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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: September 22, 2015
Decided on: December 23, 2015

\+ **ITA 643/2014**

BAUSCH & LOMB EYECARE (INDIA) PVT. LTD. ..... Appellant
Through: Mr Nageshwar Rao with Mr Sandeep S. Karhail and Mr Aniket D. Agarwal, Advocates.

Versus

THE ADDITIONAL COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. G.C. Srivastava with Mr. Daksh S. Bhardwaj, Mr. Kamal Sawhney and Mr. Raghvendra Singh, Advocates.

WITH

\+ **ITA 675/2014**

BAUSCH & LOMB EYECARE (INDIA) PVT. LTD. ..... Appellant
Through: Mr Nageshwar Rao with Mr Sandeep S. Karhail and Mr Aniket D. Agarwal, Advocates.

Versus

THE ADDITIONAL COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. G.C. Srivastava with Mr. Daksh S. Bhardwaj, Mr. Kamal Sawhney and Mr. Raghvendra Singh, Advocates.

WITH

\+ **ITA 676/2014**

BAUSCH & LOMB EYECARE (INDIA) PVT. LTD. ..... Appellant
Through: Mr Nageshwar Rao with Mr Sandeep S. Karhail and Mr Aniket D. Agarwal, Advocates.

Versus

THE ADDITIONAL COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. G.C. Srivastava with Mr. Daksh S. Bhardwaj, Mr. Kamal Sawhney and Mr. Raghvendra Singh, Advocates.

WITH

\+ **ITA 677/2014**

BAUSCH & LOMB EYECARE (INDIA) PVT. LTD. ..... Appellant
Through: Mr Nageshwar Rao with Mr Sandeep S. Karhail and Mr Aniket D. Agarwal, Advocates.

versus

THE ADDITIONAL COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. G.C. Srivastava with Mr. Daksh S. Bhardwaj, Mr. Kamal Sawhney and Mr. Raghvendra Singh, Advocates.

WITH

\+ **ITA 165/2015 & CM Nos. 3777/2015 & 3778/2015**

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. G.C. Srivastava with Mr. Daksh S. Bhardwaj, Mr. N.P. Sahni and Mr. Nitin Gulati, Advocates.

Versus

BAUSCH & LOMB EYECARE (INDIA) PVT. LTD. ...Respondent
Through: Mr Nageshwar Rao with Mr Sandeep S. Karhail and Mr Aniket D. Agarwal, Advocates.

WITH

41.

\+ **ITA 166/2015 & CM No.3779/2015**

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. G.C. Srivastava with Mr. Daksh S. Bhardwaj, Mr. N.P. Sahni and Mr. Nitin Gulati, Advocates.

Versus

BAUSCH & LOMB EYECARE (INDIA) PVT. LTD. ...Respondent
Through: Mr Nageshwar Rao with Mr Sandeep S. Karhail and Mr Aniket D. Agarwal, Advocates.

AND

\+ **ITA 950/2015**

BAUSCH & LOMB EYECARE (INDIA) PVT. LTD. ..... Appellant
Through: Mr. Nageswar Rao with Mr. Sandeep S. Karhail, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. P. Roy Chaudhuri, Senior Standing counsel with Ms. Laxmi Gurung, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

J U D G E M E N T

% 23.12.2015

Dr. S. Muralidhar, J.

Introduction

1. These are seven appeals, five by the Assessee and two by the Revenue,

under Section 260A of the Income Tax Act, 1961 ('Act'). The Assessment Years ('AYs') involved are 2006-07 to 2010-11.

2. The Assessee's appeals, ITA Nos. 643 of 2014, 675 of 2014, 676 of 2014 and 677 of 2014, are directed against the common order dated 23rd May 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 4924/Del/2011, 6580/Del/2013, 6382/Del/2012 and 3861/Del/2010 for AYs 2006-07, 2007-08, 2008-09 and 2009-10.

3. The Revenue's two appeals, i.e., ITA No.165 of 2015 and 166 of 2015 are directed against the same impugned common order of the ITAT. The seventh appeal, i.e., ITA No.950 of 2015, is by the Assessee and is directed against the order dated 19th June 2015 of the ITAT in ITA No. 471/Del/2015.

Background facts

4. The Assessee, Bausch & Lomb (India) Pvt. Ltd. ('BLI'), formerly known as Bausch & Lomb Eyecare (India) Pvt. Ltd., was incorporated on 30th May 2000 under the Companies Act, 1956. It is engaged in the business of manufacturing and trading of soft contact lenses, eye care solutions and protein removing enzyme tablets (vision-care segment) and distribution of imported products such as Excimer Laser System, cataract machines and intra-ocular lenses (surgical segment).

5. The immediate parent company of the Assessee is B&L South Asia Inc., which holds 99.9% of its equity share capital. The balance 0.01% is held by B&L Opticare Inc., USA ('B&L, USA'). B&L, USA began its operations in

1853 and employs 13,000 employees across its Group companies ('B&L Group') in more than a hundred companies.

6. The Assessee used the trademarks, brand name, logo, brands, processes, technical data and operative quality standard owned by the B&L Group worldwide without making any payment of royalty. B&L, USA did not charge the Assessee for the use of the logo. The Assessee also gets the global research report of the B&L Group free of cost.

The issue

7. The central issue that arises in the present case is whether the advertising, marketing and promotion expenses ('AMP') incurred by the Assessee can be said to be incurred not only for the benefit of the Assessee but also by way of rendering the services of promoting the brand of the foreign associated enterprise ('AE') namely B&L, USA.

8. The case of the Assessee is that its marketing activity is focussed on generating domestic sales for its manufacturing and distribution operations. It is claimed that in the surgical equipment segment, the Assessee's primary customers are doctors who do not go by the brand of the product as much as its utility. It is the Assessee's case that the advertisement and channel discount expenses incurred by it are part of the business model of manufacturer and distributor and have been historically considered as deductible expenditure in its hand under Section 37 of the Act. It is further clarified that in the case of the Assessee there is no subsidy/subvention received by it from its foreign AE.

Report of the TPO

9. The Assessee filed its return for AY 2006-07, declaring income of Rs. 16,85,26 ,980. The return was picked up for scrutiny and notice dated 4th July 2008 was issued to the Assessee by the AO under Section 143(2) of the Act. The AO referred the matter to the Transfer Pricing Officer (TPO) under Section 92CA(1) for determination of the arm's length price ('ALP') of the international transactions stated to have been entered into by the Assessee with its foreign AE.

10. The Assessee submitted its transfer pricing study for the year ending 31st March 2006, which was also examined by the TPO. International transactions under the Vision Care and Surgical Segments were categorized into two sets of transactions. These included import of raw materials and consumables, export and import of contact lenses, import of surgical equipment and accessories, intraocular lenses, warranty and after sales services, training expenses receivable and repair expenses payable. The functions relating to carrying out of sales and marketing, business development and warranty and after sales support were also factored in. The declared international transactions were benchmarked applying Transactional Net Margin Method (segmental) ('TNMM') and determined to be at arm's length. The Assessee's case is that the TP study was not disputed by TPO.

11. On 23rd October 2009, the TPO passed an order in which *inter alia*¸ it was noted that the Assessee had entered into an agreement with its AE, B&L USA, for distribution of the product manufactured by its group companies,

in terms of which the Assessee was required to promote the B&L brand and to develop marketing intangibles for B&L products in India by incurring expenditure on AMP. Relying on a press article dated 19th November 2004 the TPO segregated the AMP expense as an international transaction. He benchmarked the said transaction by applying the BLT. The TPO concluded that the Assessee had developed marketing intangibles for its AE and was in the process of making the intangible even more valuable by incurring huge AMP expenses, bearing risks and using both its tangible assets and skilled, trained man power. The Assessee was described as a limited risk distributor. The TPO held that the AMP expenses did not benefit the Assessee as it had incurred a loss in AY 2006-07. The TPO noted that the Assessee did not receive any reimbursement from its AE for the AP expenses. Further the TPO applied a mark-up of 10% and determined the ALP of the AMP expenses at Rs. 19,59,90,441. This was to be added to the income of the Assessee for the AY in question, i.e., 2006-07. Similarly, additions of Rs. 25.86 crores, Rs. 13.53 crores, Rs. 9.90 crores and Rs. 6.24 crores were made in AYs 2007-08, 2008-09, 2009-10 and 2010-11 respectively including different mark-up percentages determined by the TPO.

The DRP's decision

12. On the basis of the order of the TPO, a draft assessment order was passed by the AO. The Assessee filed its objections thereto before the Dispute Resolution Panel ('DRP'). By an order dated 31st May 2010 the said objections were negatived by the DRP. It was held that the "The computation of AMP sales and the determination of bright line is found to be correct. The mark-up of 10% were show caused to the assessee on

25.09.2009 and then added". The DRP, *inter alia*, found that the TPO had relied on the function analysis and concluded that the Assessee had developed marketing intangibles for the sale in India of the products manufactured by its AE by "incurring huge AMP expenditure".

13. It was further held by the DRP that the TPO has amply demonstrated that the Assessee should have been compensated separately for the said services. This compensation was not reflected in the price paid by the Assessee for the purchase of B&L goods from its AE. The two factors which justified the benchmark adopted by the TPO as noted by the DRP are as under:

(i) The Assessee was promoting the brand of B&L, USA and was developing market intangibles for the products manufactured by B&L, USA;

(ii) It had done so at its own cost and risk "and by investing huge sum in marketing and other selling activities." However, B&L, USA had made no contribution to the total AMP expenditure incurred by the Assessee in developing the brand and assumed no responsibility for developing and defending its trademark and market intangibles in India.

Order of the AO

14. On the basis of the order of the DRP, the AO passed a final order dated 14th June 2010, making additions on the basis of the AMP. Accordingly, the total taxable income determined for AY 2006-07 was Rs.36,45,53,644 as against the disclosed income of Rs.16,85,26,980. Aggrieved by the above

order, the Assessee filed an appeal before the ITAT being ITA No. 3861/Del/2010.

15. For the other AYs 2007-08, 2008-09, 2009-10 and 2010-11 similar orders were passed on the same basis.

Order of the Special Bench of the ITAT

16. At this stage, it is required to be noticed that the Special Bench of the ITAT considered the issue of TP adjustment in relation to AMP expenses incurred by Indian entities for improving the market intangibles for their respective AEs. By a majority of 2:1, the Special Bench of the ITAT in ***LG Electronics India Pvt. Ltd. v. ACIT (2013) 140 ITD 41 (Del)*** adopted the 'Bright Line Test' ('BLT') for determining the existence of an international transaction involving AMP expenses as well as for determining the ALP. It was held that if the expense incurred by the Assessee on AMP was higher than what was incurred by an independent entity behaving in a commercially rational manner, then the TPO would determine whether the said transaction required re-characterisation. If the Assessee failed to supply the details of the value of such international transaction, the onus was on the TPO to determine its ALP it on some rational basis by identifying the comparable domestic cases. It was further held that the initial burden to show that the international transaction with the AE was at ALP was on the Assessee.

Decision in Sony Ericsson

17. The correctness of the decision of the Special Bench of the ITAT in ***LG Electronics*** (supra) was considered by this Court in ***Sony Ericsson Mobile Communications India P. Ltd. v. Commissioner of Income Tax (2015) 374 ITR***

118 (Del). This Court heard a batch of appeals in the aforementioned decision and disposed of, in particular, the appeals concerning the Indian entities who were distributers of products manufactured by their respective foreign AEs including Sony Ericsson Mobile Communications India Pvt. Ltd, Discovery Communications India, Daikin Air-conditioning (India) Pvt. Ltd., Reebok India Company and Canon India Pvt. Ltd.

18. The Court in ***Sony Ericsson*** (supra) explained the features particular to three of the said Assessees, i.e, Sony Mobile Communications India Pvt. Ltd., Reebok India Company and Canon India Pvt. Ltd. In the case of Sony Mobile Communications India Pvt. Ltd., TNMM had been followed. In respect of Reebok India, for the sourcing of goods and exports from India TNMM had been followed, in respect of the royalty paid by the Indian entity to the foreign AE CUP method had been followed, and, for import of apparels and footwear for re-sale the re-sale price ('RP') method had been followed. In the case of Cannon India, the RP method was adopted for import of finished goods for resale.

19. The following questions were addressed by the Division Bench in ***Sony Ericsson*** (supra):

> "(i) Whether the additions suggested by the Transfer Pricing Officer on account of Advertising/Marketing and Promotion Expenses (AMP Expenses' for short) was beyond jurisdiction and bad in law as no specific reference was made by the Assessing Officer, having regard to retrospective amendment to Section 92CA of the Income Tax Act, 1961 by Finance Act, 2012.
>
> (ii)Whether AMP Expenses incurred by the assessee in India can be treated and categorized as an international transaction under Section 92B of the Income Tax Act, 1961?

(iii) Whether under Chapter X of the Income Tax Act, 1961, a transfer pricing adjustment can be made by the Transfer Pricing Officer/ Assessing Officer in respect of expenditure treated as AMP Expenses and if so in which circumstances?

(iv) If answer to question Nos.2 and 3 is in favour of the Revenue, whether the Income Tax Appellate Tribunal was right in holding that transfer pricing adjustment in respect of AMP Expenses should be computed by applying Cost Plus Method.

(v) Whether the Income Tax Appellate Tribunal was right in directing that fresh bench marking/comparability analysis should be undertaken by the Transfer Pricing Officer by applying the parameters specified in paragraph 17.4 of the order dated 23.01.2013 passed by the Special Bench in the case of LG Electronics India (P) Ltd.?"

20. The conclusions of the Division Bench in ***Sony Ericsson*** (supra) are as under:

(i) The Court concurred with the majority of the Special Bench of the ITAT in the LG Electronics case qua the applicability of 92CA(2B) and how it cured the defect inherent in 92CA(2A). The issue concerning retrospective insertion of 92CA(2B) was decided in favour of the Revenue.

(ii) AMP expenses were held to be international transaction as this was not denied as such by the assessees.

(iii) Chapter X and Section 37(1) of the Act operated independently. The former dealt with the ALP of an international transaction whereas the latter deals with the allowability/disallowability of business expenditure. Also, once the conditions for applicability of Chapter X

were satisfied nothing shall impede the law contained therein to come into play.

(iv) Chapter X dealt with ALP adjustment whereas Section 40A(2)(b) dealt with the reasonability of quantum of expenditure.

(v) TNMM applied with equal force on single transaction as well as multiple transactions as per the scheme of Chapter X and the TP Rules. Thus, the word 'transaction' would include a series of closely linked transactions.

(vi) The TPO/AO could overrule the method adopted by the Assessee for determining the ALP and select the most appropriate method. The reasons for selecting or adopting a particular method would depend upon functional analysis comparison, which required availability of data of comparables performing of similar or suitable functional tasks in a comparable business. When suitable comparables relating to a particular method were not available and functional analysis or adjustment was not possible, it would be advisable to adopt and apply another method.

(vii) Once the AO /TPO accepted and adopted the TNMM, but chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would lead to unusual and incongruous results as AMP expenses was the cost or expense and was not diverse. It was factored in the net profit of the inter-linked transaction. The TNMM proceeded on the assumption that functions, assets and risks being broadly similar and once suitable adjustments

have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible.

(viii) The Bright Line Test was judicial legislation. By validating the Bright Line Test the Special Bench in ***LG Electronics Case*** (supra) went beyond Chapter X of the Act. Even international tax jurisprudence and commentaries do not recognise BLT for bifurcation of routine and non-routine expenses.

(ix) Segregation of aggregated transactions requires detailed scrutiny without which there shall be no segregation of a bundled transaction. Set off of transactions segregated as a single transaction is just and equitable and not prohibited by Section 92(3). Set-off is also recognized by international tax experts and commentaries.

(x) Segregation of bundled transactions shall be done only if exceptions laid down in ***CIT v. EKL Appliances Ltd. [2012] 345 ITR 241 (Del)*** are justified. Re-categorisation and segregation of transactions are different exercises; former would require separate comparables and functional analysis.

