

**IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH KOLKATA**

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT  
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.619/Kol/2017  
Assessment Year: 2012-13**

Reckitt Benckiser (India) Pvt. Ltd., Diamond Prestige, 3 <sup>rd</sup> floor, suit No. 315, 42A, A.J.C. Bose Road, Kolkata-700017. (PAN: AABCR 2655 Q)	Vs.	Deputy Commissioner of Income Tax, Circle-12(1), Kolkata.
<b>(Appellant)</b>		<b>(Respondent)</b>

**Present for:**

Appellant by : Shri Deepak Chopra,  
Shri Rohan Kher, Advocates and  
Shri Ankit Agarwal, FCA  
Respondent by : Shri G. Hukugha Sema, CIT, DR

Date of Hearing : 22.05.2023  
Date of Pronouncement : 20.07.2023

**ORDER**

**PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:**

This appeal filed by the assessee is against the order of Ld. DCIT, Circle-12(1), Kolkata dated 31.01.2017 u/s. 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), passed in terms of the directions of the Dispute Resolution Panel u/s. 144C(5) of the Act, dated 20.12.2016 for AY 2012-13.

2. Grounds raised by the assessee before the Tribunal are reproduced as under:

- 1 That, on the facts and in the circumstances of the case, impugned order of assessment under section 143(3) read with section 144C(13) of the Act, is contrary to law laid down by courts, based on extraneous consideration, unsubstantiated presumptions, ignoring to consider all relevant facts and relevant law, bad in law and violative of principles of natural justice.
- 2 That, on the facts and in the circumstances of the case, the AO erred on facts and in law in computing the total income of the appellant at Rs 3,358,116,130 against the returned total income of Rs 1,185,511,610 subsequently revised suo-moto to Rs 1,444,386,992 vide letter dated 25 May 2015 filed before the AO.
- 3(a) That, on the facts and in the circumstances of the case, Transfer Pricing Officer ('TPO')/ DRP/ AO erred in relying on extraneous consideration, unsubstantiated presumptions in holding that expenditure towards advertisement, marketing and promotion ('AMP'), unilaterally incurred by the appellant, results in a separate international transaction.
- 3(b) That, on the facts and in the circumstances of the case and in law, TPO/ DRP/ AO have erred in not appreciating that RBIL has incurred the AMP expenses wholly and exclusively for the purpose of its business and the same does not fulfill any condition of being an 'international transaction' under section 92B of the Act.
- 3(c) That, on the facts and in the circumstances of the case and in law, the TPO/ DRP/ AO have erred in placing reliance on the decision of the Hon'ble Delhi High Court decision in **Sony Ericson Mobile Co Pvt Ltd (ITA No. 16.2014)** in concluding that the incurrence expenses related to AMP is an 'International Transaction', without correctly appreciating the subsequent decision of **Maruti Suzuki India Ltd vs. CIT (ITA No. 110/2014)**.
- 3(d) That, on the facts and in the circumstances of the case, the TPO/ DRP have erred in holding that AMP expenses incurred by the appellant resulted in

- 'promotion' of brand name owned by the Associated Enterprises ('AEs') and not 'use' of brand name.
- 3(e) That, on the facts and in the circumstances of the case, the TPO/ DRP have erred in not appreciating the fact that the appellant is the sole beneficiary of the AMP expenditure incurred by it and the benefit to the AEs, if any, is only incidental. Hence bearing the cost of such expenditure was consistent with the arm's length principle and not on behalf of/ for the benefit of the AEs.
- 3(f) That, on the facts and in the circumstances of the case, the TPO/ DRP have erred in holding that the assessee is not subjected to related risk of a brand owner producer and failed to appreciate that the appellant being a full-fledged manufacturer undertaking all the functions and bearing all the risks, is justified in incurring and bearing the cost of AMP expenditure.
- 3(g) That, on the facts and in the circumstances of the case, the TPO/ DRP have erred in not appreciating that application of "bright line test" which is not a prescribed method within the purview of section 92C of the Act read with Rule 10B of the Income Tax Rules, 1962 cannot be applied in the garb of 'Cost Plus Method' as done by the TPO.
- 3(h) Without prejudice to above grounds of appeal, on the facts and in the circumstances of the case, the AO/ TPO have erred in not following the directions of the DRP which is binding as per the provisions of section 144C(10) of the Act by not reducing expenses in connection with sales promotion.
- 3(i) Without prejudice to above grounds of appeal, on the facts and in the circumstances of the case, the AO/ TPO/ DRP have erred in not excluding the reversal of the advertisement expenses credited by the appellant under the head 'Other Income' for AY 2012-13 in computing the alleged AMP expenditure.
- 3(j) Without prejudice to above grounds of appeal, on the facts and in the circumstances of the case, the AO/ TPO/ DRP have erred in ignoring reasons furnished by the appellant with respect to selection of appropriate set of comparable companies in light of detailed analysis of comparability factors and matching FAR profile.
- 3(k) Without prejudice to above grounds of appeal, on the facts and in the circumstances of the case, the AO/ DRP have erred in upholding the action of the TPO that the assessee has rendered brand promotion services to its AEs and it should charge a mark-up on cost incurred in rendering such services thereby making an adjustment of Rs 1,680,190,546 towards alleged AMP transaction.
- 3(l) Without prejudice to above grounds of appeal, on the facts and in the circumstances of the case, the AO/ TPO erred in not following directions of the DRP pursuant to which no adjustment on account of AMP is required in the case of the appellant.
- 4(a) Whether on the facts and in the circumstances of the case, the DRP erred in not adjudicating the specific objection raised by the appellant with respect to applicability of Comparable Uncontrolled Price ('CUP') method instead of Transactional Net Margin Method ('TNMM') for benchmarking payment of royalty transactions, and further erred in ignoring the fact that the same method was duly accepted by the TPO for AY 2010-11.

- 4(b) Whether on the facts and in the circumstances of the case, the DRP/ TPO erred in making an adjustment of Rs 26,552,926 by treating the royalty paid by the assessee with respect to sale of imported goods as NIL.
- 5(a) That, on the facts and in the circumstances of the case, TPO/ DRP/ AO erred in making an adjustment of Rs 10,228,455 with respect to Research & Development ('R&D') services.
- 5(b) Whether on the facts and in the circumstances of the case, TPO/ DRP/ AO erred in not appreciating the specific objections raised by the appellant against the set of comparable companies chosen by the TPO.
- 5(c) Without prejudice to above grounds of appeal, AO/ TPO erred in not following directions of the DRP in the context of R&D Services.
- 6(a) That, on the facts and in the circumstances of the case, the TPO/ DRP erred in making an adjustment of Rs 50,400,731 with respect to IT Support Services by the appellant.
- 6(b) That, on the facts and in the circumstances of the case, the TPO/ DRP/ AO erred in not appreciating the specific objections raised by the appellant against the set of comparable companies chosen by the TPO.
- 6(c) That, on the facts and in the circumstances of the case, the TPO/ DRP erred in not considering the fact that the appellant has also made voluntary transfer pricing adjustments amounting to Rs 22,826,418 in respect of this international transaction of IT support services to its AEs vide letter dated 25 May 2015.
- 6(d) Without prejudice to above grounds of appeal, AO/ TPO erred in not following directions of the DRP in the context of IT Support Services.
- 7(a) That, on the facts and in the circumstances of the case, the TPO/ DRP erred in making an adjustment on account of transaction of export of raw materials and finished goods to AEs of Rs 11,899,893.
- 7(b) That, on the facts and in the circumstances of the case, without prejudice to other grounds of appeal, the TPO/ DRP erred in not appreciating that, even adopting single year data of comparable companies chosen by the appellant justify that the profit margin earned by the appellant falls within the arm's length range.
- 7(c) On the facts and in the circumstances of the case, the TPO/ DRP erred in not appreciating the objection of the appellant with respect to adoption of internal TNMM, in view of the functional and other differences between the transaction of export of raw materials and finished goods and the transaction of manufacture for domestic sales to unrelated third parties.
- 7(d) On the facts and in the circumstances of the case, the TPO/ DRP erred in rejecting companies selected by the appellant for the purpose of benchmarking the transaction of export of raw materials and finished goods.
- 7(e) Without prejudice to above grounds of appeal, AO/ TPO erred in not following directions of the DRP in the context of export of raw materials and finished goods.
- 8(a) That, on the facts and in the circumstances of the case, the TPO/ DRP/ AO erred in making an adjustment on account of transaction of import of finished goods of Rs 79,956,607.

