2025:DHC:1487-DB

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on: March 03, 2025
Judgment pronounced on March 07, 2025

\+ ITA 155/2022

PCIT-1, NEW DELHI .....Appellant
Through: Mr. Gaurav Gupta, SSC, Mr. Shivendra Singh, Adv.

Versus

BEAM GLOBAL SPIRITS & WINE (INDIA) PVT.LTD. .....Respondent
Through: Mr. Deepak Chopra and Mr. Harpreet Singh Ajmani, Ms. Ashmita, Advs.

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CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

JUDGMENT

YASHWANT VARMA, J.

1. These two appeals pertain to **Assessment Years**[1] 2009-10 and 2012-13 and raise the question of whether the **Advertisement,**

[1] AYs

Marketing and Promotion[2] expenditure incurred by the respondent-assessee would constitute an *"international transaction"* as contemplated under Section 92B read along with Section 92F of the **Income Tax Act, 1961**[3].

2. The appeals were originally admitted by us in terms of an order dated 12 March 2024. We had on that date after hearing learned counsels for respective sides framed the following two questions which, according to us, arose for our consideration: -

> "(a) Whether the Income Tax Appellate Tribunal ["**ITAT**"] was justified on facts and in law in deleting addition of Rs. 35,09,33,103/- on account of expenses incurred by the assessee for advertisement, marketing and promotion ["**AMP**"] for brand-building for brand owned by the associated enterprise?
>
> (b) Whether the ITAT was justified on facts and in law in holding that the Revenue needs to establish on the basis of tangible material or evidence that there exists an international transaction regarding brand-building by way of AMP expenses despite the fact that it was held by the Hon'ble Delhi High Court in the case of **Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT** [374 ITR 118] that transaction of excess AMP is an international transaction?"

3. The appeals were thereafter extensively heard on 19 February 2025, and when we had passed the following order: -

> "1. Having heard Mr. Gupta, learned counsel appearing for the appellant at some length, we take note of the following position which emerges from the record.
>
> 2. The respondent-assessee is stated to be one of the companies under the Beam Global Group and was engaged in the business of manufacture, sale, marketing and trading of **Indian Made Foreign Liquor**. The IMFL was sold under brands owned and licensed to the Beam Global Group of which Fortune Brands is stated to be the ultimate holding company. Fortune Brands was the parent entity of Beam India Holding.
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> 3. In the course of undertaking a Transfer Pricing Study, the **Transfer Pricing Officer** took note of the following international

[2] AMP
[3] Act

transactions which are stated to have been entered into by the respondents. The said international transactions are noted in paragraph 6 of the order of the **Income Tax Appellate Tribunal** and which reads thus: -

"6. The international transactions entered into by the assessee during the year are as under:

S.No.	Nature of transaction	Value International transaction	MAM
1	Purchase of compound Alcoholic Preparation	159120097	TNMM
2	Distribution of Imported Liquor	17280852	RPM
3	Provision of Marketing Support services	10782778	TNMM
4	Re-imbursement of Expenses	19067033	No
5	Recovery of expenses	721078	No bench marking

4. The Tribunal records that although the TPO did not interfere with the benchmarking in respect of transactions listed at S. No. 1, 4 and 5, it came to the conclusion that the assessee had incurred *"an extremely high level of advertising and market promotion expenditure [AMP]"*. It thus proceeded to come to the conclusion that the aforesaid would be liable to be treated as an international transaction and, consequently, an **Arm's Length Pricing** study being commenced.

5. The Tribunal has, however, faulted the procedure as adopted by the TPO by observing as follows: -

"29. In our understanding of the facts and law, mere agreement or arrangement for allowing use of their brand name by the AE on products does not lead to an inference that there is an "action in concert" or the parties were acting together to incur higher expenditure on AMP in order to render a service of brand building. Such inference would be in the realm of assumption/surmise. In our considered opinion, for assumption of jurisdiction u/s 92 of the Act, the condition precedent is an international transaction has to exist in the first place. The TPO is not permitted to embark upon the bench marking analysis of allocating AMP expenses as attributed to the AE without there being an 'agreement' or 'arrangement' for incurring such AMP expenses.

30.The aforesaid view that existence of an International transaction is a sine qua non for invoking the transfer pricing provisions contained in Chapter X of the Act, can be further supported by analysis of section 92(1) of the Act, which seeks to benchmark income / expenditure arising from an international transaction, having regard to the arm's length price. The income /expenditure must arise qua an international transaction meaning thereby that the (i) income has accrued to the Indian tax payer under an international transaction entered into with an associated enterprise; or (ii) expenditure payable by the Indian enterprise has accrued / arisen under an international transaction with the foreign AE. The scheme of Chapter X of the Act is not to benchmark transactions between the Indian enterprise and unrelated third parties in India, where there is no income arising to the Indian enterprise from the foreign payee or there is no payment of expense by the Indian enterprise to the associated enterprise. Conversely, transfer pricing provisions enshrined in Chapter X of the Act do not seek to benchmark transactions between two Indian enterprises."

6. As is manifest from the above, the Tribunal was constrained to interfere with the view expressed by the TPO, bearing in mind a failure on the part of the Department to have alluded or referred to any arrangement which may have qualified as a *"transaction"* as defined in the Act. It is in the aforesaid context that the Tribunal has observed that it was impermissible for the TPO to have embarked upon a benchmarking analysis pertaining to **Advertising, Marketing and Promotion** expenses in the absence of an agreement or arrangement for incurring of AMP having been found to exist.

7. We note that Section 92B of the **Income Tax Act, 1961** speaks of a transaction between two or more **Associated Enterprises** in the nature of purchase, sale or lease of tangible or intangible property or provision of services, lending or borrowing of money or any other transaction having a bearing on the profits income, losses or assets of such enterprises. The expression "*transaction*", which appears in the principal part of Section 92B (1) would have to draw colour from its definition comprised in Section 92F(v) and which reads thus: -

"92F. In sections 92, 92A, 92B, 92C, 92D and 92E, unless the context otherwise requires,—

(i) "accountant" shall have the same meaning as in the Explanation below sub-section (2) of section 288;

(ii) "arm's length price" means a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions;

(iii) "enterprise" means a person (including a permanent establishment of such person) who is, or has been, or is proposed to be, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights, or the provision of services of any kind, [or in carrying out any work in pursuance of a contract,] or in investment, or providing loan or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, whether such activity or business is carried on, directly or through one or more of its units or divisions or subsidiaries, or whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or places;

(iiia) "permanent establishment", referred to in clause (iii), includes a fixed place of business through which the business of the enterprise is wholly or partly carried on;

(iv) "specified date" means the date one month prior to the due date for furnishing the return of income under sub-section (1) of section 139 for the relevant assessment year;]

(v) "transaction" includes an arrangement, understanding or action in concert,—

(A) whether or not such arrangement, understanding or action is formal or in writing; or

(B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding."