(xi) Economic ownership of a brand would only arise in cases of long-term contracts and where there is no negative stipulation denying

economic ownership. Economic ownership of a brand or a trade mark when pleaded can be accepted if it is proved by the Assessee. The burden is on the Assessee. It cannot be assumed.

(xii) After the order of the Supreme Court in the *Maruti Suzuki* case, the judgment of the Delhi High Court does not continue to bind the parties. This position was misunderstood by the majority of the Special Bench in the ***LG Electronics Case***.

(xiii) The RP Method loses its accuracy and reliability where the reseller adds substantially to the value of the product or the goods are further processed or incorporated into a more sophisticated product or when the product/service is transformed. RP Method may require fewer adjustments on account of product differences in comparison to the CUP Method because minor product differences are less likely to have material effect on the profit margins as they do on the price.

(xiv) Determination of cost or expense can cause difficulties in applying cost plus (CP) Method. Careful consideration should be given to what would constitute cost i.e. what should be included or excluded from cost. A studied scrutiny of CP Method would indicate that when the said Method is applied by treating AMP expenses as an independent transaction, it would not make any difference whether the same are routine or non-routine, once functional comparability with or without adjustment is accepted.

(xv) The task of arm's length pricing in the case of tested party may become difficult when a number of transactions are interconnected and

compensated but a transaction is bifurcated and segregated. CP Method, when applied to the segregated transaction, must pass the criteria of most appropriate method. If and when such determination of gross profit with reference to AMP transaction is required, it must be undertaken in a fair, objective and reasonable manner.

(xvi) The marketing or selling expenses like trade discounts, volume discounts, etc. offered to sub-distributors or retailers are not in the nature and character of brand promotion. They are not directly or immediately related to brand building exercise, but have a live link and direct connect with marketing and increased volume of sales or turnover. The brand building connect is too remote and faint. To include and treat the direct marketing expenses like trade or volume discount or incentive as brand building exercise would be contrary to common sense and would be highly exaggerated. Direct marketing and sale related expenses or discounts/concessions would not form part of the AMP expenses.

(xvii) The prime lending rate cannot be the basis for computing mark-up under Rule 10B(1)(c) of the Rules, as the case set up by the Revenue pertains to mark-up on AMP expenses as an international transaction. Mark up as per sub-clause (ii) to Rule 10B(1)(c) would be comparable gross profit on the cost or expenses incurred as AMP. The mark-up has to be benchmarked with comparable uncontrolled transactions or transactions for providing similar service/product.

(xviii) The exceptions laid down in ***EKL Appliances Case*** (supra) were neither invoked in the present case nor were the conditions satisfied.

(xix) An order of remand to the ITAT for *de novo* consideration would be appropriate because the legal standards or ratio accepted and applied by the ITAT was erroneous. On the basis of the legal ratio expounded in this decision, facts have to be ascertained and applied. If required and necessary, the assessed and the Revenue should be asked to furnish details or tables. The ITAT, in the first instance, would try and dispose of the appeals, rather than passing an order of remand to the AO /TPO. An endeavour should be to ascertain and satisfy whether the gross/net profit margin would duly account for AMP expenses. When figures and calculations as per the TNM or RP Method adopted and applied show that the net/gross margins are adequate and acceptable, the appeal of the assessed should be accepted. Where there is a doubt or the other view is plausible, an order of remand for re-examination by the AO/TPO would be justified. A practical approach is required and the ITAT has sufficient discretion and flexibility to reach a fair and just conclusion on the ALP.

Impugned order of the ITAT

21. The Assessee then filed appeals being ITA Nos. ITA No. 3861/Del/2010, 4924/Del/2011, 6580/Del/2013 and 6382/Del/2012 for the said four AYs in question. The above four appeals were disposed of by the common impugned order dated 23rd May 2014 by the ITAT.

22. In the impugned order dated 23rd May 2014, in the present case, it was held as follows:

(i) The approach of the TPO and the DRP has been fundamentally changed by the Special Bench of ITAT in ***LG Electronics*** (supra) and therefore, it was desirable that the relevant expenses are verified by the AO. Accordingly, the ITAT set aside the assessment order and remanded the matter to the file of TPO to decide it afresh after giving the Assessee adequate opportunity of hearing.

(ii) As regards the disallowance of intra group support services since according to the ITAT, no evidence was furnished by the AE, the issue was sent back to the file of the TPO.

(iii) To enable the Assessee to produce the evidence in that regard, similar directions were passed in respect of adjustment in relation to the notional interest in respect of outstanding and corporate additions.

Facts for AY 2010-11

23. As far as AY 2010-11 is concerned, in the Assessee's appeal, i.e., 471/Del/2015, the ITAT in its impugned order took note of the decision of this Court in ***Sony Ericsson*** (supra). It restored the matter to the file of AO/TPO for fresh consideration.

24. The ITAT noted the fact that in the earlier exercise by the TPO adopting the BLT, the AMP expenditure has been benchmarked by the Transactional Net Margin Method ('TNMM') and the Assessee had demonstrated that its Profit Level Indicator ('PLI') was 21.23% as compared to 6.19% of the comparables. In the surgical equipment segment, the PLI of the Assessee was 13.81% as against 5.97% of the comparables. The TPO accordingly did

not make any adjustment in regard to the transactions reported by the Assessee.