- 8(b) That, on the facts and in the circumstances of the case, without prejudice to other grounds of appeal, the TPO/ DRP erred in not appreciating that even adopting of single year data of comparable companies chosen by the appellant justify that the profit margin earned by the appellant falls within the arm's length range.
- 8(c) That, on the facts and in the circumstances of the case, the TPO/ DRP/ AO erred in not appreciating the specific objection raised by the appellant against the set of comparable chosen by TPO with respect to difference in the products imported by the appellant in FY 2010-11 as compared to the products imported in FY 2011-12.
- 8(d) That, on the facts and in the circumstances of the case, the TPO/ DRP/ AO erred in applying Resale Price Method ('RPM') and holding that closer product comparability is not essential.
- 8(e) Without prejudice to above, AO/ TPO erred in not following directions of the DRP in the context of transaction of import of finished goods.
- 9(a) That, on the facts and in the circumstances of the case, the TPO/ DRP erred in making an adjustment of Rs 30,833,644 on account of chargeback at cost, of expenses incurred by the appellant on behalf of its AEs and treating the same as 'market support services'.
- 9(b) That, on the facts and in the circumstances of the case, the TPO/ DRP erred in not appreciating that charging of mark-up of 18.17% is not required since the expenses are incurred on behalf of AEs for merely facilitation purpose and the same cannot be treated as rendering of 'market support services'.
- 9(c) That, on the facts and in the circumstances of the case, without prejudice to other grounds, the TPO/ DRP erred in not appreciating that out of total recovery of Rs 169,695,346, only Rs 95,966,841 pertains to reimbursements from Reckitt Benckiser Corporate Services Ltd ('RBCSL') with respect to Area-IS Project Bedrock, legal expenses incurred for TTK and regional health care quality control and it also includes significant third party costs over which a mark-up is not warranted.
- 9(d) That, on the facts and in the circumstances of the case, without prejudice to other grounds, the TPO/ DRP erred in rejecting the objections raised by the appellant in respect to factors of incomparability in the set of comparable chosen by the TPO.
- 10(a) That, on the facts and in the circumstances of the case, the TPO/ DRP erred in making an adjustment of Rs 46,494,723 by treating the expenses allocated to the appellant as NIL and applying the 'benefit test'.
- 10(b) That, on the facts and in the circumstances of the case, the TPO/ DRP erred in not appreciating that the expenses allocated to the appellant cannot be treated akin to rendering of intra-group 'stewardship services'.
- 10(c) That, on the facts and in the circumstances of the case, the TPO/ DRP erred in treating the expenses of Rs 46,494,723 as NIL by applying Comparable Uncontrolled Price Method, without appreciating that the costs have been scientifically allocated to all group companies.
- 10(d) That, on the facts and in the circumstances of the case, without prejudice to other grounds, the DRP/ TPO failed to appreciate that only Rs 4,30,58,557 was incurred towards Mucinex Labelling Project, Tonic recharge hygiene council, Dettol MFH Adaptation DVM Project and Tonic Q/1/12/Fee.
- 11 Whether, on the facts and circumstances of the case and in law, the AO has erred in initiating penalty proceedings under sections 271(1)(c) of the Act.

3. Assessee has taken additional grounds also vide application dated 29.07.2020. The same are also reproduced as under:

**Ground 13: Refund of dividend distribution tax ('DDT') paid in respect of non-resident shareholders:**

**Ground 13.1:** That the Assessing Office ("AO") erred in not extending the benefit of applicable Double Taxation Avoidance Agreements between India - UK and India - Spain ("DTAA") respectively qua the rate of tax towards payment of dividend to the shareholders namely Reckitt Benckiser Plc., UK and Lancaster Square Holdings, Spain.

**Ground 13.2:** That the AO failed to appreciate that the dividend income was that of the non-resident recipient who was governed by the provisions of the relevant DTAA's.

**Ground 13.3:** That the AO also failed to appreciate that in terms of section 90(2), dividends being the income in the hands of the non-resident could not be subjected to tax by applying DDT at a rate in excess of the rate prescribed under the DTAA and hence, erred in subjecting the Appellant to additional income tax in terms of section 115-O of the Act.

**Ground 13.4:** That the AO erred in not granting refund of the excess Dividend Distribution Tax paid by the Appellant, since as per the provisions of Section 237 of the Act read with Article 265 of the Constitution of India, only legitimate tax could have been retained.

**Ground 14: Deduction of education cess on income tax and DDT paid for the AY as allowable expenditure**

**Ground 14.1:** That the AO erred in not allowing the deduction of education cess on the income tax paid, given the fact that the same was not hit by the provisions of section 40(a)(ii) of the Act and hence is an allowable deduction.

**Ground 14.2:** Without prejudice to Ground 13 above, the AO erred in not allowing the deduction of education cess on the DDT paid, given the fact that the same was not hit by the provisions of section 40(a)(ii) of the Act and hence is an allowable deduction.

4. In respect of the additional grounds stated above, assessee submitted that these are purely questions of law and all the relevant material facts necessary for adjudication of the same are on record. Considering Rule 11 of the Income Tax Appellate Tribunal Rules, 1963 these additional grounds were confronted to the Ld. CIT, DR on which no objection was raised for their admission. Accordingly, the same are admitted for adjudication.

5. Summary of grounds raised above in respect of transfer pricing adjustments is noted as under:

		(In Rs.)
1.	Royalty	26,552,926
2.	AMP expenditure	168,01,90,546
3.	R & D Services	1,02,28,455
4.	I T support services	5,04,00,731
5.	Export of raw material and finished goods	1,18,99,893
6.	Import of finished goods	7,99,56,607
7.	Allocation of expenses	4,64,94,723
8.	Recovery of expenses	<u>3,08,33,644</u>
		<u>193,65,57,525/-</u>

6. Facts of the case as stated in the order of Ld. Transfer Pricing Officer (TPO) are as under:

6.1. Reckitt Benckiser (India) Limited or 'RBIL' or 'the company' is a subsidiary of Reckitt Benckiser Plc., UK. RBIL is engaged in the business of manufacturing and trading of FMCG products. RBIL manufactures and distributes various brands of household products, and over the counter pharmaceutical products. Some of the key products are Dettol Soap, Dispirin, Robin Blue, Cherry Blossom shoe polish, Harpic toilet cleaner, Mortein Insecticide, Colin, etc. RBI is registered in India under the Companies Act, 1956.

6.2. RBIL has entered into a License Agreement with Reckitt Benckiser N. V. and Reckitt & Colman Limited for the transfer of Intellectual Property Rights for the production, sale, distribution and marketing of Reckitt Benckiser "products" domestically and internationally. These include all IPR(s) owned by the AEs such as trademarks, design and model rights, know-how, and all current and future copyrights and rights to databases relating to design,

distribution, marketing and sale of licensed products in the licensed territory.

6.3. In the course of transfer pricing assessment, Ld. Transfer Pricing Officer (TPO) dealt with various transactions between the assessee and its Associated Enterprises (AEs) and made adjustments, resulting into increase of the total income assessed. Assessee raised its objection before the Ld. DRP who had given its directions which were incorporated in the assessment completed by the Ld. AO for which the assessee is in appeal before the Tribunal. We will deal with the grounds seriatim.

