**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"K" BENCH, MUMBAI**

**BEFORE SHRI BR BASKARAN, AM &**
**SHRI N. K. CHOUDHRY, JM**

I.T.A. No. 2533/Mum/2022
Assessment Year: 2018-19)

| | | |
|---|---|---|
| Kellogg India Pvt. Ltd<br>Plot No. L2, L3,<br>MIDC Taloja,<br>Raigarh- 410208 | Vs. | ACIT, 15(1)(2)<br>Aayakar Bhavan, New Marin Lines, Mumbai- 400020 |

PAN No. **AAACK1748A**

| | | |
|---|---|---|
| **Appellant**) | : | **Respondent**) |
| **Appellant by** | : | Ms. Hirali Desai/ Mr. Amol Mahajan/ Ms. Hinal Shah, LD. CAs |
| **Respondent by** | : | Vachaspati Tripathi, Ld. CIT (DR) |
| **Date of Hearing** | : | 24.08.2023 |
| **Date of pronouncement** | : | 31.08.2023 |

O R D E R

***Per N. K. Choudhry, JM:***

The Assessee/Appellant herein has preferred this appeal against the order dated 31.07.2022 impugned herein passed by Ld. Commissioner of

Income Tax/National Faceless Appeal Centre {in short 'Ld. Commissioner'} u/s 250 of the Income Tax Act 1961 (in short 'the Act').

**2.** In this case, the Assessee Company claimed to be a wholly owned subsidiary of Kellogg USA and having principal activity of manufacturing and selling of breakfast cereal products in India and neighboring countries. The Assessee company is also engaged in the business of distributing Pringles products in the Indian market. The key product of Kellogg India Pvt. Ltd. includes Chocos, Corn Flakes, Honey Loops Muesli, Oats and Special K. etc.

**2.1** The Assessee, by filling its return of income in original for the Assessment Year under consideration on dated 30.11.2018 had declared its total income of Rs.72,32,70,720/- which was determined at Rs.73,49,49,580/- after adjustment of Rs.1,16,78,865/-. Subsequently, the case of the Assessee was selected for scrutiny under CASS for the determination of following issues:

*(i) Lower amount disallowed u/s. 40(a)(ia) in ITR (Part A-OI) in comparison to audit report.*

*(ii) Claim of large value refund.*

*(iii) Large "any other amount allowable as deduction claimed in Schedule BP of retun.*

*(iv) Large sales promotion expenses vis-a-vis gross receipts:*

**2.2** Accordingly, statutory notices u/s 143(2) & 142(1) of the Act were issued to the Assessee, in response to which, the Assessee submitted details through e-mail on ITBA portal.

**2.3** The AO by perusing financials of the Assessee noticed that during the year under consideration, the Assessee-Company has entered into International transactions as detailed in Form No. 3CEB filed along with return of income and therefore the AO referred the case to the Transfer Pricing Officer as per provisions of section 92CA(1) of the Act for computation of Arm's Length Price qua International Transactions.

**2.4** Subsequently, an order u/s 92CA(3) of the Income-tax Act, 1961 dated 26.07.2021 was passed by the Transfer Pricing Officer/Assistant Commissioner of Income tax -2(3)(1), Mumbai,

wherein the Arm's Length Price was computed at Rs.113,59,72,724/-.

**2.5** In pursuance to the order of Transfer Pricing Officer, the A.O. being agreed with the views taken by the TPO for determining the Arm's Length Price, accordingly framed the draft order u/s 144C of the Income-tax Act, 1961 dated 28/09/2021, and issued to the Assessee proposing the taxable income at Rs.1,87,50,05,741/- after considering the adjustments of Rs.113,59,72,724/- as per TPO order and disallowing meetings and seminar expenses of Rs.58,30,192/- and Repairs to Buildings expenses of Rs.99,32,105/-.

**2.6** The Assessee being aggrieved with the Draft assessment order, preferred objections under section 144C(2) of the Act on 26/10/2021 before the Dispute Resolution Panel-1, Mumbai, who vide order dated 07-06-2022 u/s 144C (5) of the Act, decided the objections raised by the Assessee-Company and in para 12 of its order issued the directions and directed the Assessing Officer to give effect to the said order, and the AO gave effects as recorded in final assessment order .

*5.2 On perusal of the order of the CIT(DRP-1), Mumbai, it is seen that the DRP has dealt the objections raised by the Assessee-Company as under:*

*i. Objection No. 1: Transfer pricing adjustment of Rs.113,19,65,878/- in relation to AMP expenses incurred by the Assessee-Company -Rejected*

*As, the additions on account of Transfer Pricing adjustments of Rs. 113,19,65,878/- in relation to AMP expenses incurred by the Assessee-Company are sustained, Penalty proceedings u/s.274 read with Section 270A of the Income-tax Act, 1961 are hereby initiated for under reporting as a consequence of misreporting of income.*

*ii. Objection No. 2: TPO Transfer pricing adjustment of Rs.40,06,846/- in relation to provision of IT support services -Rejected*