25. The ITAT also noted that since this Court in ***Sony Ericsson*** (supra) had rejected the applicability of the BLT, it would be appropriate to restore the entire issue to the file of the TPO for benchmarking the AMP functions, keeping in view the decision in ***Sony Ericsson*** (supra). It was clarified that while computing the AMP expenditure, direct selling and distribution had to be excluded. As regards selection of comparables, the ITAT was of the opinion that the whole exercise is to be carried out *de novo*.

Issues urged by the Assessee

26. The issues urged by the Assessee in its appeals for AYs 2006-07 to 2009-10 read as under:

> "(a) Whether Transfer Pricing adjustment on account of Advertisement, Marketing and Promotion ('AMP') expenditure is warranted and justified under the law?
>
> (b) Whether the Tribunal proceeded on unlawful and unjustified presumption(s) relating to existence of an international transaction for AMP expenses and on applicability of principles laid down by the Special Bench in the case of L.G. Electronics India Private Limited vs. Assistant Commissioner of Income Tax (ITA No. 5140/Del/2011) to the facts of the appellant's case without appreciating that the legality and validity of principles laid down in L.G. Electronics (supra) is yet to attain finality, and consequently the directions restoring file to the Transfer Pricing Officer ('TPO') are not fully in accordance with law?
>
> (c) Whether Tribunal erred in setting aside dispute relating to adjustment in relation to AMP expenditure in Appellant's case in terms of the principles laid down by the Special Bench of the

Tribunal in case of L.G. Electronics (supra), when the legality and validity of such principles is disputed before this Hon'ble Court?

(d) Whether AMP expenditure incurred by Appellant for its business cannot be characterized as an 'international transaction' under the Act?

(e) Whether TPO is not empowered to look into the reasonableness, quantum and commercial expediency of AMP expenditure incurred by the Appellant for carrying on its business and cannot deem any portion of such expenditure as being incurred by the Appellant as a result of an arrangement or understanding with the associated enterprises so as to constitute an 'international transaction' under the Act or Income Tax Rules, 1962 ('the Rules')?

(f) Whether the AMP expense incurred by the Appellant wholly and exclusively for the purpose of its business operations in India is fully deductible under the provisions of Section 37(1) of the Act?

(g) Whether re-characterisation of AMP expense as constituting rendition of advertisement and brand promotion services by the Appellant to its overseas associated enterprises is not warranted under the provisions of Act and the Rules?

(h) Without prejudice to the above, whether the alleged deemed international transaction(s) relating to AMP cannot be separately analysed when Vision Care Segment of the Appellant is benchmarked by using Transactional Net Margin Method ('TNMM')?

(i) Without prejudice to the above, whether 'Bright-line test' is not a method recognized under the provisions of Act or Rules for purpose of benchmarking international transactions?

(g) Without prejudice to the above, whether the comparables selected for the application of 'Bright-line test' meet the criteria laid out by the special bench of the Tribunal in case of L.G. Electronics India Private Ltd. vs. Assistant Commissioner of Income Tax (ITA No. 5140/Del/2011), when the legality and validity of such principle is disputed before this Court?

(k) Without prejudice to the above, whether Comparable Uncontrolled Price ('CUP') Method and selection of an arbitrary rate of 10% as the mark-up for application of CUP to benchmark AMP is unjustified under provisions of Act and Rules?"

27. As regards AY 2010-11, the questions urged by the Assessee are as under:

"(a) Whether Transfer Pricing adjustment on account of Advertisement, Marketing and Promotion ('AMP') expenditure is warranted and justified under law?

(b) Whether Tribunal erred in restoring the dispute relating to adjustment to/disallowance of Advertisement, Marketing and Promotion ('AMP') expenditure in Appellant's case to Transfer Pricing Officer ('TPO') for de novo consideration without finally adjudicating issues raised before the Tribunal and without correctly appreciating submissions of Appellant in view of decision of this Hon'ble Court in case of ***Sony Ericsson Mobile Communications India Pvt. Ltd v. CIT, 374 ITR 118?***

(c) Whether AMP expenditure incurred by Appellant for its business cannot be characterized as an 'international transaction' under the Act in the facts of present case?

(d) Whether TPO is not empowered to look into the reasonableness, quantum and commercial expediency of AMP expenditure incurred by the Appellant for carrying on its business and cannot deem any portion of such expenditure as being incurred by the Appellant as a result of an arrangement or understanding with the associated enterprises so as to constitute an

'international transaction' under the Act or Income Tax Rules, 1962 ('the Rules')?

(e) Whether in the facts of case AMP expenditure incurred by the Appellant wholly and exclusively for the purpose of its business operations in India is fully deductible under the provisions of Section 3 7 (1) of the Act without any adjustment under Chapter X of the Act?

(f) Whether re-characterisation of AMP expense as constituting rendition of advertisement and brand promotion services by the Appellant to its overseas associated enterprises is not warranted under the provisions of Act and the Rules?

(g) Without prejudice to the above, whether the Tribunal erred in not appreciating that in view of decision of this Hon'ble Court in Sony Ericsson (supra), no transfer pricing adjustment on account of AMP expenses are sustainable in case entity-level operating margins realized by Appellant under TNMM are higher as compared to comparables?

(h) Without prejudice to the above, whether the Tribunal erred in not appreciating that in view of decision of this Court in Sony Ericsson (supra), AMP transaction was closely linked to the imports transaction and the business of the appellant?

(i) Without prejudice to the above, whether the Tribunal erred in erroneously relying upon irrelevant observations made by TPO which also stand superseded pursuant to DRP directions and routinely remanding the matter back to file of TPO for de novo adjudication?"