7. Ground nos. 1 and 2 are general in nature as submitted by the Ld. Counsel for the assessee. Accordingly, they are not adjudicated upon and are dismissed.

8. Ground no. 3(a) to 3(l) are in respect of upward adjustment made for advertisement, marketing and publicity expenses (AMP) of Rs.1,68,01,90,546/-. Ld. AO/TPO noted that assessee has incurred AMP expenses amounting to Rs.31,368.88 lacs against the sales turnover of Rs.2,90,765.21 lacs. The details of AMP expenses incurred during the year are tabulated as under:

**Details of the Advertisement Expenses**

<b>Sl. No.</b>	<b>Nature of expense incurred</b>	<b>Amount (in Rs)</b>
1.	<i>Business Promotion expenses directly related to sales</i>	<b>339,762,562</b>
2.	<i>Market Research Expenses</i>	<b>92,431,795</b>
3.	<i>Freebies/ Gifts/ Bonus Packs /Consumer Promos</i>	<b>40,543,663</b>
	<b>Total</b>	<b>472,738,019</b>

8.1. Assessee was show caused by the Ld. AO/TPO for bench-marking of the AMP expenses. Assessee raised its objection on the show cause notice, summary of which is listed as under:

- *AMP expenses incurred by RBIL does not constitute international transaction.*
- *Non-satisfaction of requisites of being an international transaction under section 92B read with section 92F(v) of the Act.*
- *Incurrence of AMP expenses, being a domestic transaction, cannot be touted as an instance of profit-shifting exercise*
- *Incurrence of AMP expenses does not constitute 'international transaction' under either of sub-sections (1) or (2) of section 92B of the Act*
- *Incurrence of AMP expenses is a unilateral act, not a bilateral arrangement*
- *Incurrence of AMP expenses is also not covered under amendment made by Finance Act 2012 under section 92B of the Act*
- *Incurrence of AMP expenses is also not covered under newly inserted section 92BA of the Act*
- *RBIL is engaged in only product promotion and not brand promotion*
- *Advertisement is done solely for product promotion and not for brand promotion*
- *No cost/income can be attributed only to brand promotion*
- *Benefit of AMP to assessee and not to AE(s)*

- *Benefit of AMP expenditure accrues only to assessee and nobody else*
- *Benefit arising to the AE(s), if any, is purely incidental in nature*
- *AMP is covered in TNMM analysis in the TP documentation of the assessee*
- *Use of Cost Plus Method for applying the mark-up for AMP adjustment and treating it as a separate transaction would result in re-characterization*
- *Direct selling expenses to be excluded from the purview of AMP expenses.”*

8.2. On considering the submissions of the assessee, an amount of Rs.7,79,77,729/- was excluded from the total AMP expenses by the Ld. AO/TPO. Ld. AO/TPO computed the AMP expenses to sales ratio of comparable companies and arrived at upward adjustment of Rs.168,01,90,546/- on account of AMP expenses. Ld. TPO held that AMP expenses incurred by the assessee are International Transaction and added a mark-up of 18.17% to the alleged cost of brand promotion activity by applying the Bright Line Test, adopting cost plus method. Ld. DRP gave its direction by holding AMP expenses as International Transaction and directed to exclude selling and distribution expenses for computing the adjustment for AMP expenses.

8.3. At the outset, Ld. Counsel for the assessee submitted that in the assessee's own case for the immediately preceding two years i.e. AY 2010-11 and 2011-12 in ITA Nos. 404/Kol/2015 and 625/Kol/2016 dated 17.06.2020, the Coordinate Bench of ITAT, Kolkata has dealt with this identical issue holding in favour of the assessee that AMP expenses is not an International Transaction. The relevant

extract on the finding given by the Coordinate Bench in this respect is reproduced as under:

*“25. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id DRP and other materials brought on record. Learned Counsel for the assessee submitted before us that the facts of the case of the Special Bench ruling in LG Electronics (supra) is different from the facts of the present case of the assessee. Assessee Company is engaged in only product promotion and not brand promotion and hence benefit of AMP accrues to the assessee and not to its AE(s). The Bright Line Test ('BLT') is not one of the prescribed methods under the Act and hence cannot be applied in the assessee's case under consideration. The various expenses in the nature of sales promotion expenses, business promotion expenses (including free gifts/freebie/bonus packs etc.) market research expenses has to be excluded from the computation of AMP expenditure. Ld Counsel also pointed out that addition of any profit mark-up over the costs of AMP is unwarranted from the facts of the assessee's case.*

*On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the TPO/Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. We note that issue before us relates to TPO's action in applying provision of Section 92 of the Act in respect of advertisement marketing and promotion (AMP) expenses treating them as international transaction covered under the purview of section 92 of the Act. The assessee had entered into license agreement with its AE Reckitt Benckiser NV and Reckitt Colman Ltd for transfer and intellectual property right for provision of sale, distribution and marketing of Reckitt Benckiser products. It was manufacturing and distributing various brands of such products and had incurred substantial marketing and promotion expenses in respect of same amounting to Rs. 3,02,43,43,377/-. Such expenses were related to the promotion of the brand owned by the AE of the assessee which were prominently displayed in the advertisement. The TPO further observed that AMP expenses were substantially higher than the comparables selected by the assessee. The excess of such expenses was considered by him to be for brand promotion done for the AE. The TPO, placing reliance upon the decision of Special Bench of ITAT, Delhi in the case of LG Electronics India Pvt .Ltd Vs ACIT, Cir-3, Noida ITA No.5140/Del/2011, held that such brand promotion was to be treated as international transaction u/s 92B of the Act. The TPO applied Bright Line test (BLT) and after applying mark up of 12.27%, based on margin of entities carrying out marketing and advertising activities, made ALP adjustment of Rs.104,43,39,401/-. We note that in the case of LG Electronics (supra), the Indian company was acting on behalf of/for the benefit of Korean company and had 'no autonomy' in decisions relating to expenditure incurred on marketing and promotion. In the assessee's case, the assessee company was not under any obligation to incur AMP expenses and also its parent company had no control over such decisions of RBIL. The activities of brand promotion were a global marketing and sales promotion strategy of the parent called "Blue Ocean Strategy", which is not the fact in the case of RBIL. There is no transaction/undertaking/agreement between RBIL and its AE, as different from that which was existed in LG Electronics case(supra). Therefore, assessee company's case cannot be compared with LG Electronics case(supra).*

*26. We note that incurrence of the AMP expenses, being a domestic transaction cannot be touted as an instance of profit-sharing exercise. We note that the TPO failed to appreciate that, though a 'transaction' under section 92F(v) includes arrangement or understanding; it*

*per se involves a bilateral arrangement or contract between the parties. A unilateral action by one party in absence of any understanding or contract or binding obligation could not be termed as 'transaction'. In the assessee's case, RBIL has incurred AMP expenditure in respect of its business operations in India and in order to boost its sales in India. Thus, no 'transaction' could be said to exist in respect of such AMP expenditure incurred by the assessee.*

*At the cost of repetition we state that there is no term or condition or provision in either of the Licensing Agreements to the effect which create any sort of obligation on RBIL to carry out marketing and promotional activities in order to promote the brands and related IPRs. Neither there is an undertaking between RBIL and any of its Associated Enterprise) ['AE(s)] including the brand owners to incur such expenses for brand promotion as per any global or nation specific strategy, unlike in LG Electronics (supra) case. The RBIL has complete autonomy to incur expenses relating to marketing and promotion of its products for enhancing better sales and marketing and is under no obligation from any of its AE(s). In the light of above facts we note that arm's length price adjustment (ALP) made by TPO and confirmed by DRP is not justified for that we rely on the judgment of Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd V.CIT [2016] 381 ITR 117 (Del-HC), wherein it was held as follows:*

*"66. It is contended by the Revenue that the mere fact that the Indian entity is engaged in the activity of creation, promotion or maintenance of certain brands of its foreign AE or for the creation/promotion of new/existing markets for the AE, is by itself enough to demonstrate that there is an arrangement with the parent company for this activity. It is urged that merely because MSIL and SMC do not have an explicit arrangement/agreement on this aspect cannot lead to the inference that there is no such arrangement or the entire AMP activity of the Indian entity is unilateral and only for its own benefit. According to the Revenue, "the only credible test in the context of TP provisions to determine whether the Indian subsidiary is incurring AMP expenses unilaterally on its own or at the instance of the AE is to find out whether an independent party would have also done the same." It is asserted: "An independent party with a short term agreement with the MNC will not incur costs which give long term benefits of brand & market development to the other entity. An independent party will, in such circumstances, carry out the function of development of markets only when it is adequately remunerated for the same."*

*67. Reference is made by Mr. Srivastava to some sample agreements between Reebok (UK) and Reebok (South Africa) and IC Issacs & Co and BHP Marketing to urge that the level of AMP spend is a matter of negotiation between the parties together with the rate of royalty. It is further suggested that it might be necessary to examine whether in other jurisdictions the foreign AE i.e., SMC is engaged in AMP/brand promotion through independent entities or their subsidiaries without any compensation to them either directly or through an adjustment of royalty payments.*

*Absence of a machinery provision*

*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 negated by the Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT.*

*69. There is nothing in the Act which indicates how, in the absence of the BLT, one can discern the existence of an international transaction as far as AMP expenditure is concerned. The Court finds considerable merit in the contention of the Assessee that the only TP adjustment authorised and permitted by Chapter X is the substitution of the ALP for the transaction price or the contract price. It bears repetition that each of the methods specified in S.92C (1) is a price discovery method. S.92C (1) thus is explicit that the only manner of effecting a TP adjustment is to substitute the transaction price with the ALP so determined. The second proviso to Section 92C (2) provides a 'gateway' by stipulating that if the variation between the ALP and the transaction price does not exceed the specified percentage, no TP adjustment can at all be made. Both Section 92CA, which provides for making a reference to the TPO for computation of the ALP and the manner of the determination of the ALP by the TPO, and Section 92CB which provides for the "safe harbour" rules for determination of the ALP, can be applied only if the TP adjustment involves substitution of the transaction price with the ALP. Rules 10B, 10C and the new Rule 10AB only deal with the determination of the ALP. Thus for the purposes of Chapter X of the Act, what is envisaged is not a quantitative adjustment but only a substitution of the transaction price with the ALP.*

*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.*

*72. As rightly pointed out by the Assessee, while such quantitative adjustment involved in respect of AMP expenses may be contemplated in the taxing statutes of certain foreign countries like U.S.A., Australia and New Zealand, no provision in Chapter X of the Act contemplates such an adjustment. An AMP TP adjustment to*

*which none of the substantive or procedural provisions of Chapter X of the Act apply, cannot be held to be permitted by Chapter X. In other words, with neither the substantive nor the machinery provisions of Chapter X of the Act being applicable to an AMP TP adjustment, the inevitable conclusion is that Chapter X as a whole, does not permit such an adjustment.*

*73. It bears repetition that the subject matter of the attempted price adjustment is not the transaction involving the Indian entity and the agencies to whom it is making payments for the AMP expenses. The Revenue is not joining issue, the Court was told, that the Indian entity would be entitled to claim such expenses as revenue expense in terms of Section 37 of the Act. It is not for the Revenue to dictate to an entity how much it should spend on AMP. That would be a business decision of such entity keeping in view its exigencies and its perception of what is best needed to promote its products. The argument of the Revenue, however, is that while such AMP expense may be wholly and exclusively for the benefit of the Indian entity, it also ensures to building the brand of the foreign AE for which the foreign AE is obliged to compensate the Indian entity. The burden of the Revenue's song is this: an Indian entity, whose AMP expense is extraordinary (or 'non-routine') ought to be compensated by the foreign AE to whose benefit also such expense enures. The 'non-routine' AMP spend is taken to have 'subsumed' the portion constituting the 'compensation' owed to the Indian entity by the foreign AE. In such a scenario what will be required to be benchmarked is not the AMP expense itself but to what extent the Indian entity must be compensated. That is not within the realm of the provisions of Chapter X.*

*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?*

*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 40A (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.*

*76. As explained by the Supreme Court in CIT v. B.C. Srinivasa Setty (1979) 128 ITR 294 (SC) and PNB Finance Ltd. vs. CIT (2008) 307 ITR 75 (SC) in the absence of any machinery provision, bringing an imagined international transaction to tax is fraught with the danger of invalidation. In the present case, in the absence of there being an international transaction involving AMP spend with an ascertainable price, neither the substantive nor the machinery provision of Chapter X are applicable to the transfer pricing adjustment exercise”*

*27. Our view is also fortified by the decision of the Coordinate Bench of ITAT Kolkata in the case of M/s Philips India Ltd ,ITA No.2489/Kol/2017, order dated 04.04.2018 wherein it was held as follows:*

*“11. We have heard the rival submissions. At the outset, we find that the Id TPO, Id AO and the Id DRP had categorically accepted the basic fact that the assessee is a manufacturer and also engaged in distribution of products. While this is so, we are not able to comprehend the argument advanced by the Id DR that assessee is only a distributor and thereby the decision of Sony Ericsson would apply to the case. We find that since the assessee is a manufacturer cum distributor as accepted by the lower authorities, the decision rendered in Maruti Suzuki supra would be applicable to the assessee’s case, since the contention of the Id DR that assessee is only distributor, is not emanating from the records of the lower authorities. We find that the issue under dispute before us is squarely addressed by this tribunal in assessee’s own case for the Asst Year 2011-12 supra wherein it was held :-*

*“43. We have heard the rival submissions and perused the materials available on record. The preliminary issue here arises whether the AMP expenses constitute the international transactions so as to attract the provisions of transfer pricing of the Income Tax Act, 1961. The claim of the Ld. AR is that the AMP transaction does not represent the international transaction between the AE’s therefore no question of determining the ALP of AMP transactions. We find force in the argument of the Id. AR in the given facts and circumstances. Therefore, in our considered view the AMP cannot be regarded as international transaction. In holding so we find the support & guidance from the judgment of Hon’ble Delhi High Court in the case of Maruti Suzuki India Limited vs. CIT reported in 381 ITR 117 wherein it was held as under:*

*51. The result of the above discussion is that in the considered view of the court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL. Secondly, the Court is of the view that the decision in Sony Ericsson Mobile Communications India (P) Ltd. case (supra) holding that there is an international transaction as a result of the AMP expenses cannot be held to have answered the issue as far as the present Assessee MSIL is concerned since finding in Sony Ericsson to the above effect is in the context of those Assesseees whose cases have been disposed of by that judgment and who did*

*not dispute the existence of an international transaction regarding AMP expenses.”*

*In view of we note that the facts of the above cases are identical to the present issue, thus, the principle laid down by the Hon’ble Delhi High Court in the case of Maruti Suzuki India Limited (supra) are applicable to the instant case. Respectfully following the same we dismiss the ground of appeal filed by the Revenue.”*

*28.We note that the AMP transaction does not represent the international transaction between the assessee and its AE’s as the revenue failed to bring on record any contract or arrangement between assessee and its AE for making AMP expenses for promotion of brand of its AE.In the assessee’s case, the assessee company was not under any obligation to incur AMP expenses and also its parent company had no control over such decisions of RBIL. These are routine advertisement expenses. Therefore, in assessee’s case the AMP cannot be regarded as international transaction as held by the Hon’ble Delhi High Court in the case of Maruti Suzuki India Limited Vs. CIT reported in 381 ITR 117 (supra). Therefore, we allow the appeal of the assessee and dismiss the appeal of the revenue and delete the ALP adjustment made by TPO Rs.104,43,39,401/- for A.Y.2010-11 and Rs.331,09,56,767/- for A.Y. 2011-12.”*

8.4. Before us, ld. Counsel submitted that there is no material change in the facts of the present case vis-à-vis the earlier two preceding years as well as in the applicable law and, therefore, this issue is squarely covered in favour of the assessee by the said decision.

8.5. Before us, Ld. CIT, DR placed a detailed written submission containing 35 pages on all the issues raised in the present appeal. On perusal of the relevant part of the submission in respect of AMP expenses, we note that reliance has been placed on the decision of Hon’ble Special Bench of the Tribunal in the case of L. G Electronics (India) Pvt. Ltd. vis. ACIT (2014) 150 ITD 94 (Del.) and several other judicial precedents. The contentions raised by the Ld. CIT, DR by placing reliance on judicial precedents and OECD guidelines have already been dealt with by the Coordinate Bench in the decision for the two preceding assessment years. On a specific query from the Bench to the Ld. Counsel to understand if the department has gone into appeal before

the Hon'ble High Court on this issue, it was submitted that no appeal has been preferred. Considering the facts of the present case and the applicable law as well as the recent decision of Coordinate bench in assessee's own case for the preceding two years as extracted above, we are in agreement that AMP is not an International Transaction and thus, delete the ALP adjustment made in this respect of Rs.168,01,90,546/-. Accordingly, grounds taken by the assessee in this respect are allowed.

9. In respect of grounds 4(a) and 4(b) relating to ALP adjustment of Rs.2,65,52,926/- made on account of payment of royalty, Ld. AO/TPO observed that many of the brands on which royalty for know-how and brand were paid are very old for which no patent exists. Assessee was show caused as to why not royalty paid for know-how on the brands be considered as junk and only the royalty on brand be allowed on the basis of comparable agreement. Assessee submitted the details of royalty payments. In response to the show cause notice, assessee submitted that it has entered into royalty agreement with its AEs viz., Reckitt & Coleman (Overseas) Ltd., UK (RCO) and Reckitt Benckiser, N.V., Neitherlands (RBNV) for production, sales, distribution and marketing of products. As per the licensing agreements entered into by the assessee with these AEs, royalty is paid by the assessee for the right to use the Intellectual Property Rights (IPR) which includes trademark, patent, design and model rights, know-how and all current and future copy rights and rights to database relating to the design, production, distribution, marketing and sale of the products.

Assessee further submitted that there have been on going improvements/developments in the products with the support of licensors. Submissions of the assessee were found not tenable and an upward adjustment was computed by taking 3% of the sales chargeable to royalty, amounting to Rs.10,65,24,001/-.

9.1. Further, it was noted that assessee had paid royalty for goods which have been imported by it. Quantum of royalty in this respect is Rs.2,65,52,926/-. In respect of this component, assessee submitted that apart from the use of brand, trade mark, know-how etc. assessee has also been given the right to market, distribute and sell its products in India by its AEs, thus assessee is paying royalty for the import of goods from its AEs in accordance with the commercial arrangement.

9.2. It was submitted that in the initial years, demand for these products which are imported are low and, therefore, company has adopted a model whereby it obtained license for these products from the brand owning entity (i.e. AEs) to manufacture, market, distribute and sell in India against payment of royalty. Assessee provides specification to its AEs for these imported products and part with only nominal profit margin. Gradually, manufacturing of these products by the assessee locally grows, by setting up manufacturing facilities. Assessee submitted that imported products are marketed and sold by the assessee locally on which it pays royalty to the licensors. Further, it was submitted that products manufactured locally by the assessee on the basis of know-how from the AEs and also exported to the other

group entities depending upon their demands. On export sale of its products which are manufactured locally in India, assessee does not pay any royalty to the licensors under the licensing agreements. Assessee thus contended that from the import of finished goods, it is able to earn overall gross margin of 17.31% and is thus creating local demands for these products and at the same time is able to earn better margins inspite of paying royalty for the use of its AEs IPRs.

9.3. AO/TPO did not accept the submission of the assessee and took it as Nil by applying Comparable Uncontrolled Price (CUP) method by holding that with the imported goods, the payment of royalty is embedded and thus, an upward adjustment of royalty was made on two components of Rs.10,65,24,001/- and Rs.2,65,52,926/-, totalling Rs.13,30,76,927/-. On the objections raised by the assessee before the Ld. DRP on the above ALP adjustment, it directed to delete the adjustment made of Rs.10,65,24,001/- against which the Department is not in appeal. Thus, the only issue before us is in respect of royalty payment on imported goods by the assessee from its AEs, amounting to Rs. 2,65,52,926/-.

9.4. Observations of Ld. AO/TPO while making this upward adjustment are noted as under:

*“With the imported goods the payment of royalty is embedded*

*As per agreement for sales of goods outside India the assessee should pay Royalty to A.E at the 8%. Thus when any goods that are manufactured whether sold India or outside India royalty is paid.*

*As per Agreement the royalty payment is on net Sales while the net sales has been left undefined which shall be in accordance with law for the time being in force.*

*As per the majority of agreement net sales mean goods sold in India minus excise duty, packing material, brought out goods, ex-factory value of the sales etc.*

*The undersigned is not privy to pricing policy of the A.E from which the assessee has purchased imported goods.”*

9.5. The moot point before us in respect of this ALP adjustment on account of royalty payment is to consider whether royalty is embedded in the import price paid by the assessee to its AEs, on the goods imported by it. In this respect, assessee has already explained the business model carried by it as stated above. Further, Ld. Counsel for the assessee referred to the licensing agreement entered into between it and the AE (RCOL), placed in the paper book at page 2332. The said licence agreement is dated 15.07.2005. He specifically referred to Article 6.1 which lays down the terms for the payment of royalty equivalent to 5% of net sales of products in India and 7% of exports from India. He also referred to Article 7 which lays down the terms for calculation and payment of said royalty. The two articles are reproduced as under:

*“6.1. In consideration of the rights and Intellectual Property Rights granted by the Licensor under this Agreement, the Licensee shall pay the Licensor:*

*(i) Royalty equivalent to 5% of net sales of Product(s) in India or such other percentage as may be permitted by the laws for the time being in force in India.*

*(ii) Royalty equivalent to 8% on exports from India or such other percentage as may be permitted by the laws for the time being in force in India.*

*Any costs either directly or indirectly paid by the Licensee for any and all costs including legal services in relation to any Intellectual Property Rights owned by an RB group entity including without limitation for advise, registry related work, litigation (both civil and criminal counterfeit actions and raid, administrative action, may be deducted from the royalty provided that the Licensee supplies evidence of such payments to the Licensor. The*

*claims for the royalty shall arise at the time of Products sold leave the premises of the Licensee.*

6.2. *Net sales shall be in accordance with law for the time being in force in India.*

Article 7

Payment

- 7.1. *A calculation of the amount of royalties due according to article 6 above shall be made at the end of each calendar half year. The Licensee shall send a complete statement by the 20<sup>th</sup> of the month following a calendar half year and shall transfer the corresponding amount within the same period. The statement shall set forth the net sales of the products, the amount of any payment due and all other information necessary to show the grounds on which such payment has been computed.*
- 7.2. *The Licensor and the Licensee may jointly decide to adjust the royalty at the end of each calendar year in connection with market circumstances which justify an adjustment.*
- 7.3. *All amounts due hereunder shall be transferred after deduction of any taxes and cesses including but not limited to Research & Development Cess due and in local currency at a bank account to be notified from time to time by the Licensor. The costs of payment shall be borne by the Licensee.”*

9.6. On perusal of the said Articles of the licence agreement, it is observed that these are pure commercial terms and there is no legal bar for having such commercial arrangement. Ld. Counsel further submitted that there is no basis for holding that royalty is embedded in the import price of the goods imported by the assessee. Nothing positive is brought on record by the Ld. AO/TPO to demonstrate as to how this conclusion has been arrived at. He further contended that it is the prerogative of the assessee to decide in a particular, if royalty is payable or not and Ld. AO/TPO cannot step into the shoes of the assessee for such commercial arrangements which is adequately documented and verifiable from the records. It is a mere presumption at

the end of the Ld. AO/TPO to conclude that royalty is embedded in the import price which is based on nothing but surmises and conjectures, claimed the Ld. Counsel. He also referred to the Schedule forming part of the licence agreement wherein brand and the products are listed which are subjected to payment of royalty when imported by the assessee from the concerned AEs. This schedule is placed at page 2344 of the paper book. From the perusal of this schedule, ld. Counsel pointed out specific products which have been imported during the year under consideration and royalty has been paid by the assessee on import of these specific products in terms of this license agreement.

