback)		
Total			14,59,79,910	28.01%			
Total imports from third party vendors			50,28,99,455				

18. Thus, it is demonstrated that the average price charged to the Appellant by third party vendors was lower than the average price at which raw material is available in the open market. Thus, the Appellant submits that the transfer pricing adjustment made by the lower authorities of Rs. Rs. 7,77,82,397/- is unsustainable and bad in law.

19. Insofar as the raw material purchased from the AEs is concerned, the appellant submits that the lower authorities failed to appreciate that the mark up of 9% charged by Yuhan Kimberly Ltd. and Kimberly Global sales LLC, is lower than the margin earned by the foreign companies carrying out the similar activities. As per the fresh benchmarking submitted during the course of the proceeding the arm's length margin comes to 10.62% and 10.18% respectively. Despite the fresh benchmarking submitted by the Appellant justifying the price charged by the AE for supply of raw material, the lower authorities made the adjustment without considering the evidence submitted by the Appellant.

20. The Appellant also submits that the rejection of gross margin under the cost plus method used by the Appellant in the transfer pricing report is also incorrect. The lower authorities failed to appreciate that the net operating margin of the Appellant during the year was under severe pressure due to the competition faced from the rival companies, who reduced the price of the products to achieve higher market share which

resulted in increase in the sales volume for the competitors of the Appellant however, the sales volume of the Appellant decreased for the year under consideration and, therefore, it was incorrect to compare the net operating margin of the Appellant with that of the comparable companies as the net operating margin of the Appellant was lower due to commercial reasons and, not on account of the raw material purchased from AE and third party vendors under the global sourcing agreement.

21. Since, the competition faced by the Appellant did not have any impact on the gross margin of the Appellant, the international transaction of purchase of raw material was benchmarked at the gross profit level applying cost plus method. The gross margin of the Appellant for the year was 57.54% which was more than the average margin of the comparable companies of 36.55% which clearly reflects that the price paid for purchase of raw material is at arm's length as the Appellant has earned huge margin of 57.54% by using the raw material in manufacturing of the product. Therefore, the lower authorities erred in rejecting the gross margin under the cost plus method used for the purpose of benchmarking the international transaction.

22. We have heard the rival contentions and perused the record. The issue in the present ground of appeal relates to the benchmarking of international transaction of import of raw materials. The appellant company sought this transaction of import of raw materials to be justified at arm's length price by adopting benchmarking analysis by considering the AE as tested party taking the foreign companies as comparable entities by submitting the documents in the form of confirmation certificates from

AE certifying the mark-up charged on supply of raw materials and certificate issued by Independent Cost Accountant certifying the mark-up charged by the AE to the appellant on supply of raw material.

23. As regards to the deemed international transaction i.e. third party vendors, the appellant company sought to justify that the transaction of import of raw materials at arm's length by submitting certificates from third party vendors demonstrating that the price charged to the appellant is lower than the market price. The benchmarking analysis carried out by the appellant was rejected by the TPO as well as the DRP.

We find that the contention of assessee that the third party vendors are not the AEs of the appellant remained un-adverted. Therefore, the certificate issued by third party vendors whereby, they confirmed that the discount of 10% to 20% had been given to the appellant on the raw materials supplied during the year and further confirmed that the price they have charged to the appellant company is lower than the price, it would have charged if the appellant had not purchased under global sourcing arrangement cannot be ignored by holding that these certificates were issued by AEs. Similarly, as regards to the import of raw materials from AEs, the contention of appellant company that the price charged by the AEs is lower than the prevailing market price remains uncontroverted. The lower authorities have failed to advert to this submission made by the appellant and therefore, we are of the considered opinion that the matter requires remission to the AO / TPO to examine the above benchmarking analysis furnished by the appellant and then proceed with the

benchmarking of the transaction of import of raw materials in accordance with law.

Without prejudice to the above, the appellant company made an alternate claim that for the purpose of benchmarking the transaction of import of raw materials, the gross margins of appellant company should be compared with the gross margins of comparable companies, as the competition faced by the appellant company effected the net margins of appellant company on account of lower volume and in support of this, he also placed reliance on the decisions of Bangalore Bench of Tribunal in Kirloskar Toyota Textile Machinery Pvt. Ltd. vs. DCIT in IT(TP)A 485 of 2015 and 3M India Ltd. vs. ACIT in ITA 2013 of 2009. We are of the considered opinion that, in case the AO / TPO on examination of benchmarking analysis made by the appellant company is found to be not acceptable, the AO / TPO shall examine the relevance of comparison of gross profits of appellant company with the comparable companies and proceed to benchmark the international transaction of import of raw materials. Thus, this ground of appeal stands partly allowed for statistical purposes. The other grounds of appeal become academic in view of above our decision.

Revenue's appeal (ITA No.576/PUN/2015)

24. In this appeal, Revenue challenges the findings of DRP restricting the TP adjustment to international transaction alone. The direction of DRP is in consonance with the law laid down by Jurisdictional High Court in the case of (i) CIT vs. Hindustan Unilever Ltd., 72 taxmann.com 325 (Bombay)

and (ii) CIT vs. Ratilal Becharlal & Sons, 65 taxmann.com 155 (Bombay).
Therefore, we do not find any reason to interfere with the directions of DRP
and hence, we do not find any merit in the grounds of appeal filed by the
Revenue.

25. In the result, appeal of assessee is allowed for statistical purposes
and the appeal of Revenue is dismissed in the above terms.

Order pronounced in the open Court on 20th July, 2022.

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

Sd/-
INTURI RAMA RAO
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 20th July, 2022
GCVSR/Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. DRP, Pune;
4. The concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "C" / DR 'C',
ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

//सत्यापित प्रति// True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune