

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI****BEFORE VIKAS AWASTHY (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)****I.T.A. No.1240 /Mum/2016 - A.Y. 2011-12
I.T.A. No.1518/Mum/2017 - A.Y. 2012-13**

M/s Mondelez India Foods Private Ltd (formerly known as Cadbury Limited), Unit No.2001, 20 th Floor, Tower-3 (Wing C), India Bulls Finance Centre Parel, Mumbai-400 013 PAN : AAACC0460H	vs	Asst.Commissioner of Income-tax, Range-5(1)(2), Aayakar Bhavan, M.K. Road, Mumbai-400 020
APPELLANT		RESPONDENT

Assessee represented by	Shri J.D. Mistri, Shri Hiten Chande
Department represented by	Smt. Uodol Raj Singh

Date of hearing	13-07-2023
Date of pronouncement	31-07-2023

ORDER**PER : MS PADMAVATHY S. (AM)**

These appeals are against the final order of assessment passed by DCIT-5(1)(2), Mumbai under section 143(3) read with section 144C(13) of the Income-tax (in short, 'the Act') dated 20/01/2016 for A.Ys. 2011-12 & 2012-13. The common issues contended by the assessee in both the assessment years through various grounds are as tabulated below:-

Issue	AY 2011-12	AY 2012-13
Adjustment on account of Advertisement, Marketing and Promotion ('AMP') expenses	Ground Nos. 2 to 18	Ground Nos. 2 to 23
Disallowance of payment of royalty on technology paid to Cadbury Adams USA LLC	Ground Nos. 19 to 21	-
Disallowance of payment of royalty on technology paid to Cadbury Enterprises Pte Ltd	Ground Nos. 22 to 24	Ground Nos. 24 to 27
Disallowance of regional service fees paid to Cadbury Enterprises Pte Ltd. Singapore (Cadbury Schweppes Asia Pacific Pte Limited merged with Cadbury Enterprises Pte Ltd in 2010)	Ground Nos. 25 to 28	Ground Nos. 28 to 30
Disallowance of global service fees paid to Cadbury Holdings Limited	Ground Nos. 29 to 32	Ground Nos. 31 to 32
Disallowance under section 14A of the Act read with Rule 8D	Ground No. 33	Ground No. 33
Treating foreign exchange loss on cancellation of contracts as speculative	Ground No.34	Ground No.34
Allocation of expenditure at Baddi Unit-I & II	Ground Nos.35 to 36	Ground Nos.35 to 36
Addition on account of Annual Information Report	Ground No.37	Ground No.37
Non grant of MAT credit	Ground No.38	Ground No.38
Levy of interest under section 234A of the Act	Ground No.39	Ground No.39
Levy of interest under section 234C of the Act	Ground No.40	Ground No.40

2. The assessee also raised an additional ground in both AY 2011-12 and AY 2012-13 contending the validity of final assessment order passed under section 143(3) r.w.s.144C relying on the decision of the Hon'ble Madras High Court in the case of Roca Bathroom Products Private Limited (WA No.1517 and 1519 of 2021 dated 9th June 2022). However during the course of hearing the Id AR did not press

for the admission of additional grounds. Accordingly the additional ground is not admitted for adjudication.

3. The assessee Mondelez India Foods Private Ltd (formerly known as Cadbury India Limited) is a subsidiary of Cadbury Overseas Ltd UK which holds 58.63% and Cadbury Mauritius Ltd which holds 38.97% of the equity shareholding while the balance 2.41% equity share holding is held by Indian public company comprising of various shareholders. The assessee was incorporated in the year 1948 as Cadbury Fry (India) Private Limited. The Assessee was initially set up for processing imported chocolates and Bournvita, over the years, it expanded to cover a range of products in the chocolate, sugar confectionery and malted food drinks segment. The chocolate business contributes about 75% of assessee's turnover, whereas, malted food drinks contribute remaining 25%. Assessee operates in food segment of the fast moving consumer goods industry. The assessee is in the business of manufacturing and marketing of malted food drinks , cake, powder chocolates, toffees, drinking chocolate and sugar confectionery. The assessee has its factories at Thane, Induri in Maharashtra and Malanpur, Buddi and Bangalore and marketing branches at Delhi, Kolkata, Chennai and Mumbai. Assessee exports its products to Bangladesh, Sri Lanka, Middle East, Nigeria, South Africa, USA, Malaysia, West Indies etc. The Assessee is a group company of Cadbury Schweppes Plc., a company incorporated in United Kingdom, having its principal place of business at 25 Berkeley Square, London. The group deals in beverages and confectionery business with presence in more than 200 countries. Cadbury and Schweppes, two different groups, were merged in 1969 to form Cadbury Schweppes Plc.

I.T.A. No.1240 /Mum/2016 (A.Y. 2011-12)

3. For the assessment year 2011-12, the assessee filed the return of income on 30/11/2011 declaring a total income of Rs.218,37,50,890/- and later on revised the return on 11/10/2012 without any change in the amount of returned income. The case was selected for scrutiny and the statutory notices were duly served on the assessee. Since the assessee had international transactions with its Associated Enterprises, a reference was made to the Transfer Pricing Officer (TPO) to determine the arm's length price of the international transaction of the assessee with its AEs. The TPO, vide order dated 27/01/2015 proposed a total adjustment of Rs.199,53,59,553/-. The Assessing Officer passed the draft assessment order incorporating the TP adjustment and also made the following additions/disallowances:-

(1) Depreciation claimed on marketing know how	Rs. 5,39,988/-
(2) Disallowance under section 14A	Rs. 23,24,430/-
(3) Disallowance of forex loss	Rs. 4,17,51,000/-
(4)Denial of deduction under section 80IC Unit I	Rs.6,25,43,786/-
Unit II	Rs,21,85,37,371/-
(5) Addition on account of difference in AIR	Rs. 2,45,454/-

4. The Assessing Officer passed a draft assessment order against which the assessee raised objections before the DRP. The DRP gave marginal relief to the assessee with respect of depreciation claimed on marketing know how and sustained the TP adjustment as well as the other additions / disallowance made by the Assessing Officer. The assessee is in appeal before the Tribunal against the final order of assessment passed pursuant to the directions of the DRP.

TRANSFER PRICING ADJUSTMENTS**Adjustment on account of advertising, marketing & promotion expenses****Ground No.2 to 18**

5. The TPO noticed that the assessee is incurring huge expenses on advertisement, marketing and promotion on Cadbury brand in India. The TPO was of the view that since the assessee is not the legal owner of the brand in India, the AMP expenses incurred by the assessee translates into development of AEs brand and, therefore, the assessee needs to be compensated. The TPO selected the following list of comparables to arrive at the arithmetic mean of AMP expenses to sales at 5.01%:

S.N o.	Particulars	AMP expenses (in Rs)	Sales (in Rs)	AMP expenses to Sales (%)
1	Anmol Biscuits Ltd	4,84,64,373	2,40,18,06,508	2.02%
2	Britannia Industries Ltd	3,04,14,61,000	42,13,71,16,000	7.22%
3	Haldiram Foods Intl. Ltd	36,60,70,012	6,78,29,09,448	5.40%
4	Nutrine Confectionery Co. Ltd	10,96,00,000	1,52,17,00,000	7.20%
5	Priya Food Products Ltd	2,4,93,943	6,66,67,039	5.21%
6	Surya Foods & Agro Ltd	36,87,89,359	4,73,68,11,191	7.79%
7	Veeramani Biscuits Industries Ltd	5,35,582	22,38,92,180	0.24%
			Arithmetic Mean	5.01%

Based on the above, the TPO computed the adjustment in respect of the excessive AMP expenses incurred by the assessee as under:-

Particulars	Amount
Net sales of the Assessee	Rs.27,61,70,20,000
AMP Expenses incurred by the assessee	Rs.3,00,36,49,311
AMP Expenses of the Assessee (in terms of Sales)	10.88%
AMP expenses of comparable third parties (in terms of sales)	5.01%
Difference in the AMP expenses	5.87%
Expenditure incurred for developing the intangibles	Rs.1,62,01,97,731

6. The TPO arrived at a mark up of 11.35% based on the earlier years' comparables chosen as below:-

Sr No	Name of the company	Operating margin on Operating cost
1	Marketing Consultants and Agencies Pvt Ltd	9.80%
2	Best Mulyakan Consultants Ltd	8.82%
3	Cyber Media Research Ltd (Formerly I D C (India) Ltd)	10.33%
4	HCCA Business Services Pvt Ltd	NA
5	Hindustan Housing Co. Ltd	NC-Significant RPT
6	Crystal Hues Ltd	11.27%
7	Quadrant Communication Ltd	15.84%
8	Indus Technical and Financial Consultants Ltd	12.05%
	Average	11.35%

7. Accordingly, the TPO arrived at the TP adjustment as per below working:-

Particulars	Amount
Expenditure incurred for developing the intangibles	Rs.1,61,01,97,731
Mark-up on Expenditure incurred for developing the intangibles (%)	11.35%
Mark-up on Expenditure incurred for developing the intangibles (in Rs)	18,39,30,678
Arm's length price of reimbursement for brand promotion and marketing intangible of the AE's in India	1,80,41,289,409

8. The assessee filed objection before the DRP. The DRP rejected the various objections raised by the assessee and confirmed the TP adjustment towards the AMP expenses.

9. The Ld.AR during the course of hearing submitted that the issue is covered by the decisions of the co-ordinate bench in assessee's own case for A.Y. 2005-06, 2006-07 and 2009-10. The Ld.DR relied on the orders of the lower authorities.

10. We heard the parties and perused the materials on record. We notice that the co-ordinate bench in assessee's own case for **A.Y.2009-10 (ITA No.2214/Mum/2014)** has considered the similar issue and held that –

“23. Considered the rival submission and material placed on record. We notice from the records that the identical ground has already been decided by the Coordinate Bench of ITAT in ITA No. 1512/Mum/2013 for AY 2006-07 in assessee's own case on merits. For the sake of clarity, which is reproduced below:- 14. We have considered rival submissions and perused materials on record. Undisputedly, as could be seen from the material on record, in response to the show cause notice issued by the Transfer Pricing Officer the assessee had specifically submitted that there is no arrangement or agreement with the overseas A.E. for incurring AMP expenditure. It is also apparent the expenditure was wholly and exclusively incurred for marketing assessee's own products and the payment was made to third parties in India. Therefore, it is outside the purview of international transaction as defined under section 92B of the ACT. As could be seen, the Transfer Pricing Officer ignoring the submissions made by the assessee had assumed that a benefit has accrued to the overseas A.E. on account of AMP expenditure incurred by the assessee. The learned Commissioner (Appeals) has upheld the adjustment / addition proposed by the Transfer Pricing Officer simply relying upon his order passed in assessee's own case for assessment year 2005–06. Notably, while deciding assessee's appeal for assessment year 2005–06 the Tribunal vide order passed in ITA no. 5470/Mum./2012, dated 18th May 2016, has decided the issue in favour of the assessee holding as under:-

“3.4. We have heard the rival submissions and perused the material before us. Before proceeding further, it would be useful to understand the philosophy and to consider the historical background of the TP provisions. It is said that the purpose and object of introduction of the provisions contained in Chapter X is to prevent an assessee from avoiding payment of tax by transferring income yielding assets to non-residents even while retaining the power to enjoy the fruits of such transactions i.e. the income so generated. As a concept, it is not totally a new idea. A reference to the provisions of section 42(2) to the Indian Income Tax Act, 1922, could be made in this regard-as it was a somewhat similar section and dealt with the trans-border transactions. The provisions of the said section broadly provided that where a nonresident carried out business with the person resident in the taxable territory and it appeared to the AO that on account of a close connection between such

persons the business was so arranged that the business conducted by the resident with the nonresident either yielded no profit or, less than ordinary profit, which may be expected to arise in that business then, the AO was empowered to tax profits which were derived or which may reasonably be deemed to be derived from the business in the hands of a person resident in the taxable territory. Thus, it can safely be concluded that TP provisions were part of tax administration even during the 1922 Act days though at infancy stage. The present provisions were been incorporated vide Finance Act,2001.Same were further amended vide Finance Act,2002 and are being amended from time to time to meet the new challenges thrown up by the dynamism of the current commercial and business realities. Having regard to the object for which provisions have been enacted, applicability of the said provisions has to be limited to situations where there is diversion of profits out of India or where there may be erosion of tax revenue in intra group transaction. So, intra-group transaction is the first pre-condition for invoking the TP provisions. Calculation of ALP is the next and logical step. But, if the first step itself is missing, the AO cannot go to the second stage. In other words, the AOs cannot climb the second storey of a building without reaching to the first storey if the existence of an IT and calculation of ALP can be compared with a double storeyed building.

3.4.1. We find that the assessee is the market leader of the chocolate market in India, that it was commanding 70% of the market share in the year under appeal, that it had debited AMP expenses, amounting to Rs.85.15crores to its P& L a/c,that the net turnover of the assessee was of Rs.766.21crores,that it was 11.11% of the sales recorded by the assessee during the year, that it had also paid royalty amounting to Rs.13.56 crores for the same period, that the TPO computed Rs.1.52 crores(1.78%) as the cost apportioned/allocable out of the A&M cost incurred by the assessee for the benefit accruing to the AE, that he restricted the cost to Rs.71 lakhs(being0.87% of Rs.85.15crores)in view of the disallowance/ adjustment in income made on account of royalty for trade mark, that the average AMP expenditure by the leading FMCG companies for the period 2001-05 was 10.28%,that the AMP expenditure incurred by the assessee during the same period was 10.45%,that the assessee had contended that its profitability(PBT to sales ratio) @10.85%was much higher compared to the average profitability of the comparables at the rate of 3.57%,that the FAA had held that higher rate profitability could not be a justification of this proportionate expenditure, that in the appellate proceedings the FAA had proposed further addition, that finally he upheld the order of the TPO and confirmed the addition of Rs.71 lakhs, that there was no contractual obligation to recover money from the AE, that it was separately paying royalty

for use of brand and trademark. There is no reason for not holding that the increased AMP expenditure led to enhanced sales and profitability, that for the purpose of analysing the AMP expenditure incurred by and the comparables it is necessary to consider various factors. If factors like growth rate, nature of business ,number of products launched, territories serviced and turnover/profits achieved have necessarily to be considered for determining the AMP expenses. The entire expenditure was focused on the Indian consumer and it is evident from the local flavour/ language/concepts. It is also an undeniable fact that new players were entering India after liberalisation-era started. If the expenditure incurred by the assessee is considered in the back ground of the growth achieved by it one has to agree with the argument of the assessee that it made rapid progress in the Indian market post liberalisation period and AMP played an important role in it. Here, we would also like to mention that there exists a fundamental and basic distinction between the provisions of section 37 and section 92 of the Act-as the first is expense oriented and the second is pricing oriented. The FAA tried to incorporate the ingredients of Section 37 while dealing with the TP adjustments, when he talked of the,,higher expenditure "and,, justification" of such expenditure. In our opinion, the approach of the FAA was not in accordance with the basic philosophy of TP provisions. In our opinion, it is the assessee who has to decide how much to spend for earning his income. The tax authorities are prevented from entering into the proverbial shoes of the assessee to decide the justification of the expenditure. The Act stipulates that in certain conditions only the so called higher expenditure can be questioned. The FAA had not proved that the expenditure incurred by the assessee for advertisement etc. was covered by those sections. If it was the case then the transaction would not fall under section 92 of the Act. Therefore, in our opinion he had adopted a totally incorrect approach, while dealing the allowability of AMP expenditure.

3.4.2. We further hold that the claim of the assessee is factually correct that it had incurred the AMP expenditure for creating product awareness and to recall the value of existing products and that it had a local marketing strategy of making advertisement/slogans in the local language. In our opinion, KUCH MEETHA HO JAY campaign proves the claim made by the assessee. The TPO had ignored the fact that films/TV advertisements of the assessee had the local messaging concept. Such local advertisement campaigns can never be held to be driven towards serving the interests of the AE. It is also a fact that new multinational players in the industry had entered the Indian market. The commercial wisdom of any assessee, in such a situation, would compel it to be innovative and to spent reasonable expenditure for maintaining its position in

the market. The TPO/FAA had not controverted the fact that the AE was the owner of intellectual property of the „Cadbury” brand and that it was responsible for promoting the brand all over the globe and that the brand related exercise at the cost of the AE for the overall brand positioning and management benefited the assessee also in an indirect manner. Nothing has been brought on record to prove that the assessee was directly or indirectly promoting the global brand rather than promoting its own products. In our opinion, there exists a fine but very important distinction between products promoted and nurtured by an assessee and the brand owned and supported by its AE. In the modern world both exist and play different and specified roles. Therefore, until and unless some -thing positive is brought on record about sharing/incurred AMP expenditure under the head by an assessee on behalf of its AE, it cannot be held that it should have recovered some amount from the AE as the expenditure by it indirectly helped in augmenting the brand value owned by its overseas AE. In the case under consideration, the assessee was incurring expenditure for its products whereas the AE was looking after the ground at global level. If the AMP expenditure incurred by them benefited indirectly in the local/ international market it would not mean that it was an IT. The basic purpose of introducing the various provisions of chapter X, as stated earlier, was to prevent tax evasion in the transactions undertaken between an Indian entity and its overseas AE. In our opinion, a perceived/notional indirect benefit to the AE, due to incurring of certain expenditure by an assessee in India, is not covered by the TP provisions. It is a fact that the payment under the head AMP expenditure was made to third parties and that those parties were located in India.

3.4.3. We find that in the cases of Maruti Suzuki (supra), Whirlpool India (supra), Bausch & Lomb Eyecare (India) Pvt. Ltd. (ITA 643 of 2014 of Hon'ble Delhi HC), the issue of AMP expenses had been deliberated upon extensively and each and every argument raised by the TPO/DRP have been analysed thread bare. We would like to reproduce relevant portion of the judgment of Bausch & Lomb Eyecare (India) Pvt. Ltd. (supra) and same reads as under:

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

pricing adjustment envisages the substitution of the price of such international transaction with the ALP.

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

55. Section 928 defines 'international transaction' as under:

"Meaning of international transaction. 928.(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 nonresidents; 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 anyone or more of such enterprises. (2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes 'of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to' the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise."

56. Thus, under Section 92B(1) an 'international transaction' means- (a) a transaction between two or more AEs, either or both of whom are non-resident (b) the transaction is in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, incomes or losses of such enterprises, and (c) shall include a mutual agreement or arrangement between two or more AEs for allocation or apportionment or contribution to the any cost or expenses incurred or to be

incurred in connection with the - benefit, service or facility provided or to be provided to one or more of such enterprises.

57. Clauses (b) and (c) above cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of BLI is "any other transaction having a bearing" on its "profits, incomes or losses", for a 'transaction' there has to be two parties. Therefore for the purposes of the 'means' part of clause (b) and the 'includes' part. of clause (c), the Revenue has to show that there exists an 'agreement' or 'arrangement' or 'understanding' between BLI -and B&L, USA whereby BLI is obliged to spend excessively on AMP in order to promote the brand of B&L, USA. As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i) (a) to (e) to Section 92B are described as an 'International transaction'. This might be only an illustrative list, but significantly' it does not list AMP spending as one such transaction. 58. In Maruti Suzuki India Ltd. (supra), one of the submissions of the Revenue was: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for the same has been paid or remains payable or there is a mutual agreement to not charge any compensation for the service or benefit. "This was negated by the Court by pointing out; "Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to Section 92F (v), which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means', part and the 'includes' part of Section 928 (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC."

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

Acquisition of Shares and Takeovers) Regulations, 1997. In. para 44, it was observed as under:

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

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

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

62. In the present case, the mere fact that B&L, USA through B&L, South Asia, Inc holds 99.9% of the share of the Assessee will not ipso facto lead to the conclusion that the mere increasing of AMP expenditure by the Assessee involves

an international transaction in that regard with B&L, USA. A similar contention by the Revenue, namely the fact that even if there is no explicit arrangement, the fact that the benefit of such AMP expenses would also encure to the AE is itself self sufficient to infer the existence of an international transaction has been negatived by the Court in Maruti Suzuki India Ltd. (supra) as under:

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

70. What is clear is that it. is the 'price' of an international transaction which is required to be adjusted: The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an adjustment had 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 herein before, what the Revenue has sought to do in the present. case is to resort to a quantitative adjustment by first determining whether the AMP spend of the Assessee on application of the BLT, is excessive, thereby evidencing the existence of an international transaction

involving the AE. The quantitative determination forms the very basis for the entire TP exercise in the present case.

74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to Section 928 of the Act. The problem does not stop here. Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?

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

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

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

65. *As already mentioned, merely because there is an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of the foreign AE. As mentioned-in- Sassoon -J David-(supra)- "the—fact that- somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being 'allowed by way of a deduction under Section 10 (2) (xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law". Considering the facts-like absence of an agreement between the assessee and the AEs. for sharing AMP expenses ,payment made by the assessee under the head AMP to the domestic parties, failure of the TPO prove that expenses were not for the business carried out by the assessee in India-and following the judgments of the Hon"ble Delhi High Court delivered in the case of Bausch and Lomb(India)Pvt.Ltd(supra),we are of the opinion that the transaction-in -question was not an international transaction and that the TPO had wrongly invoked the provisions of Chapter X of the Act for the said transaction.*

3.4.4. *With regard to the submissions of the AR that the issue of AMP should be restored back to the file of the AO, we want to mention that law as a concept is supposed to evolve with passage of time-it cannot be static always. Non availability of a particular decision of the higher forum cannot justify the restoration of issue/cases to the file of AO in each and every case. Unnecessary litigation has to be avoided and issues have to be settled for once and all.We are of the opinion that after the judgments of Maruti Suzuki and Bausch & Lomb (supra)there is no scope of any other interpretation about the AMP expenditure. In the case under consideration, the AO/TPO has not brought anything on record 5470 & ors.cadbury 21 that there existed and agreement, formal or informal, between the assessee and the AE to share/reimburse the AMP expenses incurred by the assessee in India. In absence of such an agreement the first and primary precondition of treating the transaction-in-question an IT remains unfulfilled. Conducting FAR analysis or adopting an appropriate method is the second stage of TP adjustments. The first thing is to find out whether the disputed transaction in is IT or not. Without crossing the first threshold second cannot be approached, as stated earlier. In the case under consideration, we are of the opinion that*

AMP expenditure is not an IT and therefore we are not inclined to restore back the issue to the file of the AO. Considering the facts and circumstances of the case under consideration, we are of the opinion that the FAA was not justified in upholding the order of the TPO. Therefore, reversing his order, we decide second ground in favour of the assessee.”

15. Facts being identical, respectfully following the aforesaid decision of the Co-ordinate Bench in assessee’s own case, we delete the addition made by the Assessing Officer towards transfer pricing adjustment on account of AMP expenditure. Ground raised is allowed. 24. Therefore, respectfully following the above decision of Coordinate Bench in assessee’s own case in turn relying on the decision of Assessment Year 2006-07. These issues are settled in favour of the assessee. Therefore, we are inclined to accept the submission of Ld. AR. Accordingly, these grounds raised by the assessee are allowed.”

24. Therefore, respectfully following the above decision of Coordinate Bench in assessee’s own case in turn relying on the decision of Assessment Year 2006-07. These issues are settled in favour of the assessee. Therefore, we are inclined to accept the submission of Ld. AR. Accordingly, these grounds raised by the assessee are allowed.”

10. Respectfully following the above decision of the co-ordinate bench, we hold that the decisions made by the TPO / AO towards transfer pricing adjustment on account of AMP expenditure be deleted. Accordingly, these grounds raised by the assessee are allowed.

Disallowance o payment of royalty on technology paid to Cadbury Adams USA LLC, to Cadbury Enterprises Pte Ltd and Cadbury Schweppes Asia Pacific Pte Limited (now merged with Cadbury Enterprises Pte Ltd) – Ground Nos.19 to 24

11. During the year under consideration, the assessee has paid a royalty of Rs.1.77 crores to Cadbury Adams LLP, USA for the use of trademark related to

Halls Brand and other licensed products. The assessee has entered into an agreement with Cadbury Adams LLC, USA dated 01/06/2006 for payment of royalty at 2.7% of the relevant sales. Further, the assessee has entered into a deed of amendment dated 24/12/2007 whereby the original deed entered by the assessee for payment of royalty at 2.7% was sought to be amended to incorporate the technical know how technology also. The TPO noticed that Cadbury Adams LLC, USA was only a special licensor of the trademark of Halls and what it owned was only the trademark and not the technical know how and technology in the licensed product. Accordingly, the TPO was of the view that the rate agreed between the parties is excess and that the royalty for trademark at a rate of more than 1% cannot be allowed. The TPO also relied on its own order for A.Y. 2010-11 where he allowed only 1% towards royalty on trademark. Accordingly, the TPO made an adjustment of rs.1,82,76,605/- towards TP adjustment. The DRP upheld the disallowance. The TPO also made similar adjustment towards royalty paid to Cadbury Enterprise Pte Ltd and Cadbury Schweppes Asia Pacific Pte Limited (now merged with Cadbury Enterprises Pte Ltd)

12. The Ld.AR submitted that the agreements for payment of royalty for use of trademark has been entered into in the years 2005, 2006 & 2007 with the above entities and the issue of TP adjustment towards payment of royalty is arising in assessee's case from A.Y. 2006-07. The Ld.AR brought to our attention that the co-ordinate bench of the Tribunal has been consistently holding the issue in favour of the assessee. The Ld.DR relied on the order of the lower authority.

13. We heard the parties and perused the material on record. The co-ordinate bench in assessee's own case for A.Y. 2009-10 (supra) has considered the issue of payment of royalty on technology to Cadbury Adams USA LLC, to Cadbury Enterprises Pte Ltd and Cadbury Schweppes Asia Pacific Pte Limited (now merged with Cadbury Enterprises Pte Ltd) and held that –

“10. Considered the rival submission and material placed on record. We notice from the records that the identical ground has already been decided by the Coordinate Bench of ITAT in ITA No. 7539/Mum/2012 for AY 2008-09 in assessee's own case on merits. For the sake of clarity, the same is reproduced below:-

With regard to disallowance of payment of royalty on trademarks paid to Cadbury Schweppes Overseas Ltd

3.3.2 It is admitted position that the issue stood squarely covered in assessee's favor by the decision of this very bench in assessee's own case for AY 2006-07 wherein the matter has been concluded in the following manner: -

