IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I' : NEW DELHI)

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI YOGESH KUMAR US, JUDICIAL MEMBER

ITA No.889/Del./2021
(ASSESSMENT YEAR : 2011-12)

ITA No.890/Del./2021
(ASSESSMENT YEAR : 2012-13)

ITA No.454/Del./2022
(ASSESSMENT YEAR : 2017-18)

Perfetti Van Melle India Pvt. Ltd., 47, Milestone, Delhi Jaipur Highway, Manesar, Gurgaon – 122 050 (Haryana).	vs.	ACIT, Circle 3(1), Gurgaon.
(PAN : AACP2626A)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Deepak Chopra, Advocate
Ms. Rashi Khanna, Advocate
REVENUE BY : Shri Rajesh Kumar, CIT DR

Date of Hearing : 10.05.2023
Date of Order : 30.05.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

These are appeals by the assessee arising out of the respective orders of Assessing Officer passed pursuant to the directions of Dispute Resolution Panel (DRP) for the concerned assessment year.

2. Since the issues are common and connected and appeals were heard together, these are consolidated and disposed off by this common order for the sake of convenience.

3. Since facts are identical we are referring to the facts and figures from AY 2017-18.

4. One common issue raised in these appeals is transfer pricing adjustment on account of AMP expenses.

5. Perfetti Van Melle group ("PVM group" or lithe group") is an integrated and diversified international group operating in the confectionery sector. The group is privately owned and operates internationally with its own production and distribution units.

5.1 Perfetti India was incorporated in 1992, and is a manufacturer, distributor and marketer of Candies" Gums, Jelly and Ayurvedic Products. Perfetti India started operations in 1994 and is engaged In manufacturing a variety of confectionery products from its factories in Tamil Nadu, Haryana and Uttarakhand. The Company has a diverse portfolio of products across segments which it sells through various retail channels across the country Perfetti India's products include Big Babol, Alpenliebe, Center Fresh, Center Fruit, Center Snock, Chlor-Mint, Choco Tella, Happydent white etc. These brands are owned by Assessee' s AE, and are licensed out to Assessee vide 'Technology and Trademarks

License Agreement' entered with FerfettiSpAeffective April 1, 2010. Under the said agreement, Assessee is granted the license to manufacture and sell various kinds of confectionary items as stated above along with entitlement to use Perfetti'sSpA' s technology and knowhow in this regard and utilize the skills of trained personnel belonging to Perfetti's group.

5.2 During the year under consideration. the assessee entered into following international and specified domestic transactions with the AEs:-

Sl. NO.	Nature of International Transactions	Amount (INR)
1	Export of finished goods, semi-finished goods and raw material	225157171
2	Import of raw material traded	79736875
3	Import of raw material from manufactured	394028477
4	Import of finished goods	35256632
5	Payment of royalty	284307561
6	Payment for IT Support services	37016414
7	Corporate management charge	103129512
8	Fee received for IT Support services	1228926
9	Manpower supply	306873
10	Reimbursement of expenses to AEs	6846094
11	Reimbursement of expenses from AEs	13391139
12	Import of spares	141198
13	Export of spares	600659
14	Import of second hand machinery	1593141
15	Export of second hand machinery	86750668
16	Social benefit charges	5308320
17	Payment for SAP maintenance	9180403
18	Payment for Microsoft license fee	9211093
19	Payment of interest on ECB	7500883

5.3 The AO/TPO made the following adjustments:

(i) AMP expenditure- Rs. 218,94,57,926/- (all protective basis),

(ii) Attribution of Advertisement, Marketing and Promotion expenses to the AE - using Intensity TNMM Method * Rs.139.20 crores (on substantive basis).

6. Against the above order, the assessee raised objections before the DRP.

7. Pursuant to DRP directions, the AO computed the attribution of advertisement, marketing and promotion expenses to the AE using RPSM method amounting to Rs.142.64 crores.

8. Against this order, assessee is in appeal before us. We have heard both the parties and perused the records.

9. At the outset, ld. Counsel of the assessee contended that this issue is squarely covered in favour of the assessee by the following decisions of ITAT :-

(i) Order dated 22.09.2021 passed in assessee's own case for ` AY 2016-17 in ITA No.463/Del/2021; and

(ii) Order dated 01.02.2003 passed in assessee's own case for ` AY 2009-10 in ITA No.888/Del/2021.

10. Per contra, ld. DR for the Revenue did not dispute the above said proposition.

11. Upon careful consideration, we note that ITAT in assessee's own case for AY 2016-17 vide order dated 22.09.2021 has decided the issue as under :-

> "46. We have heard the rival submissions and perused the relevant finding given in the impugned orders as well as material referred to before us. The core issue raised in the appeal qua the transfer pricing adjustment on account of incurring of AMP expenses by the assessee is, whether on the facts and circumstances of the case, can it be reckoned as international transaction within the meaning of Section 92B of the Act; and if that is so then whether any adjustment is justified on the facts of the case. The assessee company under the license granted and owned by AE is engaged in the manufacturing of variety of confectionary products and selling them as an independent entity in India. Though, we have discussed the various observations and finding of the ld. TPO, however the underline genesis is application of BLT and determination of excessive AMP expenses and consequently making transfer pricing adjustment. Though the TPO has made protective assessment using BLT, but at the same time has proceeded to make substantive adjustment in his own version of profit split method (PSM). While applying his version of PSM, he still was circumscribed by the BLT method while making the adjustment. The core reason of the ld. TPO was that, since the economic ownership of the brand and marketing tangible lies with AE, therefore, routine expenses has been incurred only for the benefit of the parent AE. Not only that, the AMP expenses are leading to enhancement of the brand value and the market penetration of these brands which needs to be compensated to the assessee for the same by the AE. The manner in which he has made the adjustment, we have already discussed in detail in the foregoing paragraphs as highlighted by both the parties.
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> 47. Coming to the issue whether the incurring of AMP expenses in the present case can be reckoned as 'international

transaction', as defined in Section 92B of the Act. The relevant Section for the sake of ready reference is reproduced as under:

> *"Section 92B - Meaning of international transaction:*
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> *"(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."*
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> *"(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."*

48. Further from perusal of *clause (v)* of section 92F of the Act defines the term 'transaction' to include an arrangement, understanding or action in concert – whether or not such arrangement, understanding or action is formal or in writing; or whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding. Section 92F only provides "definitions" of certain terms relevant to computation of arm's length price and had to be read in conjunction with Section 92B of the Act. The said section cannot be considered/ read in isolation to cover any and every transaction that a company enters into with any unrelated party that too domestically. From the conjoint reading of the provisions of clause (v) of section 92F and sub-section (1) of section 92B of the Act, it could be inferred that Transfer Pricing regulations would be applicable to any 'transaction', being an arrangement, understanding or action in concert, *inter alia*, in the nature of purchase, sale or lease of tangible or intangible property or any other transaction having bearing on profits, income, losses or assets of such enterprises.

49. Thus, in order to be characterized as an 'international transaction', it would have to be demonstrated that the transaction arose pursuant to an arrangement, understanding or action in concert. A 'transaction', per se involves a bilateral arrangement or contract between the parties. Unilateral action by one of the parties, without any binding obligation, in absence of a mutual understanding or contract, could not be termed as a 'transaction'. A unilateral action, therefore, could not be characterized as an 'international transaction' invoking the provisions of Section 92 of the Act.

50. As culled out from the records and also explained by the ld. Counsel that the entire expenditure of AMP was only to cater to the needs of the customer in the local market of India. It was neither incurred at the instance or behest of overseas AE, nor was there any mutual agreement or understanding or arrangement to the allocation or contribution by the AE towards remuneration of any part of AMP expenditure incurred by the assessee-company for the purpose of its business in India. The entire risk of profit and loss from sales or for incurring of AMP expenses solely lied upon the assessee-company. At the threshold we do not find that there was any such understanding or arrangement or action in concert, etc, which can be inferred that AMP expense would tantamount to international transaction in the present case. The AMP expense was made by the assessee-company which is a tax resident of India to other third parties in India and no foreign party was involved and neither AMP expenses has taken place between two AEs. It is well settled law that, onus is upon the Revenue to demonstrate that their existed an arrangement between assessee and its AE wherein assessee was obliged to incur excess amount of AMP expenses and to promote the brands owned by AE. It has been held so by Hon'ble Jurisdictional High Court in the case of **Maruti Suzuki India Pvt. Ltd. Vs. CIT (supra).** The relevant observation and the principles laid down in the said judgment are incorporated in the foregoing paragraph 23.

51. The ld. TPO has mainly harped upon clause (9) of the 'Trade Market Technology and Knowhow License Agreement' dated 04.09.2010 which empowered the foreign AE to approve and review the label materials, packaging materials and

advertisement materials. Nowhere the agreement envisages about quantum of AMP expenditure *albeit* it was only to monitor the advertisement content. Monitoring and reviewing the advertisement content is merely for the alignment to ensure applicable "brand guardrails" are being followed by all the AEs across the world. It does not lead to any inference that there is any direct or indirect control the marketing functions in various geographies. Looking to the nature of the confectionary products, the marketing for such impulse products, the same has to be done as per the local ethos, culture, taste and aspiration of the local population and it cannot be governed by the AE sitting outstanding India. It has been stated before us that the assessee company had full-fledged marketing team with the help of local marketing agencies and consultant use to manage the marketing functions and advertisement across the country based on the local requirements and sales. Here, in this case, it is to be kept in mind that the entire AMP expenditure has been incurred by the assessee company to promote the sale of its product in India as a full-fledged risk bearing manufacturing and solely responsible for its functions or activities and related returns.

52. The royalty has been paid on the ground of long term exclusive right to use the trademark in respect of manufacturing and sale of various kinds of confectionary products in India. It is purely technical collaboration and use of the trademark owned by the licenses. However, in so far marketing expenses are concerned, the same is for increasing the sales and profits in India reaped only by the Indian entity, i.e., assessee-company. There is no obligation or a binding covenant to agree any minimum AMP expenses as a part of its license obligation. The entire strategic decisions for sales and marketing in India is purely on the assessee-company which is developed by the assessee in India only after the study of market and survey etc. any profit or loss on a launch of any product or increase or dip in sale is owned by the Indian entity.

53. Further, nowhere from the agreement or any arrangement it can be inferred that assessee is incurring any expenditure to promote the Perfetti brand or product which are not sold in India. In this aspect, the detail submission made by the ld. Counsel incorporated above in the foregoing paragraph which

is unrebutted. This explains that there is no correlation of incurring of AMP expenditure of any kind, for which any benefit is being derived by the AE by incurring such of expenditure by Assessee Company. In case of full risk bearing entrepreneur the entire responsibility of sales and profitability or loss is on the Indian entity.

54. In so far as reference made by the TPO to the 'Trademarks Technology License and Knowhow Agreement', it has been already discussed in detail in the argument of the ld. Counsel in the foregoing paragraphs that; the clause (1), clause (3) and clause (4) of the agreement referred to providing certain kind of support relating to trademark, design, etc; using of trademark technology and knowhow for the manufacturing and selling of confectionary product in India; and license to manufacture and sell various kinds of confectionaries and to offer any experience employee to assist the licensee manufacturing, sale and advertisement and promotion of the products and any technology and problem during the manufacturing and sale of the products. From the reading of the said clause it can be deduced that AMP expenses should be incurred either on behest or on behalf of the AEs or for their benefit. Similarly, clause (9) of the agreement was purely for asserting best practices to confirm the brand of the owner and the trademark and technology and advertisement material, etc. Another important clause which has been referred by the TPO is clause (10), wherein it has been provided that the licensee will actively advertise and sell in the territory to the products manufactured by him but at the same time it also provides that no compensation would be provided to the licensee regarding advertisement expenses in the event of the termination of the agreement. Nowhere, it has been brought on record by the TPO that by virtue of this clause the assessee was entitled for compensation of advertising expenses.

55. In so far as other observations and allegation of the TPO that certain brands were conceptualized and developed in India with trademark with respect of this brand with the foreign AE it has been clarified by the ld. Counsel that it was only for conceptualising and making a different view of the products for looking to the local taste and not a separate product which has been created in India. The manufacture and sale of these

products was largely limited to India and no benefit as such has been accrued to the AE on account of promotions of these brands. Moreover, once royalty is being paid by the assessee on its sales, therefore, it cannot be alleged that the assessee was incurring the cost of developing new brands in India and simultaneously in reaching its AE by paying royalty. The ratio of the Co-ordinate Bench in the **Pepsi Food vs. ACIT (supra),** wherein on the similar aspect of the matter where the advertising campaign and the material were subject to approval by the parent AE, this Tribunal held that reviewing of advertisement material by the AE to confirm to the broad advertising gad rail does not constitute an arrangement or direction by the AE for incurring the AMP expenses on its behalf.

56. Another reasoning given by the ld. TPO to justify that AMP expenditure and international transaction is that at least two brand developments as discussed by him in paragraphs 6.1 to 6.6. This issue has been discussed by the Hon'ble Jurisdictional High Court in detail in the case of **Sony Ericsson Mobile Communication vs. CIT (supra)** which for the sake of ready reference is reproduced hereunder: -

> "*Brand and brand building*
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> *102. We begin our discussion with reference to elucidation on the concept of brand and brand building in the minority decision in the case of L. G. Electronics India Pvt Ltd. (supra). The term "brand", it holds, refers to name, term, design, symbol or any other feature that identifies one seller's goods or services as distinct from those of others. The word "brand" is derived from the word "brand" of Old Norse language and represented an identification mark on the products by burning a part. Brand has been described as a duster of functional and emotional 103 It is a matter of perception and reputation as it reflects customers' experience and faith. Brand value is not generated overnight but is created ever a period of time, when there is recognition that the logo or the name guarantees a consistent level of quality and expertise. Leslie de Chematony and McDonald have described "a successful brand is an identifiable product, service, person or place, augmented in such a way that the buyer or user perceives relevant, unique, sustainable added*

values which match their needs most closely". The words of the Supreme Court in Civil Appeal No. 1201 of 1966 decided on February 12, 1970, in Khushal Khenger Shah v. Khorshedbann Dabida Boatwala, to describe "goodwill", can be adopted to describe a brand as an intangible asset being the whole advantage of the reputation and connections formed with the customer together with circumstances which make the connection durable. The definition given by Lord MacNaghten in Commissioner of Inland Revenue v. Midler and Co. Margarine Ltd. [1901] AC 217 (223) can also be applied with marginal changes to understand the concept of brand. In the context of "goodwill" it was observed:

"It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired.

I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will—of course, under the conditions attaching to property of that nature ... What is goodwill? It is a thing very easy to describe very difficult to define. It is the benefit and advantage of the good name, reputation, and: connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However, widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyse goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the all, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such. For my part, I think that if there is one attribute common to all cases of

goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again ..."

104 "Brand" has reference to a name, trade mark or trade name. A brand like "goodwill", therefore, is a value of attraction to customers arising from name and a reputation for skill, integrity, efficient business management or efficient service. Brand creation and value, therefore, depends upon a great number of facts relevant for a particular business. It reflects the reputation which the proprietor of the brand has gathered over a passage or period of time in the form of widespread popularity and universal approval and acceptance in the eyes of the customer. To use words from CTT v. Chunilal Prabhudas and Co. [1970] 76 ITR 566 (Cal) ; AIR 1971 Cal 70, it would mean :

"It has been horticulturally and botanically viewed as 'a seed sprouting' or an 'acorn growing into the mighty oak of goodwill'. It has been geographically described by locality. It has been historically explained as growing and crystallising traditions in the business. It has been described in terms of a magnet as the 'attracting force'. In terms of comparative dynamics, goodwill has been described as the 'differential return of profit'. Philosophically it has been held to be intangible. Though immaterial, it is materially valued. Physically and psychologically, it is a 'habit and sociologically it is a 'custom'. Biologically, it has been described by Lord Macnaghten in Trego v. Hunt [1896] AC 7 as the 'sap and life' of the business."

There is a line of demarcation between development and exploitation. Development of a trade mark or goodwill takes place over a passage of time and is a slow ongoing process. In cases of well recognised or known trade marks, the said trade mark is already recognised. Expenditures incurred for promoting product(s) with a trade mark is for exploitation of the trade mark rather than development of its value. A trade mark is a market place device by which the consumers identify the goods arid services and their source. In the context of trade mark, the said mark symbolises the goodwill or the likelihood that the consumers will make future purchases of the same goods or services. Value of the brand

also would depend upon and is attributable to intangibles other than trade mark. It refers to infra-structure, know-how, ability to compete with the established market leaders. Brand value, therefore, does not represent trade mark as a standalone asset and is difficult and complex to determine and segregate its value. Brand value depends upon the nature and quality of goods and services sold or dealt with'. Quality control being the most important element, which can mar or enhance the value.

Therefore, to assert and profess that brand building as equivalent or substantial attribute of advertisement and' sale promotion would be largely incorrect. It represents a coordinated synergetic impact created by assort- merit largely representing reputation and quality. There are a good number of examples where brands have been built without incurring substantial advertisement or promotion expenses and also cases where in spite of extensive and large scale advertisements, brand values have not been created. Therefore, it would be erroneous and fallacious to treat brand building as counterpart or to commensurate brand with advertisement expenses. Brand building or creation is a vexed and complexed issue, surely not just related to advertisement. Advertisements may be the quickest and effective way to tell a brand story to a large audience but just that is not enough to create or build a brand. Market value of a brand would depend upon how many customers you have, which has reference to brand goodwill, compared to a baseline of an unknown brand. It is in this manner that the value of the brand or brand equity is calculated. Such calculations would be relevant when there is an attempt to sell or transfer the brand name. Reputed brands do not go in for advertisement with the intention to increase the brand value but to increase the sales and thereby earn larger and greater profits. It is not the case of the Revenue that the foreign associated enterprises are in the business of sale/transfer of brands.

Accounting Standard 26 exemplifies distinction between expenditure HJ7 incurred to develop or acquire an intangible asset and internally generated goodwill. An intangible asset should be recognised as an asset, if and only if, it is probable that future economic benefits attributable to the said asset will flow to the enterprise and the cost of the asset can be measured reliably. The estimate would represent the set off of

economic conditions that will exist over the useful life of the intangible asset. At the initial stage, intangible asset should be measured at cost. The above proposition would not apply to internally generated goodwill or brand. Paragraph 35 specifically elucidates that internally generated goodwill should not be recognised as an asset. In some cases expenditure is incurred to generate future economic benefits but it may not insult in creation of an intangible asset in the form of goodwill or brand, which meets the recognition criteria under AS-26. Internally generated goodwill or brand is not treated as an asset in AS-26 because it is not an identifiable resource controlled by an enterprise, which can be reliably measured at cost. Its value can change due to a range of factors. Such uncertain and unpredictable differences, which would occur in future, are indeterminate. In subsequent paragraphs, AS-26 records that expenditure on materials and services used or consumed, salary, wages and employment related costs, overheads, etc., contribute in generating internal intangible asset. Thus, it is possible to compute good- will or brand equity/value at a point of time but its future valuation would be perilous and an iffy exercise.

In paragraph 44 of AS-26, it is stated that intangible asset arising from development will be recognised only and only if amongst several factors, can demonstrate a technical feasibility of completing the intangible asset: that it will be available for use or sale and the intention is to complete the intangible asset for use or sale is shown or how the intangible asset generate probable future benefits, etc. The aforesaid position finds recognition and was accepted in CIT v. B. C. Srinivasa Setty [1981] 128 ITR 294 (SC); [1981] 2 SCC 460, a relating transfer to goodwill. Goodwill, it was held, was a capital asset and denotes benefits arising from connection and reputation. A variety of elements go into its making and the composition varies in different trades, different businesses in the same trade, as one element may pre-dominate one business, another element may dominate in another business. It remains substantial in form and nebulous in character. In progressing business, brand value or goodwill will show progressive increase but in falling business, it may vain. Thus, its value fluctuates from one moment to another, depending upon reputation and everything else relating to business, personality, business rectitude of the owners, impact of contemporary market reputation, etc. Importantly, there can be no account in value of the factors producing it and it is impossible to predicate the moment of its birth for it

comes silently into the world unheralded and unproclaimed. Its benefit and impact need not be visibly felt for some time. Imperceptible at birth, it exits unwrapped in a concept, growing or fluctuating with numerous imponderables pouring into and affecting the business. Thus, the date of acquisition or the date on which it comes into existence is not possible to determine and it is impossible to say what was the cost of acquisition. The aforesaid observations are relevant and are equally applicable to the present controversy. It has been repeatedly held by the Delhi High Court that advertisement 110 expenditure generally is not and should not be treated as capital expenditure incurred or made for creating an intangible capital asset. Appropriate in this regard would be to reproduce the observations in CTT v. Monto Motors Ltd. [2012] 206 Taxman 43 (Delhi), which read:

"4. . . . Advertisement expenses when incurred to increase sales of products are usually treated as a revenue expenditure, since the memory of purchasers or customers is short. Advertisement are issued from time to time and the expenditure is incurred periodically, so that the customers remain attracted and do not forget the product and its qualities. The advertisements published/displayed may not be of relevance or significance after lapse of time in a highly competitive market, wherein the products of different companies compete and are available in abundance. Advertisements and sales promotion are conducted to increase sale and their impact is limited and felt for a short duration. No permanent character or advantage is achieved and is palpable, unless special or specific factors are brought on record. Expenses for advertising consumer products generally are a part of the process of profit earning and not in the nature of capital outlay. The expenses in the present case were not incurred once and for all, but were a periodical expenses which had to be incurred continuously in view of the nature of the business. It was an on-going expense. Given the factual matrix, it is difficult to hold that the expenses were incurred for setting the profit earning machinery in motion or not for earning profits.".

(Also see, CIT v. Spice Distribution Ltd., I. T. A. No. 597 of 2014, decided by the Delhi High Court on September 19, 2014 [2015] 374 ITR 30 (Delhi) and CTT v. Salora International Ltd. [2009] 308 ITR 199 (Delhi).

Accepting the parameters of the "bright line test" and if the said para meters and tests are applied to Indian companies with reputed brands and substantial AMP expenses would lead to difficulty and unforeseen tax implications and complications. Tata, Hero, Mahindra, TVS, Baja], Godrej, Videocon group and several others are both manufacturers and owners of intangible property in the form of brand names. They incur substantial AMP expenditure. If we apply the "bright line test" with reference to indicators mentioned in paragraph 17.4 as well as the ratio expounded by the majority judgment in L. G. Electronics India Pvt Ltd.'s case (supra) in paragraph 17.6 to bifurcate and segregate the AMP expenses towards brand building and creation, the results would be startling and unacceptable. The same is the situation in case we apply the parameters and the "bright line test" in terms of paragraph 17.4 or as per the contention of the Revenue, i.e., AMP expenses incurred by a distributor who does not have any right in the intangible brand value and the product being marketed by him. This would be unrealistic and impracticable, if not delusive and misleading (aforesaid reputed Indian companies, it is patent, are not to be treated as comparables with the assessee, i.e., the tested parties in these appeals, for the latter are not the legal owners of the brand name/trade mark).

112. Branded products and brand image is a result of consumerism and a commercial reality, as branded products "own" and have a reputation of intrinsic believability and acceptance which results in higher price and margins. Trans-border brand reputation is recognised judicially and in the commercial world. Well known and renowned brands had extensive goodwill and image, even before they became freely and readily available in India through the subsidiary associated enterprises, who are assessees before us. It cannot be denied that the reputed and established brands had value and goodwill. But a new brand/trade mark/trade-name would be relatively unknown. We have referred to the said position not to make a comparison between different brands but to highlight that these are relevant factors and could affect the function undertaken which must be duly taken into consideration in selection of the comparables or when making subjective adjustment and, thus, for computing the arm's length price. The aforesaid discussion substantially negates and rejects the Revenue's case. But there are aspects and contentions in favour of the Revenue which requires elucidation."

56.1 Thus, the Hon'ble High Court after describing the concept of the "brand" had made a clear cut demarcation between development and exploitation of brand which is either in the form of trademark or goodwill which takes place over a passage of time by which its value depends upon and is attributable to intangibles other than trademark like, infrastructure, knowhow, ability to compete in the established market, lease, etc. Brand value does not represent trademark as asset and it is quite difficult to determine and segregate its value. Brand value largely depends upon the nature of goods and services sold, after sales services, robust distributorship, quality control, customer satisfaction and catena of other factors. The advertisement is more telling about the brand story, penetrating the mind of the customers and constantly reminding about the brand, but it is not enough to create brand, because market value of a brand would depend upon how many customers you have, which has reference to a brand goodwill. There are instances where reputed brand does not go for advertisement with the intention to increase the brand value but to only increase the sale and thereby earning greater profits. It is also not the case here that foreign AE is in the business of sale/transfer of brands. Their Lordships have also referred to Accounting Standard 26 which provides for computation of goodwill and brand equal value at a point of time but not its future valuation or how such an intangible asset will generate probable future benefit. Because, the value of Brand fluctuates from time to time depending upon reputation and other factors. Reputation of a brand only enhances the sale and profitability and here in this case is only benefitting the assessee company when marketing its products using the trade mark and the brand of AE. Even otherwise also, the value of the brand which has been created in India by the assessee company will only be relevant when at some point of time the foreign AE decides to sell the brand, and then perhaps that would be the time when brand value will have some significance and relevance. But to make any transfer pricing adjustment simply on the ground that assessee has spent advertisement, marketing expenditure which is benefitting the brand/trademark of the AE would not be correct approach. Thus, this line of reasoning given by the TPO is rejected.

> 57. Thus, on the facts of the present case, it cannot be held that there was any kind of understanding or arrangement with the AE which can be lead to inference that AMP expenditure incurred by the assessee is an international transaction nor there is any iota of material that there was any action in concert. Accordingly, we hold that there is no international transaction of incurring any AMP expenditure.
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> 58. Otherwise also, if we go by the alternative arguments placed by the ld. Counsel, Mr. Deepak Chopra that if intensity approach is to be applied to determine the assessee's profitability, then assessee has earned a profit margin 15.70% as against PLI of the comparable determination by the TPO 4.36% and therefore, at the entity level profitability assessee's margin was far excess of the comparables and accordingly no adjustment on such transaction can be made.
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> 58. Lastly, as regards the substantive AMP adjustment of applying residual profits split methods, it is incumbent upon the TPO firstly to combine profit from the so called international transaction of incurring of AMP expenses and then split the combined profit in proportion to the relative contribution made by both the entities. The manner in which RSPM has been applied by the TPO cannot be held as same is consistent with Rule 10B of the Income Tax Rules. Accordingly, this ground raised by the assessee is allowed."

12. Since no dispute has been made out that facts are different in the present year, we follow the aforesaid precedent and hold that there is no international transaction of incurring any AMP expenses. Accordingly, we allow this ground of assessee.

13. One more issue has been raised in AY 2012-13 which is disallowance of INR 1,97,99,459 being excess deduction claimed under section 80-IC.

14. With regard to claim of deduction u/s 80-IC, AO made certain disallowance of common expenses in AY 2012-13 by changing the method of allocation between eligible & non-eligible unit and accordingly made an addition of INR 1,97,99,459.

15. Against this order, assessee is in appeal before us. We have heard both the parties and perused the records.

16. Ld. Counsel of the assessee submitted that the issue is covered in favour of the assessee by the following decisions :-

(i) Order dated 22.09.2021 passed in assessee's own case for ` AY 2016-17 in ITA No.463/Del/2021; and

(ii) Order dated 01.02.2003 passed in assessee's own case for ` AY 2009-10 in ITA No.888/Del/2021.

17. Per contra, ld. DR for the Revenue did not dispute the aforesaid proposition.

18. Upon careful consideration, we note that ITAT for AY 2016-17 on this issue has held as under :-

> "74. The second issue which required our consideration is whether the lower authorities were correct in reducing the element of excise duty from the total sales turnover of the ineligible unit so as to determine the ratio of allocation between the eligible and non-eligible units. The assessee while allocating the un allocable common expenses, which were not identifiable to any brand or unit, allocated such expenses on the basis of turnover ratios, i.e. ratios of total sales of eligible unit upon total sales of PVM India. The said ratio for the year under consideration was worked out to be 51.26: 48.74 and all common expenses were allocated on this basis. The AO however rejected this basis of allocation and while determining

the percentage of expenses to be allocated simply removed the element of excise duty from the turnover of the ineligible units which changed the percentage adopted by the assessee at 51.26 % to 52.97% which resulted in the addition of Rs. 17,96,61,158/- and the consequential deduction under section 80IC. While doing so the AO relied on the order of the CIT (A) for AY 2009-10.

75. Given the absence of any error pointed out by the lower authorities, we find no justification in the reduction of the turnover of the ineligible units by the excise duty which has disturbed the overall allocable percentages. We find force in the contention of the assessee that even for the purposes of section 145A of the Act which deals with the method of accounting for income tax purposes specifically provides that the sale of goods should be inclusive of the amount of tax, duty, cess or fees actually paid or incurred by the assessee. The Ld. Counsel also placed reliance on the definition of the term turnover under the Central Sales Tax Act and the Companies Act.

76. We also find that the assessee has filed a copy of the order of the CIT(A) for AY 2009-10 which is placed on Pages 525 of the paper book. A perusal of the said order shows that the CIT(A) discarded the approach of the assessee in terms of taking the turnover basis for allocating the common expenses, which for the ineligible units included the element of excise duty. He determined such allocation on the basis of the tonnage production between these units and thus, arrived at a different percentage for allocation of such expenses. The CIT(A) also relied on the decision of the Hon'ble Supreme Court in the case of CIT vs. Lakshmi Machine Works Ltd. ((2007) 160 Taxman 404) to support his contention that excise duty had nothing to do with the cost of production and as such should not be considered for computing the turnover. We find that the methodology applied by the CIT (A) in AY 2009-10 cannot be blindly applied in every year because that was based on total production between the units. We also find that the CIT (A) has grossly misapplied the decision of the Hon'ble Supreme Court in the case of Lakshmi Machine Works (supra). That was a case relating to the deduction under section 80HHC and the issue involved was regarding the computation of the eligible profits. The issue which was considered by the Supreme Court was regarding the interpretation of the term "total turnover" in the formulae contained in Section 80HHC(3) and whether excise

duty and sales tax could form part of the total turnover being the denominator in the said formulae. It was in that context the Supreme Court observed that for the purposes of computing deduction under section 80HHC, excise duty and sales tax should not be considered as part of the total turnover since they have no bearing on the activity of exports and would make the formulae unworkable. Thus, in our view, respectfully this decision has no bearing on the matter.

77. We find support in the order of the coordinate Bench in the case of Indica Industries Pvt. Ltd. v. ACIT, (2018 53 CCH 0516(Delhi)), where it has been held that where the assessee adopted a reasonable basis for allocation of expenses, there was no warrant for interference to change such basis. Another coordinate Bench in the case of Mahle Filter System Pvt. Ltd. v. ACIT, (2019 56 CCH 0226(Delhi)) has also accepted the apportionment of expenses on the basis of sales. We also find support from the decision of the Delhi Tribunal in Hero Motocorp Ltd. v. DCIT, (2018 53 CCH 200(Delhi)), where while examining the issue of the comparison of price between goods procured from third party vendors and the non-eligible units, the coordinate Bench held that a different formula cannot be applied and while taking the cost of such material and the same yardstick has to be applied and no further substitution is warranted. The turnover basis has also been accepted as a reasonable basis for allocation of common expenses in Dr. Reddy's Laboratories Ltd. Vs. ACIT (2013) (37 CCH 532) (Hyd.).

78. Thus, we do not find any basis for the change of allocation from the turnover basis to the production basis since the production basis does not reflect all the costs relating to the manufacturing. In our view, the basis of allocation done by the assessee by taking the actual turnover of the eligible and non-eligible units was a reasonable basis since the non-eligible units were subjected to excise duty and there was no reason to reduce the element of excise duty while taking the turnover of the non-eligible units for allocation of common expenses."

19. We note that no case has been made out that the facts in the present year is different and the ratio of the above ITAT order is not applicable, hence following the aforesaid precedent, we decide the issue in favour of the assessee.

20. One additional ground has been raised in AY 2011-12 & 2012-13 with regard to deduction on account of education cess.

21. Ld. Counsel for the assessee stated that he shall not be pressing this ground, hence this ground is dismissed as not pressed.

22. The above adjudication applies mutatis mutandis to all the above assessment years.

23. In the result, the appeals filed by the assessee stand partly allowed.

Order pronounced in the open court on this 30th day of May, 2023.

Sd/-	**sd/-**
(YOGESH KUMAR US)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 30th day of May, 2023
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.DRP
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.