9.7. Ld. Counsel further submitted that payment of royalty on import of goods is not a one off transaction and assessee has been paying the said royalty in earlier years which has never been challenged and has always been allowed in the preceding years. Ld. Counsel thus claimed for application of principle of consistency for which he placed reliance on the decision of Hon'ble Supreme Court in the case of Radhasoami Satsang Vs. CIT [1992] 193 ITR 321 (SC). In this respect, he submitted that this principle has been appreciated and upheld by the Coordinate Bench in assessee's own case for the preceding two assessment years (supra).

9.8. Ld. Counsel also contended that it is not within the jurisdiction of the Ld. TPO to test the commercial expediency of an international transaction by applying the benefit test and taking the transaction value at nil. On this contention, he again placed reliance on the decision of Coordinate Bench

in assessee's own case for the preceding two assessment years (supra).

9.9. Ld. Counsel reiterated to accept the business model in respect of payment of royalty on the import of finished goods by submitting that as per terms of the license agreement between the assessee and its AE, assessee enjoys the right to manufacture (in own factory) the licensed goods or get the same manufactured from other contractors. Accordingly, the rights granted by the licensor to assessee in respect of all licensed goods are identical. However, in respect of certain goods for which the demand in its licensed territory is not adequate or attained a sizeable scale, assessee chooses to import these goods from other Reckitt Benckiser entities ("AE") and sell in the local market. It may also be noted that for such goods imported from group entities, assessee pays cost plus a fixed mark-up of 5 percent to such group entities for goods manufactured by such entities for the assessee. Accordingly, it may be appreciated that no amount of "Royalty" is embedded in the import price paid by the assessee to its AE. Furthermore, it may also be noted that likewise when an AE sources goods from the assessee for sale in their respective market, assessee is paid on cost plus a fixed mark-up on such cost, and no royalty is paid to the assessee on such related party exports. In such cases, where the AE sources the goods from assessee, the AE operating in the respective local country pays 'the Royalty for use of IPR.

9.10. On this submission, a specific query was raised by the Bench on the Ld. Counsel as to whether the business model so explained has been accepted by any Government

Authority in any further proceedings. To this effect, Ld. Counsel placed on record a copy of order dated 29.06.2015 passed by Deputy Commissioner of Customs, Special Valuation Branch, New Custom House, New Delhi in the assessee's own case wherein valuation of imports made by the assessee from its AEs was referred to Special Valuation Branch under the Customs Valuation (Determination of Value of imported goods) Rules, 2007. While dealing with the valuation issue in respect of import of goods done by the assessee the Customs Authority held that royalty is not included in the invoice value of the goods imported by the importer from the foreign suppliers. The relevant extracts of the findings given by the Customs Authority in the said order are reproduced for ease of reference:

*"19. From the provisions of the above agreements it is noticed that the Licensor has granted the Importer the right to use the Intellectual Property Rights in connection with the design, production, distribution, marketing and sale of the products. The Licensor also granted to the Importer the right to sublicense the rights granted herein to the Licensee to third Parties for the purpose of manufacture, packaging, sale and distribution of products. In consideration of the rights and Intellectual Property Rights granted by the Licensor under this Agreement, the Importer is required to pay royalty to the Licensor on the basis of Net sales of products sold in India/exported from India.*

*20.1 Guidelines to make addition of royalty to the assessable value of imported goods are enshrined in Rule 10(1)(c) of the Valuation Rules, 2007. The said Rule provides that in determining the transaction value, royalties and license fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable; shall be added to the price actually paid or payable for the imported goods.*

*Explanation:- Where the royalty, license fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.*

*Interpretative Notes-to Rule 10(1) (c) provide that the royalties and license fees referred to in Rule 10(1) (c) may include among other things, payments in respect to patents, trademarks and copyrights. However, the Charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the customs value.*

*20.2 From these provisions of the Valuation Rules it is clear that for addition of any amount under Rule 10(1)(c) of the Valuation Rules the following conditions need to be fulfilled:-*

*(i) such amount is not Included in the price actually paid or payable*

*(ii) the amount should be paid as a condition of the sale of the goods being valued and*

*(iii) the amount is actually paid or payable for the imported goods*

***20.3 Since in this case royalty is to be paid on Net Sales of products sold in India or exported from India, it is clear that the said amount of royalty is not included in the invoice values of the goods Imported by the Importer from the foreign Suppliers.”***

***[emphasis supplied by us ]***

9.11. Per contra, Ld. CIT, DR referred to the written submission placed on record wherein contentions raised are in respect of challenging the commercial expediency of a transaction and the benefits derived by the assessee from the alleged royalty payment.

10. We have heard the rival contentions and perused the material available on record. In this respect, we find force in the submissions made by the Ld. Counsel vis-à-vis application of principle of consistency as well as jurisdiction of the Ld. TPO to test the commercial expediency of an international transaction while applying the benefit test for which we place our reliance on the decision of the Coordinate Bench in assessee's own case for the preceding

two years (supra). In this respect, we extract the findings given by the Coordinate Bench which is as under:

*“16. We note that the assessee is a manufacturer and distributor of a large number of products/brands. These brands are owned by its AEs. The assessee has been paying royalty to its AEs for a number of years which has been allowed in the assessment of earlier years. This year there is no change in facts and law so far assessee company and its Associate Enterprises (AEs) are concerned.*

*It is a well settled legal position that factual matters which permeate through more than one assessment year, if the Revenue has accepted a particular view or proposition in the past, it is not open for the Revenue to take an entirely contrary or different stand in a later year on the same issue, involving identical facts unless and until a cogent case is made out by the TPO/ Assessing Officer on the basis of change in facts. For that we rely on the order of the Hon'ble Supreme Court in Radhasoami Satsang vs. CIT 193 ITR 321 (SC).*

*We are of the view that the above cited precedent on principle of consistency is squarely applicable to the assessee under consideration. In the facts of the assessee's case, the Ld. TPO has not pointed out the change in facts or any provision of law which led him to take a view contrary to the view taken by his predecessors in previous years. We note that the assessee has been paying royalty to its Associate Enterprises(AEs) for a number of years which has been allowed in the assessment of earlier years. Therefore, the TPO cannot take a contrary view and disturb the settled facts unless there is a change in law or facts. Therefore, the arm's length price adjustment made by TPO is not sustainable in law.*

*17. We note that TPO has allowed royalty in respect of all except two products viz. Mincream and Robinson Burley, the TPO has held that no benefit was derived by the assessee from its AE. It is not denied that the trade- marks for the two products viz. Mincream and Robinson Burley were registered and the said brands were owned by the AEs. The royalties are paid not only in respect of patent but for a basket of services. It is a common occurrence that a person using a brand name pays certain brand royalty to the owner of brand. It is not the case of the TPO, that the royalty paid in respect of these products was without any use of the said brand names. The assessee has in its TP study included payment of royalty and according to it the royalties are at arm's length. Considering these facts the proposed disallowance of royalty in respect of Mincream and Robinson Burley does not appear to be justified and proper.”*

10.1. Further, we observe that payment of royalty on the import of goods by the assessee from its AEs is governed by the licence agreement which is effective since the year 2005. We note that there is no legal bar on the commercial terms arrange by the assessee in respect of payment of royalty of the net sales as referred in Article 6 extracted above. Also, Customs Authorities have duly examined the issue in respect of royalty if embedded within the import price in respect of goods imported by the assessee from its related parties i.e. AEs. The Special Valuation Branch of the Customs Authorities has given a categorical finding that royalty is not included in the invoice value of the goods imported by the assessee. We also observe that while arriving at a conclusion, ld. TPO has no where recorded and referred to any material which could demonstrate that royalty payment by the assessee is embedded in the process of the imported goods. To our understanding, it is merely a presumption which cannot be upheld after looking into the facts of the case and corroborative material placed on record. Accordingly, considering the submissions made by the Ld. Counsel and in reference to the discussion made above, we delete the upward adjustment in respect of payment of royalty of Rs.2,65,52,956/-. Thus, grounds 4(a) and 4(b) are allowed.