It is the aforesaid statutory provision which appears to have constituted the foundation for the findings ultimately returned by the Tribunal and which have been referred to hereinabove.

8. Although the appellants also seek to draw sustenance from the Explanation which came to be inserted in Section 92B by virtue

of Finance Act, 2012 with retrospective effect from 01 April 2002 and in terms of which AMP came to be included in the ambit of an international transaction, the question which would still survive for consideration and merit an answer would be whether absent an agreement or arrangement for incurring AMP expenses, an international transaction could be said to have come into existence so as to trigger the further process of ALP analysis in accordance with Section 92C of the Act.

9. We also bear in consideration the following pertinent observations that came to be rendered by the Court in **Maruti Suzuki India Ltd. v. Commissioner of Income Tax:-**

> "**44.** However, in the present appeals, the very existence of an international transaction is in issue. The specific case of MSIL is that the Revenue has failed to show the existence of any agreement, understanding or arrangement between MSIL and SMC regarding the AMP spend of MSIL. It is pointed out that the bright line test has been applied to the AMP spend by MSIL to (a) deduce the existence of an international transaction involving SMC and (b) to make a quantitative "adjustment" to the arm's length price to the extent that the expenditure exceeds the expenditure by comparable entities. It is submitted that with the decision in Sony Ericsson having disapproved of bright line test as a legitimate means of determining the arm's length price of an international transaction involving AMP expenses, the very basis of the Revenue's case is negated.
>
> **45.** Since none of the above issues that arise in the present appeals were contested by the assessees who appeals were decided in the Sony Ericsson case, it cannot be said that the decision in Sony Ericsson, to the extent it affirms the existence of an international transaction on account of the incurring of the AMP expenses, decided that issue in the appeals of MSIL as well. In this context, para 52 of the decision in Sony Ericsson has to be read as a whole. It reads as under (page 157 of 374 ITR):
>
> > "The contention that AMP expenses are not international transactions has to be rejected. There seems to be an incongruity in the submission of the assessee on the said aspect for the simple reason that in most cases the assessee have submitted that the international transactions between them and the associated enterprise, resident abroad included the cost/value of the AMP expenses, which the assessee had incurred in India. In other words, when the assessee raise the aforesaid argument,

they accept that the declared price of the international transaction included the said element or function of AMP expenses, for which they stand duly compensated in their margins or the arm's length price as computed."

46. The said passage has to be read in the context of the discussion preceding it which concerns the assessees whose appeals were being disposed of by the said judgment. It is in the context of those assessees that para 52 notes that "in most cases the assessee have submitted that the international transactions between them and the associated enterprise, resident abroad included the cost/value of the AMP expenses. .. .".

47. As regards the submission regarding the bright line test having been rejected in the decision in Sony Ericsson is concerned, the court notes that the decision in Sony Ericsson expressly negatived the use of the bright line test both as forming the base and determining if there is an international transaction and secondly for the purpose of determining the arm's length price. Once bright line test is negatived, there is no basis on which it can be said in the present case that there is an international transaction as a result of the AMP expenses incurred by MSIL. Although the Revenue seems to contend that the bright line test was used only to arrive at the quantum of the transfer pricing adjustment, the order of the Transfer Pricing Officer in the present case proceeds on the basis that an international transaction can be inferred only because the AMP expenses incurred were significantly higher that what was being spent by comparable entities and it was also used for quantifying the amount of the transfer price adjustment. Consequently, the court does not agree with the submission of the learned Special counsel for the Revenue that dehors the bright line test, which has been rejected in the Sony Ericsson judgment, the existence of an international transaction on account of the incurring of the AMP expenses can be established.

48. The submission also proceeds on the basis that since MSIL pays royalty to the foreign associated enterprise and makes payment in respect of the use of copyright and patent, the benefit emanating from the AMP function cannot be said to be enjoyed by MSIL alone. It also proceeds on the basis that the benefits to the associated enterprise from AMP function would be same as in the case of a distributor namely increase in sale of raw material, increase in royalty, and increase in copyright and patent payments, etc. <u>The court finds that these submissions are not based on any empirical data and proceeds more on the basis of surmises. Royalty payments have been separately assessed for transfer pricing purposes. Likewise, payments for copyrights and patents have also been separately treated.</u>

49. <u>As far as the benefit to the associated enterprise, i.e., SMC, is concerned, the Revenue has been unable to counter the submission on behalf of the MSIL that by the time SMC acquired a controlling interest in MSIL in 2002, the Maruti brand had already built a huge reputation. A significant amount of AMP expenses had already been incurred by MSIL on its products. These products carried the co-branded mark "Maruti-Suzuki" which had a high degree of name recognition</u>. The Revenue has been unable to dispute that MSIL has the highest market share of automobiles manufactured in India (about 45 per cent.) and year on year growth of turnover of about 21 per cent. In other words, the AMP expenses incurred by it have substantially benefitted MSIL.

50. The second aspect which the Revenue has been unable to dispute is that SMC's AMP expenditure worldwide has been 7.5 per cent. of its sales whereas MSIL is spending only 1.87 per cent. of its total sales towards AMP. <u>Therefore</u>, this belies the possibility of any "arrangement" or "understanding" between MSIL and SMC whereby MSIL is obliged to incur the AMP expenditure for and on behalf of SMC.