Questions urged by the Revenue

28. In the Revenue's two appeals pertaining to AYs 2006-07 and 2009-10, the questions urged are as under:

"1. Whether the ITAT has erred in law and on facts in setting aside the order of AO/TPO and remitting the matter back to them with the directions to decide the matter afresh in accordance and in conformity with the judgment of Special Bench in case of ***LG Electronics India Pvt. Ltd. Vs. ACIT (2013) 152 TTJ(Del) 273?***

2. Whether the ITAT has erred in law and on facts in not appreciating that order of the TPO is a legally tenable order and the facts of the transactions of the instant case are not in conformity with that of ***LG Electronics India Pvt. Ltd. v. ACIT*** and hence the order of the TPO should be upheld?

3. Whether in the facts and circumstances of the case, the ITAT was correct in directing the TPO to consider the combined effect of 14 factors for determining the cost/value of the international transactions, ignoring that this shall make the whole process of comparability impractical and ineffective?"

Questions framed

29. In view of the developments noted hereinbefore and in particular with the decision in ***Sony Ericsson*** (supra) having rejected the BLT adopted by the TPO, for AYs 2006-07 to 2009-10, the Court is of the view that the question of remanding the case to the TPO for consideration of the issue afresh in the light of the judgment of the Special Bench of the ITAT in ***LG Electronics*** (supra) does not arise. If at all, the question would be, whether the cases should be remanded for consideration in the light of the decision of this Court in ***Sony Ericsson*** (supra).

30. It may also be noted that the Revenue has filed a Special Leave Petition ('SLP') in the Supreme Court against the decision in ***Sony Ericsson*** (supra), which is stated to be pending. Some of the Assessees have also challenged

the decision in ***Sony Ericsson*** (supra), which are pending in the Supreme Court.

31. The Court, accordingly, considers that for the purposes of these appeals, the following question arises and should be framed for determination:

> (i) Is the present case is also covered by the decision of this Court in ***Sony Ericsson*** (supra), and does the matter require to be remanded to the ITAT for fresh decision in terms thereof?
>
> (ii) If the answer to question No.1 is in negative, has the Revenue been able to discharge its primary onus of showing that there is the existence of international transactions involving AMP expenditure, between the Assessee and its AE, i.e., B&L, USA?
>
> (iii) If the answer to question No.2 is in the affirmative, then what should be the basis for determination of the ALP of the international transactions involving AMP expenditure, between the Assessee and its AE?

Submissions of counsel for the Assessee

32. Mr. Nageswar Rao, learned counsel for the Assessee, first submitted that the Revenue had not been able to discharge its primary onus of showing that there was an international transaction with regard to AMP expenditure between the Assessee and its AE. He submits that unlike the decision in ***Sony Ericsson*** (supra), where the Assessees were only distributing the products manufactured by the foreign AE and the facts brought on record clearly showed that each of them were receiving some subsidy/subvention from their foreign AEs, in the present case the Assessee received no such subsidy/subvention from B&L, USA. Also, in this Assessee's case, the operations involved both manufacturing and distribution. Therefore, the

parameters for determining the existence of an international transaction cannot be governed by what has been stated in ***Sony Ericsson*** (supra).

33. Mr. Rao pointed out that in ***Sony Ericsson*** (supra) the three Assessees had virtually conceded the position that there existed an international transaction whereas in the present case, the Assessee has throughout been contesting the existence of such transaction. It is further submitted by Mr. Rao that the figures of AMP expenses incurred by the Assessee includes huge trade discounts, sampling, marketing research and points of sales expenditure. Even according to the decision in ***Sony Ericsson*** (supra) such expenditure has to be excluded from the calculation of AMP expense. He pointed out that for the AYs 2006-07 to 2009-2010, the TPO not only treated the entire expenses as recoverable from B&L, USA but has further applied a mark-up of 10%, 14.93%, 15% and 15.27% for the aforementioned AYs respectively. There was no basis for such a mark-up.

34. The central thrust of Mr. Rao's argument is that marketing or brand enhancement is just one of the incidental activities and not a separate line of service. Marketing could, at best, be a 'function' but not a 'transaction' for the purposes of Section 92B of the Act. The promotion of services, according to him, could be a 'transaction'; but AMP expenses for this purpose can only be a 'function' and not a 'transaction'. Under Chapter X what was required to be bench-marked was an 'international transaction' and not a 'function' of such transaction. He further elaborated that every expenditure forming part of the function cannot be construed as a 'transaction'. Since the BLT was no longer a valid basis for determining the

existence of an international transaction involving AMP expenses, the onus was on the Revenue to demonstrate through some tangible material, the existence of an 'arrangement' or 'understanding' between the Assessee and its AE that the Assessee would incur extraordinary AMP expense in order to develop marketing intangibles for the AE.

35. There is no basis for concluding that the AMP expenses incurred did not result in any benefit to the Assessee only because it incurred a loss in AY 2006-07, although, the reasons for such loss were clearly explained by the Assessee. In any event, in both the surgical and vision-care segments, the earnings and profitability of the Assessee were much higher than that of the comparables. This was the case even if the AMP activity was to be considered a benchmarked 'function' without prejudice to the Assessee's contention that it could not. Reliance was placed on the decision of the Supreme Court in ***Commissioner of Central Excise v. Detergents India Ltd. (2015) 7 SCC 198***.

36. Mr. Rao further submitted that since the Assessee had in its TP study already declared the transactions of import, export and warranty etc., the alleged incidental benefit to the AE due to the Assessee's AMP expenditure could at best be one of the several functions of such 'arrangement'. In the TP study, the Assessee had already benchmarked AMP as a function. The comparables chosen by the Assessee for that purpose had been accepted by the TPO. Therefore, there was no justification for separately benchmarking the AMP expenses as that would amount to duplication. It was submitted that re-characterization of the transaction in order to bring it within the

inclusive part of Section 92B(1) was impermissible in view of the decision of this Court in ***CIT v. EKL Appliances Ltd.*** (supra).

37. Therefore, once the BLT was held to be an invalid basis for determining the existence of an international transaction, there would be no basis "even for a suspicion that any extraordinary expenditure is incurred beyond necessity of Indian business of Assessee". Mr. Rao submitted that since no objections were raised under Section 37(1) of the Act to the effect that the AMP expenses incurred were not wholly or exclusively for the benefit of the Assessee and since no AMP adjustment was made under Chapter X in the earlier AYs, there was no justification for the TPO to treat the AMP expenses as a separate international transaction for the AYs in question. Since higher margin had been earned by the Assessee *vis-a-vis* the comparables under all segments, it was clear that the Assessee's relationship with its AE had not affected the business dealings between the parties.

38. Mr. Rao submitted that the TPO's action in marking up the AMP expenses was also impermissible in law. A cost mark-up was permissible in a situation where the provision of AMP was part of the Assessee's business. This was not even the Revenue's case. Elaborating these submissions, Mr. Rao pointed out that there was no arrangement for cost contribution to the AMP expenses and therefore the question of applying a mark-up did not arise. In any event, expenses relating to selling and distribution have been held in ***Sony Ericsson*** (supra) to not form part of AMP.

39. The following figures were referred to in order to demonstrate that the revenue of the Assessee under the manufacturing and trading segments was more or less consistent over the years:

S.No.	Assessment Year	Segment	Revenue(Rs.)	% of total sales
1.	2006-07	Manufacturing	47,64,16,329	42.74%
		Trading	63,81,76,482	57.26%
		Total	1,11,45,92,811	100%
2.	2007-08	Manufacturing	35,27,81,691	40.26%
		Trading	52,34,95,468	59.74%
		Total	87,62,77,159	100%
3.	2008-09	Manufacturing	50,99,01,137	49%
		Trading	53,07,02,415	51%
		Total	1,04,06,03,552	100%
4.	2009-10	Manufacturing	50,82,89,398	43.23%
		Trading	66,74,15,304	56.77%
		Total	1,17,57,04,702	100%

40. There was thus, in fact, no international transaction to be deduced on that basis. Mr. Rao referred to paras 3.13 and 3.15 of OECD guidelines for multinational enterprises. He submitted that no TP adjustment would be justified in the Assessee's case on the principles of mutual benefit and reciprocity. The question of the Assessee being compensated by the AE for the AMP expenditure did not arise since B&L was an established brand for over 150 years and the Assessee was reaping the benefits of an established brand.

41. As regards the intra group support services received by the Assessee for the AYs 2007-08 and 2008-09, it is submitted that in the TP study, the said intra group services were benchmarked by the Assessee and shown to be at ALP. The TPO had benchmarked the said transaction by applying the 'benefit test' and concluded that the services were not essentially for its business operation. The TPO then applied the Comparable Uncontrollable Price ('CUP') method and determined the ALP of the intra group services as 'nil'. However, for the AY 2009-10, the expenditure towards some intra group services have been allowed to the Assessee without adjustment. There was no occasion for the ITAT to have granted one more opportunity to the Revenue in this regard by remanding the matter to the TPO.

Submissions of counsel for the Revenue

42. Mr. G.C. Srivastava, learned counsel for the Revenue, relied on the TP study itself to show that the inference drawn about the existence of international transaction involving AMP expenses was justified. He reiterated that the Assessee was only a limited risk distributor and was unlikely to incur such huge expenses on AMP without being compensated. He pointed out that the import of finished goods constitutes a major portion of the Assessee's business and that the manufacturing activity is relatively small. Since the comparables chosen were only of Indian companies involved in distribution of the products of foreign AEs, there was justification in seeking remand of the matter to the TPO for a fresh determination. It is submitted that the question of whether the AMP expenses is to be treated as 'function' or 'separate transaction' should also be sent back to the TPO.

43. Mr. Srivastava submitted that merely because there was no explicit agreement between the Assessee and its AE with regard to AMP expenses did not mean that from the overall facts and circumstances an inference could not be drawn regarding the Assessee and its AE 'acting in concert". He reiterated that the creation of brand building/marketing intangibles for the AE amounted to the provision of a service to the AE and therefore the mark up of the AMP expenses was called for.

44. As regards the decision in ***Sony Ericsson*** (supra), covering the present cases as well, a reference was made by Mr. Srivastava to paras 51 and 52 of the said judgment where the Court had answered the question of whether the AMP expenses incurred by the Assessee in India could be categorized as an international transaction under Section 92B in the affirmative. He submitted that the said decision in ***Sony Ericsson*** (supra) did not distinguish the cases of manufacturers from that of distributors except for an observation that for determining the ALP, TNMM would not be the appropriate method in the case of the entities which are performing complex functions like manufacturing or making substantial value addition to the material imported from the AE.

45. It is further submitted that the BLT was used by the Revenue only as an arithmetical tool to arrive at the cost base of the AMP expenditure. The determination of the cost base is a necessary step for arriving at the ALP of the transaction under different methods including the TNMM. It is submitted that although the decision in ***Sony Ericsson*** (supra) rejects the use of the BLT for determining the existence of an international transaction for

determining ALP, and although the Revenue had filed an appeal in the Supreme Court against the said finding, as far as the present appeals are concerned, the Revenue seeks to establish the existence of an international transaction *de hors* the BLT.

46. On the question of onus on the Revenue to show the existence of international transaction, Mr. Srivastava submitted that once it is shown that the AMP expenses were incurred by the Assessee, the onus should be on the Assessee to justify the extent of the expenses. He referred to the availing of intra group services by the assessee and the payments characterised as 'receivables' in its hands which was a further indication that the AMP expenses could be treated as 'transactions' within the ambit of Section 92B of the Act.

Question (i): Does the decision in Sony Ericsson cover these cases?

47. In the present case, the Assessee's activities comprised both manufacturing and distribution. The table extracted at para 39 above shows that the percentage of revenue earned from each is more or less is in the ratio of 60:40. Therefore, there is no basis for the Revenue to contend that the Assessee is basically only a distributor of the goods manufactured by its AE.

48. Each of the cases disposed of by the ***Sony Ericsson*** (*supra*) judgment, in particular, the cases of Assessees Canon India, Reebok India and Sony Ericsson India which were highlighted as illustrative examples, was a distributor of products manufactured by the foreign AE. The said Assessees were themselves not manufacturers. In any event, none of them appeared to have questioned the existence of an international transaction involving the

concerned foreign AE. It was also not disputed that the said international transaction of incurring of AMP expenses could be made subject matter of a transfer pricing adjustment in terms of Section 92 of the Act. The Assessee here has throughout been contesting the very existence of any international transaction involving AMP expenditure between the Assessee and its AE, i. e., B&L, USA. Further the Revenue has not been able to contest the submissions of Assessee that as far as the Assessee is concerned that it received no subsidy/subvention from its AE, which, however, was not the case of the Assessees in ***Sony Ericsson*** (supra).

49. Therefore, it is not correct to contend that the decision in ***Sony Ericsson*** (supra), to the extent it has remanded the cases to the ITAT for a fresh consideration, would apply to the present appeals and that the same directions would have to issue in these appeals.

50. Accordingly Question (i) is answered in the negative, i.e., in favour of the Assessee and against the Revenue.

Question (ii): Existence of an international transaction

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

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

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

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

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

55. Section 92B defines 'international transaction' as under:

"Meaning of international transaction.

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

56. Thus, under Section 92B(1) an 'international transaction' means-

(a) a transaction between two or more AEs, either or both of whom are non-resident

(b) the transaction is in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, incomes or losses of such enterprises, and

(c) shall include a mutual agreement or arrangement between two or more AEs for allocation or apportionment or contribution to the any cost or expenses incurred or to be incurred in connection with the

benefit, service or facility provided or to be provided to one or more of such enterprises.

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

58. In ***Maruti Suzuki India Ltd.*** (*supra*) one of the submissions of the Revenue was: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for the same has been paid or remains payable or there is a mutual agreement to not charge any compensation for the service or benefit." This was negatived by the Court by pointing out:

> "Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to Section 92F (v) which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an

'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means' part and the 'includes' part of Section 92B (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC."

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

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

> or an understanding, formal or informal; the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the *sine qua non* for the relationship of "persons acting in concert" to come into being."

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

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

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

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

> "68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an exercise. The Court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions". Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negatived by the Court in ***Sony Ericsson***. Therefore, the existence of an international transaction will have to be established *de hors* the BLT.
>
> .....
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> 70. What is clear is that it is the 'price' of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an

international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment."

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

.....

74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to Section 92B of the Act. The problem does not stop here. Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?

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

"75. As an analogy, and for no other purpose, in the context of a domestic transaction involving two or more related parties, reference may be made to Section 40 A (2) (a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the AO "is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods." In such event, "so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be

> allowed as a deduction." The AO in such an instance deploys the 'best judgment' assessment as a device to disallow what he considers to be an excessive expenditure. There is no corresponding 'machinery' provision in Chapter X which enables an AO to determine what should be the fair 'compensation' an Indian entity would be entitled to if it is found that there is an international transaction in that regard. In practical terms, absent a clear statutory guidance, this may encounter further difficulties. The strength of a brand, which could be product specific, may be impacted by numerous other imponderables not limited to the nature of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on. A simplistic approach using one of the modes similar to the ones contemplated by Section 92C may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance."

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

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

by way of a deduction under Section 10 (2) (xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law".

66. On the issue of the intra group services, the Assessee is justified in contending that the re-characterization of its transaction involving its AE for the two years which have been fully disclosed in the TP Study on the basis of it not being for commercial expediency of the Assessee is clearly beyond the powers of the TPO and contrary to the legal position explained in ***EKL Appliances*** (*supra*).

67. For the aforementioned reasons the Court is satisfied that the Revenue has not been able to show the existence of an international transaction involving AMP expenses between the Assessee and its AE, B&L, USA. Question (ii) is accordingly answered in favour of the Assessee and against the Revenue.

68. As a result, question (iii) does not arise.

69. The appeals of the Assessee are allowed and the appeals of the Revenue are dismissed, but in the circumstances, with no orders as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

DECEMBER 23, 2015
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