7. We have considered rival submissions and perused materials on record. As could be seen from the order of the Transfer Pricing Officer, he has determined the arm's length price of royalty payment on trademark to SCOL at zero. In other words, he has disallowed royalty payment on trademark at 1% while allowing royalty payment on technical knowhow at 1.25% of net sales. The reasoning on which the Assessing Officer has denied royalty payment on trademark are basically that as per the terms of earlier agreement approved by the Government, the assessee can pay royalty for technical knowhow at the maximum rate of 2%, whereas, the assessee has paid royalty both for technical knowhow and trademark aggregating to 2.25%. He has also referred to the Press Note issued by the Government clarifying that royalty payment cannot exceed 2% and further the royalty payment for technical knowhow subsumes royalty payment for trademark. In this context, the Transfer Pricing Officer has also referred to similar dispute arising in the preceding assessment years. It is evident that the learned Commissioner (Appeals) has upheld the disallowance of royalty payment of trademark simply relying upon the order passed by him in assessee's own case for assessment year 2005–06. As could be seen from the material available on record, the assessee has entered into agreement

with its current company in the year 1993, for availing technical knowhow for which it was required to pay royalty @ 2%. Subsequently, the assessee has entered into fresh agreements with the parent company for transfer of technical knowhow as well as use of trade mark for which assessee is required to pay royalty @ 1.25% and 1% of the net sales respectively. As could be seen from the materials placed on record, the payment of royalty for technical knowhow @ 1.25% has been approved by the Ministry of Commerce and Industry, Government of India, vide letter dated 14th September 2000 (copy is placed at Page-85 of the paper book). Similarly, payment of royalty for trademark @ 1% has been approved by the Reserve Bank of India, vide letter dated 25th June 2001, copy at Page-119 of the paper book. Thus, as could be seen, payment of royalty for trademark at 1% over and above the royalty paid at 1.25% for technical knowhow has been approved by the Reserve Bank of India. Though, the Transfer Pricing Officer has relied upon Press Note dated 3rd January 2002, to observe that in case of technology transfer payment of royalty subsumes the payment for royalty for use of trademark, however, in a subsequent Press Note issued by the Ministry of Commerce and Industry, Government of India, vide no.5(5)/2003-FC, dated 24th June 2003, has permitted royalty payment up to 8% on export sales and 5% on domestic sales. It is also relevant to note, the fact that the royalty paid by the assessee @ 2.25% both for technical knowhow and trademark is lesser than the royalty paid by other comparables and even group companies has not been disputed either by the Transfer Pricing Officer or by the learned Commissioner (Appeals). It is also relevant to note, identical dispute relating to payment of royalty for trademark at 1% over and above royalty paid for technical knowhow at 1.25% and its allowability came up for consideration before the Tribunal in assessee's own case for assessment year 2002-03 to 2005-06. While deciding the issue in the aforesaid assessment years, the Tribunal held that the payment of royalty on trademark to CSOL at 1% of sales is allowable and at arm's length. In fact, decision of the Tribunal has also been accepted by the Revenue. In this context, we may refer to the relevant observations of the Tribunal while deciding identical issue in assessee's own case for assessment year 2005-06, in ITA no.5470/Mum/2012, dated 18th May 2016, which is as under: – "2.3. We have heard the rival submissions and perused the material before us. We find that while deciding the appeal for AY 2002-03(supra) the Tribunal has decided the issue as under:-

“37. We have heard the detailed arguments from both the sides. The basic issue is the correctness of ALP on the royalty payments made by the assessee company to its parent AE on account of technical knowhow and trademark usage.

38. From the arguments of the DR, made on behalf of the TPO, the agreement for paying royalty on technical know-how at 1.25% and trademark usage at 1.25%, were overlapping and thus, TNMM method used by the assessee was incorrect. According to the TPO, the best method to ascertain ALP in the interest case was CUP, as the transactions were controlled. This was reasonable, as no data was available from independent source to benchmark the transactions.

39. On going through the records and the orders of the revenue authorities, we find that in so far as the payment of royalty on technical knowhow concerned, the assessee has been paying to its parent AE right from 1993, as, other group companies are paying across the globe. It has been accepted by the TPO that the payment does not effect the profitability of the assessee, if we are to examine the issue from that angle as well. In any case the payment of royalty on technical knowhow is at par with the similar payments from the group companies in other countries & region. Besides this, the payment is made as per the approval given by the RBI and SIA, Government of India. Hence there cannot be any scope of doubt that the royalty payment on technical knowhow is not at arm's length.

40. Coming to the issue of royalty payment on trademark usage, we find that the assessee, in fact is paying a lesser amount, if the payments are compared with the payments towards trademark usage, by the other group companies using the Brand Cadbury in other parts of the world. On the other hand, if we examine the argument taken by the TPO with regard to OECD guidelines. On this point the assessee's payment is coming to a lesser figure, as discussed in detail by the CIT(A).

41. We are not going into the arguments advanced by the DR/TPO on geographical differences, and payments made to Harshey, as these arguments gets merged in the interpretation and details available in the table supplied by the assessee and taken note of by the TPO and the CIT(A).

42. *We are also not referring to the case of Maruti Suzuki Ltd. as we find that in so far as the instant case is concerned, there is really no relevance.*

43. *On the basis of the above observations, we are of the opinion that the royalty payment on trademark usage is within the arms' length and does not call for any adjustment."*

Respectfully, following the above order, and the order for subsequent AY.s we decide the Ground of Appeal No.1 in favour of the assessee."

8. *There being no difference in factual position in the impugned assessment year, respectfully following the consistent view of the Tribunal on identical issue in assessee's own case as referred to above, we hold that the royalty payment on trade mark to SCOL @ 1% of net sales is at arm's length, hence, no further adjustment is required. Accordingly, we delete the disallowance made by the Assessing Officer. Ground raised is allowed.*

Respectfully following the aforesaid view of Tribunal in assessee's own case, we delete the impugned adjustment of Rs.1300.22 Lacs as made by Ld. AO in the final assessment order. Nothing has been shown to us that the aforesaid ruling is not applicable to the year under consideration. Ground No.3 stand allowed.

With regard to disallowance of payment of royalty on on technology paid to Cadbury Adams USA LLC

3.4.2 *We find that this issue is covered by the decision of this Tribunal for AY 2006-07 wherein it has been held as under: -*

22. *We have considered rival submissions and perused materials on record. Undisputedly, the assessee has paid royalty to CAUSA @ 2.7% of net sales as per the agreement executed on 1st June 2006. It is the claim of the assessee that the payment of royalty is for use of trademark as well as technical knowhow. However, the Transfer Pricing Officer after examining the agreement between the assessee and CAUSA has opined that the agreement only provided for use of trademark and it does not provide for use of technical knowhow. It is the say of the Transfer Pricing Officer that since as per the Government guidelines, payment of royalty on trade mark under the automatic route is fixed at the maximum rate of 1%. Royalty paid for trademark at 2.7% is not at arm's length. Accordingly, he has allowed payment of royalty for trademark at 1%. While doing so, the Transfer Pricing Officer has also observed that the agreement executed in December 2007, amending the terms of the original agreement having come in to existence after expiry of relevant financial year would not be applicable for a transaction undertaken in the relevant financial year. The learned Commissioner (Appeals) has also endorsed the aforesaid view of*

the Transfer Pricing Officer. No doubt, on a perusal of the agreement dated 1st June 2006 between the assessee and CAUSA it appears that the said agreement has been termed as trademark license agreement. However, reading the agreement as a whole and more particularly, Clause-7(b) of the said agreement, it becomes clear the licensee (the assessee) shall manufacture licensed product using any technology of the licensor provided to the licensee in accordance with all specifications and instructions provided by the licensor from time to time. It is not the case of the Revenue that in the relevant previous year assessee has neither manufactured nor sold „Halls“ brand products in India. Thus, it is necessary to ponder whether in absence of necessary technical knowhow/knowledge it would have been possible for the assessee to manufacture the aforesaid products? In our view, the answer would be—No. Further, the assessee and CAUSA have entered into one more agreement on 24th December 2007, amending the terms of the original agreement. As per the aforesaid agreement, certain terms of the original agreement was amended to include licensing / sub-licensing of technology. It is the contention of the learned Sr. Counsel for the assessee that the amendment agreement executed on 24th December 2007, shall operate retrospectively from 1st January 2006, to emphasize this fact, the learned Sr. Counsel for the assessee has sought to produce letter dated 26th April 2016, issued by Mondelez International as additional evidence. From a perusal of the aforesaid letter, it appears that it has been issued to clarify that as per the original agreement executed on 1st June 2006, effective from 1st January 2006, the parties to the agreement intended to transfer and avail technical knowhow / knowledge relating to the licensed product along with trademark. Considering the submissions of the learned Sr. Counsel for the assessee that in subsequent assessment years royalty paid by the assessee @ 2.7% of sales was accepted by the Transfer Pricing Officer, the letter dated 26th April 2016, sought to be produced by the assessee as additional evidence, in our view, is of much significance since it will have a crucial bearing in determining whether CAUSA has authorised the assessee to use technical knowhow along with trademark, hence, is admitted as additional evidence. Even, without taking cognizance of the aforesaid additional evidence, the original as well as amended agreement make it abundantly clear that assessee has also availed technical knowhow from CAUSA. Further, the Departmental Authorities don dispute the genuineness or authenticity of the amended agreement. What they are disputing is the date from which the amended agreement is effective. If the departmental authorities in the subsequent assessment years have allowed payment of royalty both for trademark and

technical knowhow, there is no reason why it should not be allowed in the impugned assessment year, since, it cannot be said that the assessee was manufacturing „Halls“ brand products without obtaining the required technical knowhow. Accordingly, we hold that payment of royalty to CAUSA is at arm“s length. The ground is allowed.

Respectfully following the same, we delete the impugned addition of Rs.87.61 Lacs. Ground No.4 stand allowed.

With regard to disallowance of payment of royalty on on technology paid to Cadbury Enterprises Pvt. Ltd.

3.5.1 It was noted that the assessee entered into Technical collaboration Agreement dated 28/06/2007 with CEPT to avail the benefits of Technical Know-how, trade secrets etc. for mixed fruit flavored and strawberry flavored sugar noncoated center filled bubble gums / chewing gums. Another agreement was entered into with the same entity for Trademarks and copyright licenses in respect of products Bubbalo, Bubba the Cat & Adams. As per agreement, the assessee paid Technical royalty @4% and Trademark Royalty @1%. Applying the same reasoning, it was held that CEPT was authorized to sub-license the rights of the Trademark only and there was no reference to presume that the same included the right to sub-license the Technology and know-how related to the products, an adjustment of Rs.142.51 Lacs was proposed by Ld. TPO. The Ld. DRP, finding the adjustment quite similar to as made for royalty payment to CAUSA, endorsed Ld. TPO“s action.

3.5.2 Since facts as well as reasoning of lower authorities are quite similar as in the case of royalty payment made by assessee to CAUSA, applying the same analogy, we delete the impugned addition. One more reason to delete the adjustment is that the assessee has entered into two separate agreement for payment of Trademark Royalty & Technical royalty and therefore, the matter would stand on a better footing. Hence, Ground No. 5 stand allowed. “

11. Therefore, respectfully following the above decision of Coordinate Bench in assessee’s own case in turn relying on the decision of Assessment Year 2008-09. These issues are settled in favour of the assessee. Therefore, we are inclined to accept the submission of Ld. AR. Accordingly, these grounds raised by the assessee are allowed.”

14. It is noticed that the payment of royalty towards trademark for the year under consideration is based on the same agreement, which is considered by the co-ordinate bench for the assessment year 2009-10. Therefore we are of the view that the issue is covered by the above decision for the year under consideration also. Accordingly, we delete the TP adjustment made by the TPO towards payment of royalty on technology paid to Cadbury Adams USA LLC, and Cadbury Enterprises Pte Ltd. These grounds are allowed in favour of the assessee.

Disallowance of regional service fees paid to Cadbury Enterprises Pte Ltd. Singapore (Cadbury Schweppes Asia Pacific Pte Limited merged with Cadbury Enterprises Pte Ltd) (Ground No.25 to 28)

15. The TPO during the transfer pricing proceedings noticed that the assessee has entered into service agreement dated 21/10/2005 with Cadbury Enterprises Pte Ltd for availing certain services such as business strategy, financial planning and accounting supply chain, co-ordination and planning human resources legally and marketing, etc. The assessee during the year under consideration, had made a payment of Rs.2,89,05,785 towards availing these services where the AE has charged cost plus 5% for providing the services. The TPO was of the view that the nature of services of rendered by AE are not in the nature of on-call services and that the assessee could neither furnish any evidence to show the actual rendering of services nor could show the actual cost incurred by the AE. The TPO applied CUP method and worked out the man-hour rate of the employee on the estimated salary cost of Rs.11,00,000 per month. This estimate of the salary cost by the TPO was based on the increments that may have occurred in foreign

exchange rate, the inflation rate between FY 2009-10 and FY 2010-11. The TPO took the average working days per month at 22 and 8 hour per day. The TPO accordingly determined ALP to be at Rs.6,250 per man-hour. The TPO considered the man hours applied in AY 2010-11 for determination of ALP and since there was a reduction in the cost paid by 57.15% the TPO applied the reduction percentage on the man hours to arrive at 2,035 hours (45.35% of 3700 hours of last year). Thus the ALP was computed for an amount of Rs.1,27,18,750/-. Based on the same the TPO made an adjustment towards the differential amount of Rs.1,61,87,035/- (Rs.2,89,05,785 (-) Rs.1,27,18,750). The DRP confirmed the said TP adjustment.

16. The Ld.AR submitted that the issue is covered by the decision of the coordinate bench in assessee's own case for A.Y. 2009-10 where it has been held that –

“14. Considered the rival submission and material placed on record. We notice from the records that the identical ground has already been decided by the Coordinate Bench of ITAT in ITA No. 7539/Mum/2012 for AY 2008-09 in assessee's own case on merits in which ITAT has restored the matter back to the file of AO with direction to enable the revenue to take a consistent stand in the matter and also to follow the ITAT order for Assessment Year 2006-07. We draw strength from the following decisions in which matter cannot be remanded back when the TPO has failed to follow the prescribed method u/s 92C:-

- i) Kodak India Pvt. Ltd. (2013) 37 taxmann.com 233 (Mum)*
- ii) Barclays Bank PLC vrs. ADIT (90 taxmann.com 378) (Mum)*
- iii) Vedanta Ltd. Vrs. PCIT (ITA 303/2018, C.M.Appl. 10257/2018).*

15. For the sake of clarity, the decision of ITAT in the case of Kodak India Pvt. Ltd. is reproduced below:-

I. Section 92B, read with section 92C, of the Income-tax Act, 1961 - Transfer

pricing -Meaning of international transaction - Assessment year 2008-09 - Assessee, an Indian company sold its medical imaging business to 'C' Ltd. another Indian company for USD 13.543 million - Being domestic transaction, assessee returned its income, disclosing sale transaction as a normal domestic transaction - Assessing Officer found that sale transaction of imaging business by assessee to 'C' Ltd. was pursuant to a larger sale transaction, on global basis, wherein holding company of assessee sold its imaging business to 'C' Inc. i.e., holding company of 'C' Ltd. on global basis - Thus, on suo moto assumption of jurisdiction over impugned transaction, TPO, proceeded to determine ALP -TPO determined ALP, based on worldwide revenue break up amongst countries and concluded that India accounted for 1.4 per cent thereof, which came to USD 32.9 million as against USD 13.54 million shown by assessee - Accordingly, an adjustment of Rs. 79.96 crore was made - Whether since transactions entered into by holding foreign companies and subsidiary Indian companies were independent of each other and there was no international element involved in sale of imaging segment by assessee of its business to 'C' Ltd., authorities below were not justified in invoking transfer pricing provisions in respect of assessee's transaction - Held, yes - Whether, therefore, impugned adjustment made by revenue authorities was to be set aside - Held, yes [paras 49 and 63] [In favour of assessee]

Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price [Others] - Assessment year 2008-09 - Whether while determining ALP of international transactions entered into by assessee, TPO cannot adopt any other method except methods prescribed in section 92C(1) - Held, yes [Para 66]

II. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price [Safe harbour rules] - Assessment year 2008-09 - Assessee had incurred certain expenses on behalf of its AE - As said expenses were to be reimbursed to assessee receipts on account of reimbursement was recovered on cost plus 10 per cent mark up TPO proposed mark up at the rate 12.5 per cent and made an adjustment accordingly- Whether since adjustment sought by TPO and sustained by DRP was falling within margin of +/- 5 per cent as provided by proviso to section 92C(2), same was not sustainable - Held, yes [Para .84] [In favour of assessee]

16. Therefore, respectfully following the above decision of Coordinate Bench which are similar to the facts of present case, we are inclined to accept the submission of Ld. AR. Accordingly, these grounds raised by the assessee are allowed.”

(emphasis supplied)

17. One of the grounds on which the TP adjustment is contested by the assessee is that the TPO has computed the ALP based on an adhoc estimation of salary and the number of man hours. The Ld AR submitted that the TPO has not followed the CUP method but has arrived at the ALP on some estimation. It was further submitted that the determination of ALP cannot be done except under one of the methods as prescribed in section 92C(1) and therefore the TPO's computation of ALP based on adhoc assumptions is not correct. We notice that the TPO while arriving at the ALP has used the estimated salary and also used earlier years man hours to determine the current year man hours spent. In the above decision, the coordinate bench has considered the issue of determination of ALP by the TPO and has held that the TP adjustment is not tenable by relying on the decision in the case of Kodak India Pvt. Ltd (supra) where it is held that –

64. On the other legal issue that whether the TPO was correct to employ an alien method for arriving at the ALP. Once again, relevant section is very clear, which reads,

"The arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe."

65. It is important to take note of the word "shall" used in the section. No doubt that under the General Clauses Act, shall can be used as may or vice versa, but the Hon'ble Supreme Court of India in the case of CIT v. Anjum M.H. Ghaswala, [\[2001\] 252 ITR 1/119 Taxman 352](#), sitting in Constitution Bench explained the exact premise of the word "shall". The case was pertaining to the levy of interest under section 234B on Chapter XIXA of the Income-tax Act, i.e. Settlement Commission. In the decision, the Hon'ble Supreme Court held,

'Nextly, the Commission has elaborately discussed the object of introduction of Chapter XIX-A in the Act, the history behind the introduction and schematic

rationalisation of the provisions of Chapter XIX-A brought about through Finance Act, 1987 to hold that in exercising its power under Chapter XIX-A it has almost an unbridled power to arrive at a settlement. This exercise of purposive interpretation by looking into the object and scheme of the Act and legislative intendment would arise, in our opinion, if the language of the Statute is either ambiguous or conflicting or gives a meaning leading to absurdity. We do not find any such problem in the provisions of the Act to which we have already referred to Sections 234A, 234B and 234C in clear terms impose a mandate to collect interest at the rates stipulated therein. The expression "shall" used in the said Section cannot by any stretch of imagination be construed as "may". There are sufficient indications in the scheme of the Act to show that the expression "shall" used in Sections 234A, 234B and 234C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression as "may".'

66. *By the use of the word "shall", for computing the ALP in one of the following methods, the Legislature has cast an embargo that no seventh method could be adopted by the TPO for computing the ALP. Even the Special Bench of the ITAT in the case of LG Electronics India (P.) Ltd., (supra), in paras 22.10 and 22.11, pages 128 and 129, observes,*

"As regards the contention that methods are tools for determining the ALP, we find that there is dispute that there is no dispute the main purpose of Chapter X is to determine the ALP of an international transaction, but such determination can be done only by way of the methods specified by the statute. When the Legislature has specifically enshrined a provision under section 92C requiring the computation of ALP by any of the prescribed methods, it does not fall in the realm of the TPO or for that matter any other authority to breach such mandate and apply or direct to apply any other method. Going by the dictate of the provision as subsists under sub-section (1) of section 92C, there can be absolutely no doubt on adoption of any single method of those set out in section. Rule 10B has specified a set procedure to be followed for determining the ALP distinctly under the five methods. It is equally not permissible to invent a new procedure and try to fit such procedure within any of the existing procedures prescribed as per these methods. No one is authorized to add one ore more new steps in the prescribed procedure or to substitute any other mechanism with the prescribed under the rule. It is neither possible to invent a method nor to substitute a new methodology in place of the one prescribed in the rule."

67. *We cannot accept the arguments of the DR that the word any has been used in section 92C(1), which could give leeway to the TPO to ascribe to a non-specific method. Word any, is founded on the suffix, "of the following methods being the*

most appropriate method". Therefore, the ambit of the word any in section 92C(1) has been restricted within the precinct of the five specific methods. This gathers strength from the fact that even in the Rules, relevant Rule 10B provides with the similar wordings.

68. Taking into account the clear and unambiguous wordings of the provisions of the Income-tax Act and Rules and respectfully following the decision of the Special Bench in the case of LG Electronics India (P.) Ltd. (supra), we hold that even on this legal issue, the assessee succeeds.

Therefore, respectfully following the above decisions of the co-ordinate bench, we delete the TP adjustment.

Disallowance of Global Service Fee paid to Cadbury Holdings Ltd – Ground Nos. 29 to 31

18. The assessee has entered into service agreement dated 30/12/2008 (with effect from 01/01/2008) for availing services from its AE Cadbury Holding Ltd (CHL) where the services rendered are in the nature of business and commercial strategy and support, executive development, programme development and delivery , internal management, etc. The assessee submitted before the TPO the documents with respect to the said services which are maintained for CHL at global level. The assessee also submitted that the said amounts are being offered to tax by CHL in India and, therefore, there has been no tax based erosion. The assessee further submitted that as per the benchmarking done, the comparable companies earn an average margin of 9.22% on operating cost whereas CHL has charged cost plus 5% for the services provided and accordingly, it was submitted that the transaction is within arm's length price. The TPO rejected the submissions of the assessee and applied CUP method where he has applied the amount / rate of Rs.6,250 to be the arm's length compensation for the services rendered. The TPO

made the TP adjustment based on the man-hours of services rendered by the AE at 3913 hours to arrive at the ALP of Rs.2,44,56,250/- and made the TP adjustment for the difference of Rs.14,56,22,330/-.

19. The Ld.AR submitted that this issue is also covered by the decision of the co-ordinate bench in assessee's own case for A.Y. 2009-10. The Ld.AR further brought to our attention that the assessee raised a Miscellaneous Application with regard to the finding given by the Hon'ble Tribunal in the order 17.02.2021 and that the Hon'ble Tribunal passed the order in M.A. vide order dated 31/08/2021 substituting the earlier finding. The relevant extract of the Tribunal order in M.A. is as given below:-

"3. The contents of misc. application insofar as assessee's Prayer-(a) is concerned, the same is reproduced below:-

Ground 11 to 13 - Transfer pricing adjustment on-account of payment of service fees to Cadbury Holding Limited

7. During the year under consideration, MIFPL has availed services from Cadbury Schweppes Asia Pacific Pte Limited ('CSAPL') (covered by ground no. 8 to 10) and Cadbury Holding Limited ('CHL') (covered by ground 11 to 13).

The Hon'ble ITAT while passing the order for AY 2009-10, allowed payment of service fees by MIFPL to CSAPL (covered by ground no. 8 to 10) stating that;

a. The method followed by TPO for making adjustment was not a method prescribed under the Act.

b. Further relying on the decision of the coordinate bench in case of Kodak India Pvt., Barclays Bank PLC and Vedanta Ltd., it was held that matter cannot be remanded back when the TPO has failed to follow the prescribed method under section 92C. (Refer Para 14 on page 13 of the ITAT order for AY 2009-10)

Since, facts and issues in relation to services availed from CSAPL (i.e. ground no. 8 to 10) and facts and issues in relation to services availed from CHL (i.e. ground 11 to 13) are identical and as both the transactions have been benchmarked by MIFPL using TNMM, findings of ITAT for ground no. 8 to 10 are to be applied for ground no. 11 to 13 as well. The Tribunal has erroneously relied on the order for A.Y. 2008-09, this being a mistake apparent from record may be rectified and the findings given in Para 14 to 16 may be adopted for Ground No. 11 to 13 also.

4. In view of the submissions of the learned Counsel for the assessee and since the mistake being apparent on the face of record, we proceed to rectify the mistakes.

5. The concluding part, vide Para-19 and 20 of grounds No.11 to 13, of the impugned order dated 17th February 2021, passed in assessee's appeal being ITA no.2214/Mum./2014, for the assessment year 2009-10, are hereby substituted and be read as under:-

“19. Having considered the rival submissions and having perused the material on record, we find that the related facts and circumstances of the issue raised by the assessee in the grounds no.11 to 13 of the present appeal is materially identical to the issue decided by us vide grounds no.8 to 11, in Para-14, 15 and 16, wherein we have allowed the issue while following the decision of the Co-ordinate Bench of the Tribunal rendered in Kodak India Pvt. Ltd. v/s ACIT, [2013] 37 taxmann.com 233 (Mum.). Since the issue raised in these grounds no.11 to 13, are identical to the issue decided by us in grounds no.8 to 11 vide Para-14, 15 and 16, as aforesaid, consistent with the view taken therein, we set aside the impugned order passed by the learned CIT(A) and allow these grounds. Thus, grounds no.11 to 13, are allowed.”

We have already held in the earlier part of this order that the determination of ALP without applying any methods as prescribed under section 92C(1) by the TPO is not tenable. We notice that the TPO has computed the TP adjustment towards global services rendered by Cadbury Holdings Limited also in the same way by

applying adhoc estimation of salary cost and man hours. Therefore our decision with respect regional service fee paid to Cadbury Enterprises Pte Ltd., is equally applicable to the current issue under consideration also. Therefore considering the decisions of the coordinate bench in assessee's own case for AY 2009-10 and in the case of Kodak India Private Ltd., (supra) we hold that the TP adjustment towards global services rendered by Cadbury Holdings Limited be deleted.

Disallowance under section 14A – Ground No.33

20. In the statement of income, the assessee has claimed income of Rs.4,99,80,342. The assessee computed a suo motu disallowance of Rs.42,29,990/- in the computation and before the DRP revised the disallowance to Rs.3,44,215/- under section 14A of the Act. The Assessing Officer issued a show cause notice requiring the assessee to explain as to why disallowance under section 14A read with rule 8D should not be made. The assessee submitted before the Assessing Officer that the investments are made out of surplus funds available with the assessee and that the assessee did not borrow any funds in order to make investments. Accordingly, the assessee submitted that no borrowings cost is incurred by the assessee. The Assessing Officer did not accept the submissions of the assessee and proceeded to compute the disallowance as below:-

“(Amount in Rs.)

1	<i>Amount of expenditure directly relating to exempted income</i>		3,44,215/-
2	<i>A X B</i> ----- <i>C</i>		
	<i>A= Interest</i>	3,38,94,979/-	
	<i>B= Average Value of Investment</i>	84,659,97,500/-	
	<i>C=Average Value of Total Assets</i>	14,48,07,70,000/-	

	<i>Interest not directly relating to any particular income or receipt</i>		19,80,217/-
3	<i>Amount equal to half percentage of Average value of investments income of which does not form part of total income [As per rule 8D(2)(iii)]</i>		42,29,988/-
	Aggregate of 1+2+3		65,54,420/-

As mentioned earlier, the assessee has suo-moto disallowed Rs.42,29,990/- in the computation of income. In view of the above, additional sum of Rs.23,24,430/- (65,54,420 – 42,29,990) was added u/s 14A r.w Rule 8D of I.T. Rules, 1962.”

21. The Id AR submitted that the assessee has made the investments out of its own funds which is substantiated by the financial statements for the year ended 31.03.2011 and accordingly the assessee has not incurred any borrowing cost warranting disallowance under section 14A. The Ld.AR submitted that the issue of disallowance under section 14A is considered by the co-ordinate bench in assessee's own case or A.Y. 2009-10 and Hon'ble Tribunal remitted the issue back to the Assessing Officer. It is brought to our notice that the Assessing Officer, in the order giving effect deleted the disallowance made under section 14A. The Ld.AR therefore submitted that the Assessing Officer by deleting the entire disallowance in the order giving effect for A.Y. 2009-10 has accepted the suo moto disallowance made by the assessee which was arrived at based on the salary of employees in treasury department. Therefore, the Ld.AR prayed that the revised suo motu disallowance which is computed on the same basis should be sustained.

22. We heard the parties and perused the material on record. It is now a settled position that when the own funds are available, no disallowance is warranted under section 14A read with rule 8D. For the year under consideration, the reserves and

surplus of the company as on 31/03/2011 is at Rs.89,988.09 lakhs and the investments made stands at Rs.12,881.07 lakhs, therefore, we see merit in the contention of the Ld.AR that no disallowance is warranted under section 14A. Further, the co-ordinate bench in assessee's own case for A.Y. 2009-10 had also held that –

“31. Considered the rival submission and material placed on record. We notice from the records that the identical ground has already been decided by the Coordinate Bench of ITAT in ITA No. 7539/Mum/2012 for AY 2008-09 in assessee's own case on merits. For the sake of clarity, which is reproduced below:-

5.1 During assessment proceedings, it transpired that the assessee earned exempt income of Rs.16.18 Crores which mainly comprised-off of dividend on mutual funds. The assessee, inter-alia, submitted that Rule 8D was not applicable to year under consideration. It was also submitted that assessee's surplus funds were invested in Liquid Mutual Fund and the same were withdrawn as per business requirements. The attention was also drawn to the fact there were two persons in the Treasury department to manage mutual funds investment on regular basis and the total salary paid to them was Rs.9.20 Lacs therefore, a part of the same could be disallowed. The arguments were also raised to submit that investments were made out of reserves and surplus. However, not satisfied, Ld. AO, applying Rule 8D, worked out aggregate disallowance of Rs.233.04 Lacs which comprised-off of direct disallowance u/r 8D(2)(i) for Rs.9.20 Lacs, interest disallowance u/r 8D(2)(ii) for Rs.80.56 Lacs and indirect expense disallowance u/r 8D(2)(iii) for Rs.143.28 Lacs. The direct expense disallowance u/r 8D(2)(i) for Rs.9.20 Lacs is the same disallowance which has been offered by the assessee against Treasury department expenses. The disallowance, upon confirmation by learned DRP, is under appeal before us.

5.2 The arguments of Ld. Sr. Counsel are two-fold viz. (i) Ld. AO has not recorded requisite satisfaction before proceeding to compute disallowance as per Rule 8D; (ii) The assessee had surplus funds to make the investments and therefore, the

presumption that the investments were out of surplus funds stood in assessee's favor by the judgments of Hon'ble Bombay High Court rendered in in HDFC Bank Ltd. V/s CIT (2016 95 CCH 61) & CIT V/s HDFC Bank Ltd. (2014 366 ITR 505). 5.3 We have considered the same. Upon perusal of financial statements, we find that own funds in the shape of share capital & free reserves at yearend stood at Rs.46266.97 Lacs as against investment of Rs.31228.98 Lacs. Nothing has been brought on record by Ld. AO to establish the nexus of investments with borrowed funds. In fact, opening investments stood at Rs.26663.91 Lacs and the assessee earned profit after tax for Rs.15094.68 Lacs during the year under consideration which is more than incremental investments. Therefore, applying the ratio of cited decisions, we hold that no interest disallowance would be justified on the facts and circumstances. We order so. So far as the disallowance of direct / indirect expenses is concerned, we are of the view that since Rule 8D was applicable to this AY, the findings given in earlier orders of Tribunal would not apply to this year and the disallowance has to be worked out in terms of the Rule 8D. The Ld. AO, in draft assessment order, at para 6.4, has noted that the submissions made by assessee in defense of suo-moto disallowance could not be accepted as against the submissions of the Ld. Sr. Counsel that the requisite satisfaction was not recorded by Ld. AO before proceeding to apply Rule 8D. We are of the considered opinion that there was no particular method of recording satisfaction in the quantum assessment order and therefore, unable to accept this specific plea of Ld. Sr. Counsel. However, keeping in view the factual matrix as well as submissions made before us, we deem it fit to restore the matter of direct / indirect expense disallowance to the file of Ld. AO for re-adjudication in the light of suo-moto disallowance offered by the assessee. As held earlier, no interest disallowance would be justified, keeping in view the assessee's financial parameters. Ground No. 14 stand partly allowed.

32. Therefore, respectfully following the above decision of Coordinate Bench in assessee's own case in turn relying on the decision of Assessment Year 2008-09. These issues are settled in favour of the assessee. Therefore, we are inclined to accept the submission of Ld. AR. Accordingly, these grounds raised by the assessee are allowed.

23. Respectfully following the above decision, we hold that no disallowance towards interest is warranted under section 14A r.w.r.8D of the Act. With regard to the contention that the suo motu disallowance we notice that the Assessing Officer in the OGE passed for AY 2009-10 has deleted the disallowance made under section 14A and therefore we see merit in the submission of the ld AR that the suo moto disallowance based on the salary of employees in treasury department is being accepted by the revenue. We therefore remit the issue of verification of direct / indirect expense disallowance to the file of Ld. AO for re-adjudication in the light of suo-moto disallowance offered by the assessee i.e. of Rs.3,44,215/- keeping in mind the fact that for AY 2009-10 the suo motu disallowance based on salary of employees in treasury department has been accepted by the Assessing Officer. Needless to say that the assessee be given an opportunity of being heard. It is ordered accordingly.

Treatment of forex loss on cancellation of contracts as speculative– Ground No.34

24. During the year under consideration, the assessee has claimed a deduction of Rs.1,237.90 lakhs in respect of net foreign exchange losses (profit on foreign exchange fluctuation Rs.74.87 lakhs and loss on account of foreign exchange fluctuation of Rs.1,312.77 lakhs). The assessee submitted before the Assessing Officer that the assessee entered into forward contracts based on estimated raw material requirements as per the production schedule and if the production schedule is delayed, the assessee rolls over / cancels the forward contracts. Towards the rolled over / cancelled forward contracts, the banks levies contract

cancellation charges, i.e. the difference between the forward contract rate and the spot rate as on the date of cancellation of the contract. In cases where the spot rate is lower than the forward contract rate on the date of cancellation, there arises a foreign exchange fluctuation loss on cancellation of forward contracts and vice versa. The assessee submitted that out of the total loss claimed as above, a net loss of Rs.417.51 lakhs is arising out of cancellation of forward contracts during the financial year relevant to assessment year 2011-12 and the same is recognised in the P&L Account. The assessee also submitted that the loss on cancellation of forward contract is arising out of the normal course of business activity and not out of intention to earn more profits and accordingly the same should be allowed as business expenditure. The Assessing Officer did not accept the submissions of the assessee and proceeded to treat the loss as a speculative loss. The Assessing Officer held that foreign exchange derivative transactions are speculative transaction unless it is proved by the assessee that it was covered by any Provisos (a) to (d) to section 43(5). The Assessing Officer further held that the assessee was not able to substantiate that the loss is arising on account of forex derivative transaction and not hedging. The Assessing Officer further held that the assessee did not settled the future contracts but chose to terminate it and, therefore, the loss arising should be a speculation loss. The DRP upheld the disallowance made by the Assessing Officer.

25. The Ld.AR submitted that the issue is covered in favour of the assessee in assessee's own case for A.Y. 2009-10 and the facts being identical for the year under consideration prayed for a similar relief.

26. We heard the parties and perused the materials on record. We notice that the co-ordinate bench in assessee's own case has considered a similar issue for A.Y. 2009-10 and held that –

“33. Before us, Ld. AR brought to our notice para 7.1 to 7.11 of AO order and para 12 of DRP order and submitted that the similar issue has already been decided by the Coordinate Bench of ITAT in the case of London Star Diamond Co. (I) Pvt. Ltd. vrs. DCIT (2013) 38 taxmann.com 338 (Mum-Trib) on merits in favour of the assessee.

34. On the other hand, Ld. DR relied on the orders passed by revenue authorities, however he conceded that this ground is covered by the order of ITAT

35. Considered the rival submission and material placed on record. We notice from the records that the identical ground has already been decided by the Coordinate Bench of ITAT in the case of London Star Diamond Co. (I) Pvt. Ltd. vrs. DCIT (2013) 38 taxmann.com 338 (Mum-Trib) on merits. For the sake of clarity, which is reproduced below:-

35. The subdivisions of the loss of Rs. 4,69,42,680/-: we have already tabulated above the three subdivisions of the impugned losses based on the timing of the cancellation of the FCs. Broadly the loss is divided into two types and the adjudication of the each subdivision of loss is given as under: (a) Loss on Cancellation of Matured FCs amounting to Rs 4,14,88,805/- relates to the FCs cancelled or terminated on or after the due date. In other words, the FCs booked as integral part of the export invoices lived its booking period in full and they were either terminated by the Bank on or after due date of maturity date of the contract as the actual realization were not received in time. These are not premature cancellations by the assessee and therefore, in our considered view, the said loss of Rs 4,14,88,805/-, being related to the FCs which are integral or incidental to the exports of the diamonds, should be allowed as business loss in view of the binding High Court or Tribunal decisions/judgments in the case of D Kishore kumar and Co (supra), Badridas Gauridu Pvt Ltd (supra), Sooraj Muill Magarmull, (supra) etc. Thus, loss arising from cancellation of the matured contracts is

allowed in favour of the assessee. Thus, this part of the ground of the assessee is allowed.

Therefore, respectfully following the above decision of Coordinate Bench that the identical issue is settled in favour of the assessee, we are inclined to accept the submission of Ld. AR. Accordingly, this ground raised by the assessee is allowed.

27. Respectfully following the above decision, we hold that the loss arising from cancellation of forward contracts is arising in the normal course of business and accordingly, should be allowed as a deduction. The disallowance made in this regard is deleted.

Allocation of expenditure at Buddi Unit-I & II – Ground No.35 to 36

28. During the year under consideration, the assessee has claimed a deduction of Rs.129,99,29,723/- under section 80IC of the Act. The break up of the said deduction is as given below:-

1.	Buddi Unit I	Rs.40,09,53,686/-
2.	Buddi Unit II	Rs.89,89,76,037/-

29. During the course of assessment, the Assessing Officer called on the assessee to furnish the break up of the deduction claimed under section 80IC. The Assessing Officer also observed that with respect to expenses claimed against the sale of Buddi Units as compared to expenses against sales of remaining units were disproportionate. Accordingly, the Assessing Officer called on the assessee to explain as to why the expenses should not be allocated proportionately on the basis of sale and the amount of deduction under section 80IC should not be recomputed

accordingly. The assessee submitted before the Assessing Officer that all direct expenses which can be identified have been allocated unit-wise. With regard to the allocation of indirect expenses, the assessee submitted a detailed note on the basis of allocation and also the reason for variations of profits with respect to Buddy units. The Assessing Officer, after considering the submissions of the assessee, was of the view that there was a huge difference in the profitability ratio of 80IC units and non 80IC units, i.e. the profit ratio of Baddi Unit I is 19.40% and Buddy Unit II comes to 15.82% whereas the profit ratio of non 80IC units is only 6.29%. The Assessing Officer did not accept the basis of allocation as done by the assessee and proceeded to re-compute the profitability based on revised allocation of expenses and accordingly, the Assessing Officer arrived at a difference of Rs.6,25,43,786/- with respect to Buddy Unit I and a disallowance of Rs. 21,85,37,371/- with respect to Buddy Unit II. The DRP confirmed the addition mad by the Assessing Officer.

30. The Ld.AR drew our attention to the order of the co-ordinate bench in assessee's own case for A.Y.2009-10 and the M.A. order passed by the co-ordinate bench wherein the Hon'ble Tribunal has upheld the method of allocation of expenses. The Hon'ble Tribunal remitted the issue back to the Assessing Officer for the limited purpose of verification of other overheads and the allocation. The Ld.AR further submitted that the Assessing Officer in the order giving effect had allowed the deduction claimed by the assessee under section 80IC as per the return of income. The Ld.AR, therefore, argued that the Assessing Officer in the earlier assessment year has accepted the basis of allocation done by the assessee for the purpose of allocating indirect expenses and that the assessee for the year under

consideration also has followed the similar method of allocation. Accordingly, it was submitted that the claim of deduction under section 80IC as per the return of income should be allowed for the year under consideration also.

31. We heard the rival submissions and perused the materials on record. From the perusal of statement showing the basis of allocation of expenses to Baddi Unit I and II (page 430 and 431 of paper book) we notice that the Assessing Officer has accepted the allocation of Material cost, employee cost and depreciation. The disallowance is arising out of the allocation of finance cost and the Operating & Establishment expenses (O&E) which the assessee allocated based on the revenue ratio as compared to the total revenue of the assessee. We notice that the coordinate bench in assessee's own case for AY 2009-10 accepted the claim towards finance cost and remitted the issue back to the Assessing Officer only with respect to the verification of allocation of O&E expenses. We further notice that in the OGE the Assessing Officer has allowed the O&E expenses as claimed in the return of income for the purpose of deduction under section 80IC thereby accepting the method of allocation followed by the assessee for allocating O&E expenses. It is also noticed that there is no change in the method of allocation followed by the assessee for AY 2011-12 also. Considering the decision of the coordinate bench and the OGE passed by the Assessing Officer, we delete the disallowance made by the Assessing Officer and hold that the assessee be allowed the deduction under section 80IC as claimed in the return of income.

Addition on account of Annual Information Report – Ground No.37

32. The Assessing Officer noticed that an aggregate income of Rs.7,87,612/- was appearing in AIR information which had not been reconciled by the assessee with respect to books of account. Accordingly, the Assessing Officer made an addition of the said amount and also allowed to claim credit of TDS on the same. On objections raised before the DRP, the DRP deleted the addition to the extent of Rs.5,42,939/- and confirmed the balance amount of Rs.2,45,454/-.

33. The Ld.AR submitted that the addition cannot be made solely based on the information in the AIR. In this regard, the Ld.AR place reliance on Reliance Apex Networks Ltd (ITA No.3531/Mum/2013) and also on Zee Media Corporation Ltd (ITA No.2166/Mum/2016).

34. The Ld.DR submitted that the onus is on the assessee to reconcile the income as per AIR and the books of account which the assessee failed to do so in the given case.

35. We heard the rival submissions and perused the materials on record. Considering the above quoted decisions of the coordinate bench and keeping in view the amount involved, vis-à-vis the total turnover, we see no reason to sustain the addition, we delete the addition made in this regard.

Non grant of MAT

36. The Ld.AR submitted that the MAT credit is carried forward from A.Y. 2010-11 and the credit was modified due to additions made in the assessment order

for A.Y. 2010-11. The Ld.AR further submitted that the Tribunal vide order dated 14th November, 2022 has quashed the assessment for A.Y. 2010-11 as being barred by limitation. It is therefore, prayed that the assessee allowed the MAT credit as per the original return of income filed as has been carried forward from A.Y. 2010-11. After hearing the parties, we are of the view that this issue needs to be factually examined for the purpose of allowing the credit towards carried for MAT credit from AY 2010-11. Therefore, we remit the issue back to the Assessing Officer to examine the status of the assessment order passed for .Y. 2010-11 and accordingly give credit for the carried forward MAT for the year under consideration.

Levy of interest under section 234A

37. The Ld.AR submitted that the assessee has filed the return of income on 30th November, 2011 which fact has been admitted by the Assessing Officer in the assessment order. The ld AR further submitted that accordingly the assessee has filed the return of income before the due date for filing the return of income for A.Y. 2011-12. Considering this fact that there is no delay in filing the return of income, the Ld.AR submitted that no interest can be charged under section 234A.

38. We notice that the Assessing Officer has recorded in the assessment order that the assessee has filed the return of income on 30/11/2011 (refer page 1 para 1 of the assessment order). Therefore, as per the provisions of section 234A, no interest is leviable in assessee's case. Accordingly, the interest levied is deleted.

Levy of Interest under section 234C

39. It is submitted by the Id AR that the Assessing Officer has levied interest under section 234C on the assessed income whereas the provisions of section 234C talks about levy of interest on income returned. We accordingly remit the issue back to the Assessing Officer with a direction to examine the records and re-compute the interest under section 234C as per the provisions of the said section.

40. The appeal for AY 2011-12 is allowed in favour of the assessee.

I.T.A. No.1518/Mum/2017 - A.Y. 2012-13

41. The assessee for the assessment year 2012-13, filed the return of income on 30.11.2011 declaring an income of Rs.172,81,99,840. The case was selected for scrutiny and the statutory notices were duly served on the assessee. The TPO made the following TP adjustment –

Sr.No.	Transaction	Amount (in Rs.)
1.	Disallowance of Advertising and Marketing expenses	1,29,99,370
2.	Disallowance on royalty on technology paid to CEPT	38,74,027
3.	Disallowance of receipt of services from CHL	1,43,40,046
4.	Disallowance of receipt of services from CEPT	13,16,46,960
	Total	144,98,30,403

The DRP confirmed the TP adjustments. The Assessing Officer besides the TP adjustment also made similar disallowance as in AY 2011-12 viz., Disallowance under section 14A, treating foreign exchange loss as speculation and disallowing expenses of Baddi Unit I&II towards deduction claimed under section 80IC.

42. The grounds of appeal raised by the assessee in both the assessment years are tabulated in the earlier part of this order, from which it is clear that the issues arising in AY 2012-13 are similar to AY 2011-12. Considering the fact that the facts being identical our decision with respect to all the issues contended through Ground Nos.2 to 37 are mutatis mutandis are applicable to AY 2012-13 also. Therefore we allow the appeal for AY 2012-13 also in favour of the assessee.

43. In result the appeal for both AY 2011-12 and AY 2012-13 are allowed.

Order pronounced in the open court on 31/07/2023.

Sd/-

sd/-

(VIKAS AWASTHY)	(PADMAVATHY S)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 31st July, 2023

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//Asstt. Registrar / Senior Private Secretary, **ITAT, Mumbai**