*As, the additions on account of Transfer Pricing adjustments of Rs.40.06,846/- in relation to provision of IT support services are sustained, Penalty proceedings u/s.274 read with Section 270A of the Income-tax Act, 1961 are hereby initiated for under reporting as a consequence of misreporting of income.*

*iii. Objection No. 3. Ad-hoc disallowance of Rs.99,32,105/- of repair to building expenses Allowed*

*iv. Objection No. 4: Ad-hoc disallowance of Rs.58,30,192/ in respect of meetings and seminar expenses – Allowed*

**2.7** The Assessing officer ultimately computed the income the income of the Assessee at Rs. 187,09,22,300/- by making the additions of Rs. 113,19,65,878/- on account of Transfer pricing adjustment qua AMP expenses and Rs. 40,06,846/- qua Transfer pricing adjustment qua IT related services.

**3.** The Assessee being aggrieved against the final assessment order dated 31 July 2022 passed by the AO u/s 143(3) r.w.s. 144(c) of the Act, preferred this appeal and raised 05 grounds of appeal.

**4.** We have heard the parties and perused the material available on record.

**5. Ground no.1** was not pressed by the Assessee, hence needs no adjudication.

**6. Ground no. 3** relates to the upholding of the upward adjustment of Rs. 40,06,846/- was also not pressed being meager amount by the Assessee, hence needs no adjudication .

**7. Ground no 4** pertains to the denial of deduction qua employee's contribution towards Provident Fund and ESIC funds which has been claimed in the return of income, was also not pressed by the Assessee, hence needs no adjudication.

**8. Ground no 5** pertains to the initiating penalty proceedings u/s 270A of the Act, infact is premature, hence needs no adjudication.

**9. Ground no 2** was only disputed and emphasized, which pertains to the making an adjustment of Rs. 113,19,65,878/- to the income of the Assessee on account of advertisement, marketing and promotional expenses (AMP) and selling and distribution expenses. The Assessee has claimed and not refuted by the ld. DR that the identical issue remained a subject matter before the Hon'ble Tribunal in the cases pertains to AY's 2009-10, 2010-11, 2011-12, 2012-13 ,2013-14 and 2014-15 and the Tribunal consistently held that AMP expenditure incurred by the Assessee in India cannot come within the purview of the international transaction.

For clarity the conclusion drawn by the Hon'ble Co-ordinate Bench of Tribunal in the case pertaining to AY 2009-10 (ITA No. 2866/M/2014 decided on 19-07-2019) is reproduced below for ready references and clarity:-

> *6. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Undisputed facts are, the assessee is not merely a distributor of the products manufactured by the AE but the assessee itself manufactures its own products in India under license from the AE. It is also a fact that for marketing and promotion of its manufactured products in India, assessee has incurred AMP expenditure by making payments to third parties in India. Therefore, the basic issue which arises for consideration is, whether the AMP expenditure incurred by the assessee in India can come within the purview of international transaction as defined under section 92B of the Act. In this regard, the contention of the assessee before the Transfer Pricing Officer was, since the assessee has incurred the AMP expenditure for products manufactured and sold by it in India, it does not come within the purview of international transaction. Further, the assessee has also submitted that since there is no arrangement/agreement between the assessee and the AE for incurring such expenditure to promote the brand of the AE, it cannot be said that there is an international transaction relating to AMP expenditure. It is worth mentioning, the Transfer Pricing Officer has also agreed with the assessee that the AMP expenditure was incurred with the third parties in India, hence, do not constitute*

*international transaction. Having held so, the Transfer Pricing Officer has still proceeded to determine the arm's length price of the AMP expenditure on the reasoning that the compensation required in the arrangement between the assessee and the AE for improving the brand intangible of the owner has to be determined. Further, he has observed that the AMP expenditure incurred by the assessee not only benefits the assessee but also the AE in terms of increase in the brand value of Kellogg. Thus, the Transfer Pricing Officer has inferred that there is an arrangement between the assessee and the AE with regard to promotion of the brand of the AE by incurring AMP expenditure. However, he has not provided any factual basis on which he has drawn such inference. By merely stating that there is an arrangement between the assessee and the AE, the Transfer Pricing Officer cannot bring the AMP expenditure within the purview of international transaction. If the Transfer Pricing Officer alleges that the AMP expenditure comes within the purview of international transaction by virtue of an arrangement between the related parties, the burden is entirely upon the Transfer Pricing Officer to demonstrate the existence of such arrangement. A careful reading of the impugned order of the Transfer Pricing Officer does not reveal any such factual basis which can demonstrate the existence of an arrangement between the assessee and the AE for incurring AMP expenditure to promote the brand of the AE. That being the case, the entire approach of the Transfer Pricing Officer in determining the arm's length price of AMP expenditure is fallacious.*