51. <u>The result of the above discussion is that in the considered view of the court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL</u>. Secondly, the court is of the view that the decision in Sony Ericsson holding that there is an international transaction as a result of the AMP expenses cannot be held to have answered the issue as far as the present assessee MSIL is concerned since finding in Sony Ericsson to the above effect is in the context of those assessees whose cases have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding AMP expenses.

xxxx **xxxx** **xxxx**

57. The court next turns to the principal contention of the Revenue that in a particular situation of independent distributors/licensed manufacturers matters relating to promotion of a brand of a foreign associated enterprise would necessarily be a matter of negotiation between the parties and not necessarily be reduced to writing as part of an agreement between them.

58. It is necessary at this juncture to discuss the reasons for enactment of Chapter X in the Act with the whole new scheme of provisions concerning transfer pricing in the form of sections 92B to 92F.

59. Nevertheless, there is no specific mention of AMP expenses as one of the items of expenditure which can be deemed to be an international transaction. For this purpose, section 92B(1) read with section 92(1) becomes significant. Under section 92B(1) an "international transaction" means:—

"(a) a transaction between two or more associated enterprises, 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 associated enterprises 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."

60. As far as clause (a) is concerned, SMC is a non-resident. It has, since 2002, a substantial share holding in MSIL and can, therefore, be construed to be a non-resident associated enterprise of MSIL. While it does have a number of "transactions" with MSIL on the issue of licensing of IPRs, supply of raw materials, etc. the question remains whether it has any "transaction" concerning the AMP expenditure. That brings us to clauses (b) and (c). They cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of MSIL 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 MSIL and

SMC whereby MSIL is obliged to spend excessively on AMP in order to promote the brand of SMC. 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 "international transaction". This might be only an illustrative list, but significantly it does not list AMP spending as one such transaction.

61. The submission of the Revenue in this regard is : "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". 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.

Step wise analysis of statutory provisions

62. If a step by step analysis is undertaken of sections 92B to 92F, the sine qua non for commencing the transfer pricing 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 arm's length price 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 the arm's length price and make the transfer pricing adjustment by substituting the arm's length price for the contract price.

63. A reading of the heading of section 92 of Chapter X ("Special provisions relating to avoidance of tax") and section 92(1) which states that any income arising from an international transaction shall be computed having regard to the arm's length price, section 92C(1) which sets out the different methods of determining the arm's length price, makes it clear that the transfer pricing adjustment is made by substituting the arm's length price 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 arm's length price.

64. 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 proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the associated enterprise. and, yet, that is what appears to have been done by the Revenue in the present case. It first arrived at the "bright line" by comparing the AMP expenses incurred by MSIL with the average percentage of the AMP expenses incurred by the comparable entities. Since on applying the bright line test, the AMP spend of MSIL was found "excessive" the Revenue deduced the existence of an international transaction. It then added back the excess expenditure as the transfer pricing "adjustment". This runs counter to legal position explained in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi), which required a Transfer Pricing Officer "to examine the 'international transaction' as he actually finds the same". In other words the very existence of an international transaction cannot be a matter for inference or surmise.

65. As already noticed, the decision in Sony Ericsson has done away with the bright line test as means for determining the arm's length price of an international transaction involving AMP expenses.

The Revenue's contentions

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

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

Absence of a machinery provision

68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a "mirage". First of all, there has to be a clear statutory mandate for such an exercise. The court is unable to find one. To the question whether there is any "machinery" provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to section 92F(ii) which defines arm's length price to mean a price "which is applied or proposed to be applied in a transaction between persons other than associated enterprises in uncontrolled conditions". Since the reference is to "price" and to "uncontrolled conditions" it implicitly brings into play the bright line test. 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 arm's length price. The court does not see this as a machinery provision particularly in light of the fact that the bright line test has been expressly negatived by the court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established dehors the bright line test.

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

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 arm's length price, 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 arm's length price. If the answer to that is in the negative the transfer pricing adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the associated enterprises involved may seek to shift from one jurisdiction to another. An "assumed" price cannot form the reason for making an arm's length price adjustment.

71. Since a quantitative adjustment is not permissible for the purposes of a transfer pricing 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 spent by the assessee on application of the bright line test, is excessive, thereby evidencing the existence of an international transaction involving the associated enterprise. The quantitative determination forms the very basis for the entire transfer price exercise in the present case.

72. As rightly pointed out by the assessee, while such quantitative adjustment involved in respect of AMP expenses may be contemplated in the taxing statutes of certain foreign countries like U.S.A., Australia and New Zealand, no provision in Chapter X of the Act contemplates such an adjustment. An AMP transfer pricing adjustment to which none of the substantive or procedural provisions of Chapter X of the Act apply, cannot be held to be permitted by Chapter X. In other words, with neither the substantive nor the machinery provisions of Chapter X of the Act being applicable to an AMP transfer pricing adjustment, the inevitable conclusion is that Chapter X as a whole, does not permit such an adjustment.

73. It bears repetition that the subject matter of the attempted price adjustment is not the transaction involving the Indian entity and the agencies to whom it is making payments for the AMP expenses. The Revenue is not joining issue, the court was told, that the Indian entity would be entitled to claim such expenses as revenue expense in terms of section 37 of the Act. It is not for the Revenue to dictate to an entity how much it should spend on AMP. That would be a business decision of such entity keeping in view its exigencies and its perception of what is best needed to promote its products. The argument of the Revenue, however, is that while such AMP expense may be wholly and exclusively for the benefit of the Indian entity, it also enures to building the brand of the foreign associated enterprise for

<ins>which the foreign associated enterprise is obliged to compensate the Indian entity. The burden of the Revenue's song is this : an Indian entity, whose AMP expense is extraordinary (or "non-routine") ought to be compensated by the foreign associated enterprise to whose benefit also such expense enures.</ins> The "non-routine" AMP spent is taken to have "subsumed" the portion constituting the "compensation" owed to the Indian entity by the foreign associated enterprise. <ins>In such a scenario what will be required to be benchmarked is not the AMP expense itself but to what extent the Indian entity must be compensated. That is not within the realm of the provisions of Chapter X</ins>.

74. <ins>The problem with the Revenue's approach is that it wants every instance of an AMP spent by an Indian entity which happens to use the brand of a foreign associated enterprise 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.</ins> The problem does not stop here. Even if a transaction involving an AMP spend for a foreign associated enterprise 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 Transfer Pricing Officer proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for ?