11. Ground no. 5(a) to 5(c) is in respect of upward adjustment of Rs.1,12,45,571/- for R&D services. In the Transfer pricing assessment, ld. TPO rejected certain comparables selected by the assessee owing to difference in functions, assets, risk (FAR analysis). Assessee raised the

objections and submitted that comparables taken by the Ld. TPO are functionally not comparable. Ld. TPO rejected the objections raised by the assessee. Ld. Counsel referred to the comparability analysis made for the comparables selected by the assessee by taking into account the correct functionality of the comparables for which detailed charts are placed on record. By referring to these charts, Ld. Counsel submitted that for making a correct comparability analysis, it is important to capture the correct functionality of the comparables and, therefore, he submitted that the matter can go back to the Ld. TPO to undertake fresh comparability test based on the charts submitted on record. According to him, it is important that proper functional profile including the FAR analysis as well as economic analysis must be undertaken to arrive at the correct benchmarking.

11.1. In this respect, he submitted that assessee provides following service to its AEs which must be kept in the perspective while undertaking fresh search of the comparables, the same is reproduced as under:

- “• Provide services in relation to preparation of samples for consumer research.*
- Provide assistance in undertaking market research, including examining consumer tastes and preferences, product packaging and other specific attributes as may be prescribed by the Recipient and/or are acceptable considering the broad guidelines laid out by the Group.*
- Assistance in providing research reports on the various activities such as sensory evaluation, shelf-life studies, storage stability studies and other product testing and trials to verify whether the same adhere to the internationally acceptable standards of quality and internal guidelines and policies of the Group.*

11.2. He also referred to FAR analysis and economic analysis placed on record in the paper book which ought to be considered for the purpose of undertaking comparability test based on correct functionality of the comparables. Considering the facts on record and the submissions made as stated above, we find it proper to remit the matter back to the file of Ld. TPO to undertake comparability test based on correct functionality of the comparables by considering the material on record and arrive at the benchmarking in accordance with the provisions of law. Assessee is at liberty to furnish any further details in this respect to justify its benchmarking of ALP of the transaction. Accordingly, ground nos. 5(a) to 5(c) are allowed for statistical purposes.

12. Ground no. 6(a) to 6(d) is in respect of adjustment made towards IT support services, amounting to Rs.5,04,00,731/-. This is also the issue similar to the ground raised in 5(a) to 5(c). On this issue, Ld. AO has considered the service as KPO Services which are in fact BPO function. Details of IT support services provided by the assessee to its AEs are as under:

- Application Monitoring to ensure all the applications are running as per expectations and to detect and raise any anomalies in the application performance or usage.*
- Take pre-emptive action to fix anomalies, if any detected and/or escalates to the respective third party vendor.*
- Provide data services to load data into applications as per business requirement. These include - periodic updates of an application's database, taking adequate data backups before an application is refreshed/ rebooted etc.*
- Provide user management services which include invoking and removing the access of users, as is prescribed in the standard operating procedures provided by the Recipient.*
- Provide incident resolution to resolve any issues users encounter in the system with respect to data accuracy.*

- *Implement minor application configurations to resolve issues on data accuracy or to cater to changing business requirement.*
- *Deploy changes to production environment for any new enhancement or bug fixes to the application.*
- *Generate and circulate management information reports in relation to organizational processes, framework etc. as may be required by the Recipients from time-to-time.”*

12.1. In this respect also, Ld. Counsel referred to charts prepared for taking the correct comparables based on the functional profile arrived at after undertaking FAR analysis and economic analysis, details of which are placed in the paper book. On this issue, Ld. Counsel candidly submitted that after capturing the correct functional profile of the comparables based on material furnished by the assessee, the matter may be remitted back to the file of Ld. TPO to undertake a fresh comparability test to arrive at correct bench-marking. Considering the submissions made, facts of the case and material placed on record, we find it proper to remit this issue also to the file of Ld. TPO to undertake afresh comparability test by capturing the correct functionality as the assessee has described the IT support services which it has provided to its AEs. Assessee is at liberty to furnish any further details in this respect to justify its benchmarking of ALP of the transaction. Accordingly, grounds 6(a) to 6(d) are allowed for statistical purposes.

13. Ground nos. 7(a) to 7(e) are in respect of upward adjustment on export of raw material and finished goods amounting to Rs.1,18,99,893/-.

13.1. Ld. TPO noted that margin in export of raw material and finished goods in the case of comparables selected is high for which assessee was issued a show cause notice. Ld.

TPO also proposed to consider internal Transaction Net Margin Method (TNMM) to determine the arms length price (ALP). Assessee had submitted that the comparables used by the assessee have not been considered by the Ld. TPO and the margin is improperly calculated. Ld. TPO excluded three comparables taken by the assessee and recomputed the comparable margin for the purpose of determining the ALP. Ld. TPO arrived at the comparable margin of 15.38% and made the upward adjustment

13.2. In this respect, Ld. Counsel for the assessee contended that financial data/statement for the comparable which was rejected by Ld. TPO, is now available which can be considered for working out the updated margin for the purpose of bench-marking the transaction. Further, he stated in respect of adopting internal TNMM that functions performed and risk assumed by the assessee in connection with the export to its AEs is different from that when it acts as a full risk bearing entrepreneur while selling to the independent third parties, therefore, adopting internal TNMM for bench-marking the export transaction to AEs is not justified. Ld. Counsel also referred to the functional profile of the assessee including the FAR analysis and the economic analysis. He also referred to the charts prepared and furnished in respect of computing the updated margin based on the comparables taken by the assessee which were excluded by the Ld. TPO. According to him, Ld. TPO has not applied the correct filter in the selection of the comparables and hence, it is required to revisit the comparables in the light of correct functional profile of the assessee.

13.3. Considering the facts on record and the submissions made and also on perusal of the charts furnished with the updated computation of margin by highlighting the functional profile of each of the comparables, we find it appropriate to remit this issue to the file of Ld. TPO to revisit the comparables by taking into consideration the material placed on record. Assessee is at liberty to furnish any further details in this respect to justify its bench-marking of the transaction to arrive at ALP. Accordingly, ground nos. 7(a) to 7(e) are allowed for statistical purposes.

14. Ground nos. 8(a) to 8(e) are in respect of import purchases of finished goods from the AEs for which an upward adjustment of Rs.7,99,56,607/- has been made.