*7. Moreover, there is no doubt that the Transfer Pricing Officer has determined the arm's length price of AMP expenditure by applying BLT method. While doing so, he has heavily relied upon the Special Bench decision of the Tribunal, in LG Electronics India Pvt. Ltd. (supra). Now, it is fairly well established that determination of arm's length price of AMP expenditure by applying BLT method is not valid.In a catena of decisions, the Hon'ble Delhi High Court while disapproving the decision of the Tribunal in L.G. Electronics India Pvt. Ltd. (supra) have held that BLT method is invalid as it is not prescribed in the statute. In this context, we may refer to the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). Following the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra) and various other decisions, different Benches of the Tribunal have also held that in absence of an express arrangement/agreement between the assessee and the AE for incurring AMP expenditure to promote the brand of the AE, AMP expenditure incurred by making payment to third parties for promoting and marketing the product manufactured by the assessee, does not come within the purview of international transaction.*

*8. At this stage, it is relevant to observe, while deciding identical nature of dispute in assessee's own case for the assessment year 2011–12, learned DRP in direction dated 28th December 2015, have deleted the adjustment made by the Transfer Pricing Officer on account of AMP expenditure by recording a factual finding that the Transfer Pricing Officer has failed to demonstrate that there is an agreement/arrangement between the assessee and the AE for incurring AMP expenditure. While doing so, learned DRP has*

*relied upon the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). Thus, viewed in the light of the ratio laid down in the decisions cited by the learned Authorised Representative, including the decision of the Hon'ble Delhi High Court in Martuti Suzuki India Ltd. (supra),* ***it has to be concluded that the AMP expenditure incurred by the assessee in India cannot come within the purview of the international transaction. Hence, the Transfer Pricing Officer has no jurisdiction to determine the arm's length price of AMP expenditure.***

*9. Having held so, it is now necessary to deal with the contention of the learned Departmental Representative to restore the issue to the Assessing Officer for keeping it pending till the issue is settled by the Hon'ble Supreme Court. In our view, the aforesaid contention of the learned Departmental Representative is not acceptable. As per the prevailing legal position, the AMP expenditure incurred by the assessee in India cannot come within the purview of international transaction. That being the case, the adjustment made by the Transfer Pricing Officer cannot survive. Therefore, we do not find any necessity to restore the issue to the Assessing Officer. Grounds are allowed.*

**10.** We further observe that the Hon'ble Co-ordinate Bench of Tribunal in ITA No. 137/M/2018 for AY 2013-14 also dealt with the identical issue and by following the judgment of the Co-ordinate Bench of Tribunal in

Assessee's own cases in AY 2009-10 ( 2866/M/2018 decided on 19 July 2019) deleted the identical addition by concluding as under:-

> ***4.1*** *As rightly pointed out by Ld. AR, this issue stood covered in assessee's favor by the order of coordinate bench of this Tribunal in assessee's own case for AY 2009-10 (lead case on the issue), Cross appeals ITA Nos. 2866 & 2888/Mum/2014 common order dated 19/07/2019 wherein the issue has been decided in assessee's favor by observing as under: -*
>
> > *6. We have considered rival submissions and perused material on record.*
> > ……
> > ……
> > ……
> > ……
> > ……
> > ……
> > ……
> > ……
> > ……
> > ……
> > ……
>
> *The aforesaid decision has subsequently been followed by another coordinate bench in assessee's own case for AY 2011-12 in revenue's appeal ITA No.1906/Mum/2016 and also in assessee's appeal for AY 2012- 13 ITA No. 2314/Mum/2017; common order dated 24/02/2020.*

> ***4.2*** *It was observed by the bench in AY 2009-10 that the assessee was not merely a distributor of the products manufactured by its AE but the assessee itself was manufacturing its own products in India under license from the AE. Further, with a view to market and promote its own manufactured products, the assessee incurred AMP expenditure by making payments to third parties in India. There was no express arrangement / agreement between the assessee and the AE for incurring such expenditure to promote the brand of the AE and therefore, the said transactions would not constitute international transaction relating to AMP expenditure. It was also observed that BLT method as adopted by Ld. TPO was not a valid method to benchmark the transactions. The technical collaboration agreement as referred to by Ld. TPO did not envisage any such express arrangement / agreement between the assessee and its AE and therefore, the same could not support the case of the revenue. Therefore, facts being pari-materia the same, respectfully following the aforesaid decisions of Tribunal in assessee's own case, we delete the impugned TP adjustment against AMP expenditure and allow ground no.1 of the appeal.*

**11.** Respectively, following the decisions of the Hon'ble Co-ordinate Benches of Tribunal, we are inclined to allow the **Ground no 2** raised by the Assessee and consequently the addition of Rs. 113,19,65,878/- is deleted.

**12.** In the result, appeal filed by the Assessee stands partly allowed.

*Order pronounced in the open court on 31.08.2023.*

| | |
|---|---|
| ***Sd/-*** | ***Sd/-*** |
| (**B R BASKARAN**) | **(N. K. CHOUDHRY)** |
| **Accountant Member** | **Judicial Member** |

Mumbai,
Shubham P. Lohar

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)

**ITAT, Mumbai**