75. As an analogy, and for no other purpose, in the context of a domestic transaction involving two or more related parties, reference may be made to section 40A(2)(a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the Assessing Officer "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 Assessing Officer 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 Assessing Officer to determine what should be the fair "compensation" an Indian entity would be entitled to if it is found that there is an international transaction in that regard. In practical terms, absent a clear statutory guidance, this may encounter further difficulties. The strength of a brand, which could be product specific, may be impacted by numerous other imponderables not limited to the nature of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on. A simplistic approach using one of the modes similar to the ones contemplated by section 92C may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance.

76. As explained by the Supreme Court in CIT v. B. C. Srinivasa Setty (1981) 128 ITR 294 (SC) and PNB Finance Ltd. v. CIT (2008) 307 ITR 75 (SC) in the absence of any machinery provision, bringing an imagined international transaction to tax is fraught with the danger of invalidation. In the present case, in the absence of there being an international transaction involving AMP spend with an ascertainable price, neither the substantive nor the machinery provision of Chapter X are applicable to the transfer pricing adjustment exercise."

10. As is manifest from a reading of the aforesaid passages appearing in Maruti Suzuki, the existence of an international transaction cannot be presumed to have been consummated merely because the quantum of expenditure incurred exceeds the spend under that head by comparable entities. It was this which constrained our Court to observe that it would be wholly impermissible to decide the issue of an international transaction on mere inference and the fact that the expenditure incurred was *"significantly higher"*. Of equal import are the conclusions of the Court of no matter how wide the expanse of the word transaction may be assumed to be, it would still be incumbent upon the respondents to establish that there was in fact in existence an understanding, arrangement or steps taken by AEs' which would satisfy the test of acting in concert.

11. More importantly and prima facie, the appellants clearly appear to ignore the note of caution which was struck in Maruti Suzuki and when the Court observed *"The problem with the Revenue's approach is that it wants every instance of an AMP spent by an Indian entity which happens to use the brand of a foreign associated* enterprise *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".

12. In order to enable Mr. Gupta, learned counsel, to address submissions in the aforesaid light, let the appeal be called again on 25.02.2025 as part heard in the category of "End of Board"."

4. As was noted by us on the previous occasion, the fundamental question which stands posited is in respect of the AMP expenditure incurred and whether it would constitute an international transaction. On facts, there does not appear to be a serious dispute with respect to the relationship between the respondent-assessee and Fortune Brands, which was the ultimate holding company. Beam India Holding, the respondent-assessee, is stated to be a constituent of the Beam Global Group engaged in the business of manufacture, sale, marketing and trading of **Indian Made Foreign Liquor**[4]. These products are marketed using brands owned by and licensed to it by the global entity.

5. In order to holistically examine the question which stands raised as well as to appreciate the contentions which were addressed, we deem it appropriate to take note of the following observations which appear in the order of the **Transfer Pricing Officer**[5] dated 24 January 2013 and pertaining to AY 2009-10. While the principal conclusions already stand extracted in our order of 19 February 2025, we deem it appropriate to additionally take note of the following observations which appear in that order of the TPO: -

"5. <u>It is seen that the assessee has incurred an extremely high level of advertising and market promotion (AMP) expenditure. In such cases there is a possibility that the objective of the heightened level of AMP expenditure is to expand the reach of the AE's brand in India. The AE is the legal owner of the brand. Therefore the beneficiary of the efforts of the assessee is the AE as the brand value</u>

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[4] IMFL

[5] TPO

2025:DHC:1487-DB

<u>increases significantly given the efforts of the assessee. The assessee is thereby creating marketing intangible in favour of the AE.</u> The OECD has made an attempt to differentiate between **"marketing intangibles"** such as trademarks, trade names, customer lists and distribution channels from **"trade intangible"** such as manufacturing know-how and trade secrets. For the sake of convenience Para 6.3 and 6.4 of OECD's "Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" edition 2010 is reproduced as under:…….”

xxxx xxxx xxxx

5.2 It is a well-accepted principle that investment in "marketing intangibles" is derived from amongst other company's level of advertisement and marketing and promotion (in short AMP) expenditure particularly those that transcend from routine cost. It is also an accepted principle that agent should be reimbursed or compensated for this additional AMP expenditure along with service charges. This view gets support from OECD guidelines in Para 6.36 to 6.38….

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5.6 The Australian Tax office (ATO)'s reaction to the "marketing intangible" is more well developed. Although the OECD's work on this has been limited, the ATO issued on its website, on Jan 25,2006 new guidelines and clarification "international transfer pricing" "marketing intangible" examples to show how the tax office will determine an approx reward for marketing activities performed by an enterprise using trademarks. **The ATO has further explained "bright line" test.** It **has been clarified that the distributor incurs marketing expenditure above and beyond what independent enterprises are required to do and has no right of recovery or reimbursement from foreign parent; so that profit are lower than what unrelated party would accept and it will therefore be considered to have assumed significantly greater and higher risk than arm's length party.** In this case expectation of ATO is likely to be that the distributor would obtain an additional return form trademark owner possibly through a reduction in the transfer price. Of course, the marketing expenditure here would be considered in excess of bright line test.

5.7 It is seen in the case of the assessee that in order to promote the brand of the AE in Indian market and to develop market for products manufactured, the assessee company incurred huge expenditure both on promotion of brands owned by the parent AE and on development of market in India. The promotion of brand of the AE and development of the market for the product manufactured are not routine AMP expenditure and such sale promotion expenditure would not be incurred by a third party as this is also incurred to meet the aspirational needs of a consumer to own a globally branded product."

6. Similarly, the order of the TPO dated 29 January 2016, and which pertains to AY 2012-13, carries the following significant observations insofar as the issue of AMP constituting an international transaction is concerned: -

"1.2 <u>During the course of proceedings for earlier years, this office has taken a stand that bright line test should be applied and any AMP expenditure incurred by the taxpayer in excess of the expenditure incurred by the comparables should be considered as the expenditure incurred by the taxpayer for the benefit of the parent AE and corresponding adjustment should be made.</u> The Hon'ble High Court in the case of Sony Mobile Communication [India] Pvt Ltd. has rejected the contention of revenue on the applicability of bright line test and corresponding calculations. <u>The Department has filed an appeal against the order of the Hon'ble High Court and contested the judgment before the Hon'ble Supreme Court. Accordingly, the primary contention of this office remains the same as in earlier years</u>.

1.3 The ratio of AMP/Sales in the case of the tested party has been computed as under:

Expenditure on AMP	1119028161
Value a/Gross Sales	3135762021
	35.69%

xxxx xxxx xxxx

1.5 <u>In view of the discussions in the foregoing paragraphs I am of the considered view that the expenditure incurred on AMP by the taxpayer and thereby promoting the brand/trade name owned by the AEs, is an international transaction and the same has neither been reported in Form 3CEB nor has been benchmarked in transfer pricing study</u>. I am of the considered view that the onus which was on the taxpayer to benchmark the international transaction relating to the expenditure incurred on AMP has not been discharged. I therefore propose to benchmark the transactions relating to "AMP".

xxxx xxxx xxxx

1.8 In order to benchmark the transactions, I propose to compare AMP expenditure of the tested party with AMP expenditure of other comparables engaged in similar business using Advertisement and Marketing and Promotional expenditure (including trade discount and volume rebate) to the sales ratio for comparability analysis. For the purpose of comparability, I propose to use the current year's data (March, 2012)."

7. Consequent to the objections taken by the respondent-assessee coming to be rejected by the **Dispute Resolution Panel**[6] and orders of assessment being framed, appeals came to be instituted before the **Income Tax Appellate Tribunal**[7]. It is the orders passed on those appeals which have given rise to the present matters arriving on the board of this Court. The Tribunal, while evaluating the view expressed by the TPO, has held as follows: -

> "**8.** During the transfer pricing assessment proceedings, the TPO noticed that the assessee has incurred an extremely high level of advertising and market promotion expenditure [AMP]. The TPO was of the opinion that the objective of heightened level of AMP expenditure is to expand the reach of the AE's brand in India. Since the assessee is not the legal owner of the brand, therefore, the beneficiary of the efforts of the assessee is the AE as the brand value increases significantly given in the efforts of the assessee.
>
> **9.** Referring to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, Edition 2010, the TPO formed a belief that investment in marketing intangibles is derived from amongst other company's level of AMP, particularly those that transcend from routine cost. The TPO was of the opinion that agent should be reimbursed or compensated for this additional AMP expenditure along with service charges. The TPO further observed that in order to promote the brand of the AE in Indian market and to develop market for products manufactured, the assessee company incurred huge expenditure, both on promotion of brands owned by the parent AE and on development of market in India. According to the TPO, promotion of brand of the AE and development of the market forthe product manufactured are not routine AMP expenditure and such sale promotion expenditure would not be incurred by a third party as this is a also incurred to meet the aspirational needs of a consumer to own a globally branded product."

8. Upon considering the rival submissions which were addressed, it has thereafter come to render the following findings: -

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[6] DRP

[7] Tribunal

"**23.** <u>In our considered opinion, while dealing with the issue of bench marking of AMP expenses, the Revenue needs to establish the existence of international transaction before undertaking bench marking of AMP expenses and such transactions cannot be inferred merely on the basis of BLT</u>. For this proposition, we draw support from the judgment of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd 381 ITR 117.

> *"13. In this case, the Hon'ble High Court held that existence of an international transaction needs to be established de hors the Bright Line Test. The relevant finding of the Hon'ble High Court reads as under:*
>
> > *"43. Secondly, the cases which were disposed of by the judgment, i.e. of the three Assessees Canon, Reebok and Sony Ericsson were all of distributors of products manufactured by foreign AEs. 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 transfer pricing adjustment in terms of Section 92 of the Act.*
> >
> > *44. However, in the present appeals, the very existence of an international transaction is in issue. The specific case of MSIL is that the Revenue has failed to show the existence of any agreement, understanding or arrangement between MSIL and SMC regarding the AMP spend of MSIL. It is pointed out that the BLT has been applied to the AMP spend by MSIL to (a) deduce the existence of an international transaction involving SMC and (b) to make a quantitative 'adjustment' to the ALP to the extent that the expenditure exceeds the expenditure by comparable entities. It is submitted that with the decision in Sony Ericsson having disapproved of BLT as a legitimate means of determining the ALP of an international transaction involving AMP expenses, the very basis of the Revenue's case is negated.*
> >
> > *XXX*
> >
> > *51. The result of the above discussion is that in the considered view of the Court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL. Secondly, the Court is of the view that the decision in Sony Ericsson holding that there is an international transaction as a result of the*

AMP expenses cannot be held to have answered the issue as far as the present Assessee MSIL is concerned since finding in Sony Ericsson to the above effect is in the context of those Assessees whose cases have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding AMP expenses.

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60. As far as clause (a) is concerned, SMC is a non-resident. It has, since 2002, a substantial share holding in MSIL and can, therefore, be construed to be a non-resident AE of MSIL. While it does have a number of 'transactions' with MSIL on the issue of licensing of IPRs, supply of raw materials, etc. the question remains whether it has any 'transaction' concerning the AMP expenditure. That brings us to clauses (b) and (c). They cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of MSIL 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 MSIL and SMC whereby MSIL is obliged to spend excessively on AMP in order to promote the brand of SMC. 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 'international transaction'. This might be only an illustrative list, but significantly it does not list AMP spending as one such transaction.

61. The submission of the Revenue in this regard is: "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." 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.*

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68……………….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."

24. In the light of the aforesaid finding of the Hon'ble High Court, before embarking upon a benchmarking analysis, the Revenue needs to demonstrate on the basis of tangible material or evidence that there exists an international transaction between the assessee and the AE. Needless to mention, that the existence of such a transaction cannot be a matter of inference.

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26. Respectfully following the judgment of the Hon'ble High Court of Delhi [supra], we hold that BLT has no mandate under the Act and accordingly, the same cannot be resorted to for the purpose of ascertaining if there exists an international transaction of brand promotion services between the assessee and the AE.

27. Considering the facts of the case in hand, in the light of judicial decisions discussed hereinabove, we are of the considered opinion that the Revenue needs to establish on the basis of some tangible material or evidence that there exists an international transaction for provisions of brand building services between the assessee and the AE.

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29. In our understanding of the facts and law, mere agreement or arrangement for allowing use of their brand name by the AE on products does not lead to an inference that there is an "action in concert" the parties were acting together to incur higher expenditure on AMP in order to render a service of brand building.

<u>Such inference would be in the realm of assumption/surmise</u>. In our considered opinion, for assumption of jurisdiction u/s 92 of the Act, the condition precedent is an international transaction has to exist in the first place. The TPO is not permitted to embark upon the bench marking analysis of allocating AMP expenses as attributed to the AE without there being an 'agreement' or 'arrangement' for incurring such AMP expenses.

30. The aforesaid view that existence of an international transaction is a sine qua non for invoking the transfer pricing provisions contained in Chapter X of the Act, can be further supported by analysis of section 92(1) of the Act, which seeks to benchmark income / expenditure arising from an international transaction, having regard to the arm's length price. The income / expenditure must arise qua an international transaction, meaning thereby that the (i) income has accrued to the Indian tax payer under an international transaction entered into with an associated enterprise; or (ii) expenditure payable by the Indian enterprise has accrued / arisen under an international transaction with the foreign AE. The scheme of Chapter X of the Act is not to benchmark transactions between the Indian enterprise and unrelated third parties in India, where there is no income arising to the Indian enterprise from the foreign payee or there is no payment of expense by the Indian enterprise to the associated enterprise. Conversely, transfer pricing provisions enshrined in Chapter X of the Act do not seek to benchmark transactions between two Indian enterprises."

9. As is manifest from the above, the Tribunal has essentially intervened and set aside the orders of assessment in light of the Revenue having failed to demonstrate on the basis of any tangible material that an international transaction between the assessee and its **Associated Enterprise**[8] had come into existence. It has thus held that the existence of an international transaction cannot rest on a mere inference or surmise. In the context of these appeals it essentially held that it would be wholly erroneous to assume that the expenditure was incurred for the benefit of the AE merely because it was conceived or estimated to be excessive. The Tribunal has also, and in our considered opinion, correctly held that the mere relationship between parties would

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[8] AE

not be sufficient to presume that an international transaction had come into being or that there was an arrangement in place to undertake AMP for the benefit of the brand owner. It was thus observed that before undertaking a benchmarking of AMP expenses, it was incumbent upon the TPO to have found that an international transaction had, in fact, occurred.

10. The view that has been taken by the Tribunal, in essence, follows what our Court had enunciated in **Maruti Suzuki India Ltd. vs. Commissioner of Income Tax**[9] and which we had an occasion to notice in our order of 19 February 2025. As is manifest from a reading of the passages from *Maruti Suzuki* extracted in that order, we have no hesitation in observing that the existence of an international transaction cannot rest or be founded upon a mere surmise or conjecture. As is evident from the principles which were elucidated in *Maruti Suzuki*, our Court had stoutly negated the contention of the Revenue that the mere rendering of service by one party to another would constitute a transaction irrespective of whether the same was based on a mutual agreement or an arrangement and which would qualify the prescriptions provided in Section 92F of the Act. It was further pertinently observed that the mere opinion of the TPO that the AMP expenditure was excessive when compared with the expenditure incurred by comparable entities would not justify the commencement of a benchmarking analysis.

11. The Court in *Maruti Suzuki* had further observed that the Revenue's approach of seeking to benchmark every AMP expenditure incurred by an entity which happens to use a brand owned by a foreign

[9] 2015 SCC OnLine Del 13940

AE and is licensed for use as leading to a presumption of an existence of an international transaction was wholly untenable. It was thus categorically held that unless the expenditure pertained to a transaction as defined by Section 92F and the same meeting the thresholds prescribed therein, it would be wholly impermissible for an international transaction being presumed to exist and a benchmarking analysis being undertaken.

12. It becomes pertinent to note that the principles enunciated by the Court in *Maruti Suzuki* have been consistently followed and reiterated by various judgments as would be evident from the discussion which ensues. In **Commissioner of Income Tax (LTU) vs. Whirlpool India Ltd.**[10] our Court observed as under: -

> "**38.** The clauses of the trade name licence agreement which had been referred to in extenso by Mr. Srivastava go to show that Whirlpool, USA, was protective of its brand. However, it is not discernible from the clauses of the said trade name licence agreement that WOIL was under any obligation to incur an extent of AMP expense for building the brand or mark of Whirlpool, USA. The Revenue has been unable to explain why there should be a presumption that as a result of the trade name licence agreement, there must have been an understanding between Whirlpool, USA, and WOIL and that WOIL will spend "excessively" on AMP in order to promote the "Whirlpool" brand in India. In other words, it is not clear why a presumption should be drawn that since an incidental benefit might enure to the brand of Whirlpool USA, a proportion of the AMP expenses incurred must be attributed to it.
>
> **39.** It is in this context that it is submitted, and rightly, by the assessee that there must be a machinery provision in the Act to bring an international transaction involving AMP expense under the tax radar. In the absence of any clear statutory provision giving guidance as to how the existence of an international transaction involving AMP expense, in the absence of an express agreement in that behalf, should be ascertained and further how the arm's length price of such a transaction should be ascertained, it cannot be left entirely to surmises and conjectures of the Transfer Pricing Officer.

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[10] 2015 SCC OnLine SC 14314

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46. As already mentioned, merely because there is an incidental benefit to Whirlpool, USA, it cannot be said that the AMP expenses incurred by WOIL was for promoting the brand of Whirlpool, USA. As mentioned in Sassoon J. David (supra) "the fact that somebody other than the assessee is also benefited 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"."

13. In **Bausch and Lomb Eyecare (India) vs. Addl. Commissioner of Income Tax**[11], the position in law as noticed above came to be reiterated in the following words: -

"**54.** Under sections 92B to 92F, the pre-requisite for commencing the transfer pricing 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 arm's length price 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 arm's length price and make the transfer pricing adjustment by substituting the arm's length price for the contract price.

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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 associated enterprise. In any event, after the decision in Sony Ericsson (supra), the question of applying the bright line test to determine the existence of an international transaction involving AMP expenditure does not arise.

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62. In the present case, the mere fact that B&L, USA, through B&L, South Asia, Inc. holds 99.9 per cent. 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

[11] 2015 SCC OnLine SC 14382

<u>the associated enterprise 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</u> (page 146 of 381 ITR):

> "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 arm's length price to mean a price 'which is applied or proposed to be applied in a transaction between persons other than associated enterprises in uncontrolled conditions'. Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the bright line test. 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 arm's length price. The court does not see this as a machinery provision particularly in the light of the fact that the bright line test has been expressly negatived by the court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established dehors the bright line test.. ..
>
> 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 arm's length price, 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 arm's length price. If the answer to that is in the negative the transfer pricing adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the associated enterprises involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an arm's length price adjustment.
>
> Since a quantitative adjustment is not permissible for the purposes of a transfer pricing 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 bright line test, is excessive, thereby evidencing the existence of an international transaction involving the associated enterprise. The quantitative determination forms the very basis for the entire transfer pricing exercise in the present case.. ..

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 associated enterprise 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 associated enterprise 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 Transfer Pricing Officer proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for ?"

14. Answering this question yet again in favour of the assessee, our Court in **Pr. Commissioner of Income Tax vs. Moet Hennessy Pvt. Ltd.**[12] observed: -

> "**8.** We have heard the learned counsel for the parties. <u>It is admitted on record that the contention of the Revenue that there exists an international transaction between the assessee and its associated enterprises, is not based on any agreement executed between the said parties. The sole basis for making this adjustment was a presumption drawn by the Transfer Pricing Officer that huge advertising, marketing and promotion expenditure was incurred by the assessee to expand the reach of its associated enterprise's brand in India.</u> The relevant finding of the Transfer Pricing Officer in its order for the assessment year 2009-10 read as under :
>
> "4.1 It is seen that the assessee has incurred an extremely high level of advertising, marketing and promotion (AMP) expenditure. In such cases there is a possibility that the objective of the heightened level of advertising, marketing and promotion expenditure is to expand the reach of the associated enterprise's brand in India. The associated enterprises is the legal owner of the brand. Therefore the beneficiary of the efforts of the assessee is the associated enterprises as the brand value increases significantly given

[12] 2022 SCC OnLine Del 3977

the efforts of the assessee. The assessee is thereby creating marketing intangible in favour of the associated enterprises. . ."

(emphasis supplied)

It is evident from the aforesaid that the Transfer Pricing Officer has determined the existence of an international transaction on a matter of a presumption, which runs counter to the decision of this court in Maruti Suzuki (supra).

9. The Income-tax Appellate Tribunal while allowing the assessee's appeal for the assessment year 2009-10 has after considering the material on record held that there was no international transaction between the assessee and its associated enterprises. The relevant findings of the Income-tax Appellate Tribunal are as under (page 369 of 67 ITR (Trib) :

"On a careful consideration of all these factors, including the inconsistency in the approach of the Assessing Officer/Transfer Pricing Officer with respect to the advertising, marketing and promotion expenditure being in the nature of an international transaction as expenditure incurred on behalf of the assessee, including the quantum and nature of expenditure and including lack of any material to suggest that there was 'an arrangement, understanding or action in concert' with respect of the expenditure incurred by the assessee and including the fact that, in our considered view, the expenditure incurred by the assessee was in the nature of bona fide business expenditure in furtherance of its legitimate business interests, we are of the considered view that there is no legally sustainable basis for the Transfer Pricing Officer coming to the conclusion that there was an international transaction, under section 92B, on the facts of this case. It was only on the basis of bright line test that the impugned arm's length price adjustment was made but that approach has already been negatived by the hon'ble courts above. We see no reasons to remit the matter to the file of the Transfer Pricing Officer, as is prayed for by the learned Departmental Representative. A remand to the assessment stage cannot be a matter of routine ; it has to be so done only when there is anything in the facts and circumstances to so warrant or justify. In any case, there are direct judicial precedents from the hon'ble jurisdictional High Court which clearly suggest that the matter regarding existence of international transaction under section 92B, as far as possible, should be decided at the level of Tribunal itself. ..

In the present case, no new facts have emerged and all the facts brought to record, during the course of the assessment proceedings, do not indicate legally sustainable basis for coming to the conclusion that there was an internal transaction in respect of advertising, marketing and promotion expenses incurred by the assessee. We are, therefore, of the considered view that the plea of the assessee, on the peculiar facts of this case, does indeed deserve to be upheld that there is no material on record to hold that there was an international transaction, in terms of the provisions of section 92B, nor any material has been brought on record to even remotely suggest so and, therefore, that there is no good reason to remit the matter to the assessment stage for building a case afresh. Respectfully following the binding judicial precedents, we delete the impugned arm's length price adjustment which was made solely on the basis of bright line test. The plea of the learned counsel was indeed well taken and merits acceptance. The impugned arm's length price adjustment of Rs. 6,64,70,841, accordingly, stands deleted."

10. The Revenue has not brought on record any material to assail the aforesaid finding of the Income-tax Appellate Tribunal as regards the absence of any international transaction."

15. In order to appreciate the submissions which were addressed by Mr. Gupta, learned counsel appearing for the appellant, we deem it appropriate to extract the provisions of Section 92B and 92F as they exist today on the statute book hereinbelow: -

"**92B. Meaning of International Transaction**.—(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 an international 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 where the enterprise or the associated enterprise or both of them are non-residents irrespective of whether such other person is a non-resident or not.

Explanation.—For the removal of doubts, it is hereby clarified that—

(*i*) the expression "international transaction" shall include—

(*a*) the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;

(*b*) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;

(*c*) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

(*d*) provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service;

(*e*) a transaction of business restructuring or reorganisation, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date;

(*ii*) the expression "intangible property" shall include—

(*a*) marketing related intangible assets, such as, trademarks, trade names, brand names, logos;

(*b*) technology related intangible assets, such as, process patents, patent applications, technical documentation such as laboratory notebooks, technical know-how;

(*c*) artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps, engravings;

(*d*) data processing related intangible assets, such as, proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters;

(*e*) engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schematics, blueprints, proprietary documentation;

(*f*) customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders;

(*g*) contract related intangible assets, such as, favourable supplier, contracts, licence agreements, franchise agreements, non-compete agreements;

(*h*) human capital related intangible assets, such as, trained and organised work force, employment agreements, union contracts;

(*i*) location related intangible assets, such as, leasehold interest, mineral exploitation rights, easements, air rights, water rights;

(*j*) goodwill related intangible assets, such as, institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value;

(*k*) methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data;

(*l*) any other similar item that derives its value from its intellectual content rather than its physical attributes.

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92F. Definitions of certain terms relevant to computation of arm's length price, etc.—In Sections 92, 92A, 92B, 92C, 92D and 92-E, unless the context otherwise requires—

…………

(*v*) "transaction" includes an arrangement, understanding or action in concert—

(*A*) whether or not such arrangement, understanding or action is formal or in writing; or

(*B*) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding."

16. Section 92B defines an "international transaction", and which is an expression which appears in Sections 92, 92C, 92D and 92E, to mean a transaction between two or more AEs in the nature of purchase, sale or lease of tangible or intangible property, provision of services, lending or borrowing of money or any other transaction having a bearing on the profits, income, losses or assets of such AEs. It further brings within its fold a mutual agreement or arrangement between two or more AEs for the allocation, apportionment or any contribution to any cost or expense incurred or liable to be incurred in connection therewith.

17. By virtue of Finance Act 2012, an Explanation came to be inserted in Section 92B, and which now postulates that the expression "international transaction" would include the purchase, sale, transfer, lease or "use" of, amongst others, intangible property also. The Explanation thus brings within the fold of an international transaction the "use" of intangible property and which would necessarily include trademarks, patents, brand names or logos in addition to the words purchase, sale or lease and which formed part of the provision originally. The said Explanation itself came to be inserted by Finance Act, 2012 with retrospective effect from 01 April 2002.

18. In order to appreciate the reasons which weighed upon Parliament to introduce that Explanation, it would be beneficial to refer to the background paper which accompanied Finance Bill, 2012. The relevant extracts from that background paper are reproduced hereinbelow: -

"II. Section 92B of the Act, provides an exclusive definition of International Transaction. Although, the definition is worded broadly, the current definition of International Transaction leaves scope for its misinterpretation.

The definition by its concise nature does not mention all the nature and details of transactions, taking benefit of which large number of International Transactions are not being reported by taxpayers in transfer pricing audit report. In the definition, the term "intangible property" is included. Still, due to lack of clarity in respect of scope of intangible property, the taxpayer have not reported several such transactions.

Certain judicial authorities have taken a view that in cases of transactions of business restructuring etc. where even if there is an international transaction Transfer Pricing provisions would not be applicable if it does not have bearing on profits or loss of current year or impact on profit and loss account is not determinable under normal computation provisions other than transfer pricing regulations. The present scheme of Transfer pricing provisions does not require that international transaction should have bearing on profits or income of current year.

Therefore, there is a need to amend the definition of international transaction in order to clarify the true scope of the meaning of the term. "international transaction" and to clarify the term "intangible property" used in the definition.

It is, therefore, proposed to amend section 92B of the Act, to provide for the explanation to clarify meaning of international transaction and to clarify the term intangible property used in the definition of international transaction and to clarify that the 'international transaction' shall include a transaction of business restructuring or reorganisation, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets or such enterprises at the time of the transaction or at any future date.

This amendment will take effect retrospectively from 1st April, 2002 and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent assessment years."

19. As is manifest from the above, the Legislature essentially appears to have borne in consideration the conciseness of the terms in which the provision stood couched as well as a perceived lack of clarity in respect of the scope of intangible property. It thus deemed it necessary to clarify the term "intangible property" to include, amongst others,

transactions pertaining to business restructuring or reorganization. However, and in our considered opinion, notwithstanding the insertion of that Explanation with retrospective effect from 01 April 2002, the commencement of a benchmarking analysis would have to necessarily be preceded by the Revenue identifying the existence of a transaction as defined and which undoubtedly constitutes a *sine qua non*. This clearly flows from the plain text of Section 92B(1), which proceeds to define an "international transaction" as being a *"transaction"* between two or more AEs. Of equal significance is the phrase "…….*and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to....*".

20. It is thus ex facie manifest that while an international transaction would undoubtedly include the purchase, sale, transfer, lease or use of intangible property, the same would be subject to there being a discernible and identified transaction between two or more AEs and who may have mutually agreed or entered into an arrangement for the allocation or apportionment of expenses proposed to be incurred. This clearly flows from a reading of Section 92F itself and which defines a transaction to include an arrangement, understanding or an action in concert, irrespective of whether such arrangement be formally reduced in writing or not, and notwithstanding such an arrangement, understanding or action not being enforceable in law.

21. However, and as *Maruti Suzuki* correctly emphasised, the existence of such a transaction, arrangement and understanding would have to be found to exist before a benchmarking analysis is commenced. It thus constitutes an indelible precondition and which

would apply notwithstanding the insertion of the Explanation in Section 92B of the Act. In our considered opinion, the insertion of the Explanation was merely aimed at lending clarity to the use of intangible property and thus sought to allay all doubts that may have existed on account of conflicting judicial interpretation. However, and notwithstanding the insertion of the said Explanation, the Revenue clearly does not stand absolved of proving or establishing the existence of a transaction itself in the first instance.

22. As is manifest from the line adopted by the TPO and which came to be affirmed by the DRP, the Revenue had abjectly failed to analyse or examine the issue in the aforesaid light. The benchmarking analysis was commenced solely on the basis of a perceived excessive expenditure incurred by the respondent assessee with respect to AMP and the consequential invocation of the Bright Line Test. It is this procedure which had fallen for adverse comment of the Court in *Maruti Suzuki*.

23. Regard must also be had to the fact that the deeming fiction which came to be introduced in Section 92B(2) would undisputedly have no impact or implication since sub-section (2) also speaks of the existence of a prior agreement in relation to the relevant transaction. This quite apart from the fact that the said amendment came to be introduced by virtue of Finance (No. 2) Act, 2014 and with effect from 01 April 2015. The said amendment would thus have no application to the AYs' with which we are concerned in these two appeals.

24. We are thus of the firm opinion that the Tribunal was justified in setting aside the orders of assessment for reasons assigned therein and consequently merits no interference.

25. We would accordingly answer both the questions as posed in the affirmative and against the appellant/Revenue. The appeals, consequently, fail and shall stand dismissed.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

MARCH 07, 2025/*neha*