14.1. In this respect, assessee has bench-marked the purchase of finished goods imported from AEs amounting to Rs.40,11,48,074/- by using resale price method. Ld. TPO found functional difference in the comparables and recomputed the gross profit margin of 37.06% to arrive at the ALP of imported goods. In this respect, Ld. DRP had observed that product comparability must be similar, it is not essential to have closer comparability of the products. The broad basket of the products of comparables should be similar to the tested party products. Thus, Ld. TPO was directed to follow this criteria to examine the comparables by verifying their product comparability. In this respect, ld. Counsel for the assessee submitted that no finding has been given by the Ld. TPO on this direction of the Ld. DRP. He further submitted that each comparable considered for the purpose of bench-marking has to be seen on its own set of

facts by taking into account the functionality. It was contended that the comparables considered by the Ld. TPO have functional differences and, therefore, the entire bench-marking exercise has to be revisited by keeping in mind similarity for the functionality of the comparables. He again referred to the functional profile of the assessee including the FAR analysis and the economic analysis and the charts which have been furnished and placed on record describing the functionality of each of the comparables to be considered for the purpose of bench-marking.

14.2. Considering the facts on record and the submissions made as well as the perusal of the charts furnished on record, we find it proper to remit the matter back to the file of Ld. TPO to revisit the bench-marking exercise by taking into account the functional profile of the comparables and that of the assessee to arrive at justifiable ALP. Assessee is at liberty to furnish any further details to substantiate its claim. Accordingly, ground nos. 8(a) to 8(e) are allowed for statistical purposes.

15. Ground nos. 9(a) to 9(d) is in respect of adjustment made for mark-up of recovery and expenses amounting to Rs.3,08,33,644/-.

15.1. In this respect, Ld. TPO observed that assessee has recovered expenses from its AEs which are in the nature of services provided in helping the AEs in the legal affairs and arranging for the trained manpower. He thus, treated this as support service and bench-mark by using the comparable companies to arrive at Profit Level Indicator (PLI) of 18.17%. Assessee had furnished details of expenses along with debit

notes supporting invoices explaining the nature of expenses. However, according to the assessee, without appreciating true nature of expenses, ld. TPO had presumed these expenses in the nature of support services “legal service and manpower management” which are eligible for a mark-up. Ld. TPO thus, selected the comparables engaged in marketing support services and applied a mark-up of 18.17% on the recovery expenses amounting to Rs.16,96,95,346/-. Ld. DRP upheld the action of the Ld. TPO.

15.2. Before us, ld. Counsel for the assessee submitted that there is no adjudication by the Ld. TPO or Ld. DRP as to what services were rendered. According to him, expenses in question were in respect of system upgrade of the assessee for which costs were reimbursed to the assessee by the AEs. It was contended that there were no element of any services that the assessee rendered to the AEs. Ld. Counsel further submitted that there is no adjudication on the evidence which were furnished in the course of assessment before the Ld. TPO and the Ld. DRP so as to establish that these were cost to cost reimbursement. According to him, since there is no income element, there was no question of invoking the transfer pricing adjustment on this transaction. Further, he alleged that no method has been applied by the Ld. TPO or Ld. DRP to bench-mark these transactions. According to the Ld. Counsel, this issue was remanded back to the Ld. TPO in the assessee’s own case for AY 2010-11 and 2011-12 (supra) and submitted that this ground may also be remitted back to the file of Ld. TPO.

15.3. Considering the facts on record and the submissions made before us as well as perusing the order of Coordinate Bench in the assessee's own case for the preceding two years (supra), we remit this issue back to the file of Ld. TPO to adjudicate upon this issue by taking into consideration the evidence placed on record by the assessee. Assessee is at liberty to furnish any further details to substantiate its claim. Accordingly, ground nos. 8(a) to 9(d) are allowed for statistical purposes.

16. Ground nos. 10(a) to 10(d) refer to upward adjustment of Rs.4,64,94,723/- towards allocation of expenses.

16.1. In this respect, Ld. TPO held that these costs are on account of stewardship activity and applied CUP method by taking transactional value at nil. Ld. DRP upheld the upward adjustment by taking into account the benefit test. While making the aforesaid upward adjustment, ld. TPO found the submissions made by the assessee is not tenable by observing the following:

*"In the absence of any material on record regarding as to how the cost has been allocated.*

*It is also known whether the assessee has requested for such services.*

*The assessee has not able to produce any agreement in respect of such allocation of cost.*

*From the details of the charge it is seen some of most of the charges are related to Brand promotion. Those bran promotion are not the identified needs of the assessee as the assessee itself is spending a hefty amount on brand promotion in India.*

*12.4. thus no third party will pay such amount for such activity which is in the nature of stewardship activity. Hence amount allocated to the assessee by its AE taken as nil under the CUP method."*

16.2. In this respect, ld. Counsel referred to the detailed evidence including debit notes, invoices, nature of expenses which were submitted in the course of assessment proceeding as well as before the Ld. DRP which have not been considered. Further, Ld. Counsel submitted that there is no income element in the said transactions which are on cost to cost basis reimbursements. He also contended that Ld. TPO has limited jurisdiction to determine the ALP of an international transaction and questioning the commercial expediency is not in his domain.

16.3. We have considered the submissions made before us and in the interest of justice and fair play, we find it proper to remit this issue back to the file of Ld. TPO to adjudicate upon the same by taking into account the details and evidence placed on record by the assessee. Assessee is at liberty to file any further documents and submissions as deem fit and proper. Accordingly, ground nos. 10(a) to 10(d) are allowed for statistical purposes.

17. Now we deal with the two additional grounds raised before us by way of an application dated 21.08.2020. The second additional ground is in respect of claim of deduction towards payment of education cess on income tax and on dividend distribution tax (DDT). Ld. Counsel did not press for the same. Accordingly, additional ground in this respect is dismissed as not pressed.

18. On the first additional ground relating to non-granting of benefit of Double Tax Avoidance Agreement (DTAA) between India-UK and India-Spain respectively, qua the right of tax towards payment of dividend to the shareholders,

assessee has raised this additional ground to claim that while distributing dividend to the non-resident shareholders, the beneficial right of tax as per the applicable India-UK and India-Spain DTAA should have been applicable. Assessee draws force on its contention by placing reliance on the decision of Coordinate Bench of ITAT Delhi in the case of Gieseckc & Devrient (India) Pvt. Ltd. Vs. ACIT [2020] 120 taxmann.com 338 (Del. Trib.). Ld. Counsel for the assessee submitted that in the immediately preceding year this issue has been remanded back to the Ld. AO for fresh examination in ITA No. 404 & 529/Kol/2015 (supra). Ld. Counsel apprised the bench of subsequent developments and submitted that owing to dissenting view on the same issue by another Coordinate Bench of ITAT, Mumbai in the case of DCIT Vs. Total Oil India Pvt. Ltd. [2021] 190 ITR 312 (Mum. Trib.) a Special Bench was constituted. The Hon'ble Special Bench so constituted in the case of DCIT Vs. Total Oil India Pvt. Ltd. (supra) has decided the issue against the assessee vide its order reported in [2023] 149 taxmann. Com 332 (Mum. Trib.)(SB). In this respect, ld counsel submitted that assessee is not a party to the decision of Hon'ble Special Bench and there are certain distinguishing factors in the case of the assessee which have not been considered in the decision of the Hon'ble Special bench and, therefore, prayed that this matter may be set aside to the file of ld. AO for fresh consideration and assessee be given an opportunity to distinguish the law laid down by the Hon'ble Special Bench. He submitted that this will enable the assessee to bring on record all factual and legal submission in support of its claim.

18.1. We have gone through the submissions made by the Ld. Counsel in this respect and find it appropriate to remit the matter back to the file of Ld. AO for fresh consideration by giving the assessee an opportunity to make its submission on the factual and legal aspect in support of the claim made before us. Accordingly, this additional ground is allowed for statistical purposes.

19. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 20th July, 2023.

Sd/-

(Rajpal Yadav)  
Vice President

Sd/-

(Girish Agrawal)  
Accountant Member

***Dated: 20th July, 2023***

JD, Sr. P.S.

Copy to:

1. The Appellant:
  2. The Respondent
  3. DRP
  4. CIT,
  5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata