IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBERAND

SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA no.126/Mum./2018
(Assessment Year : 2013–14)

Jt. Commissioner of Income Tax
Circle–14(1)(2), Mumbai ……. Appellant

v/s

General Mills India Pvt. Ltd.
905, Ventura, Hiranandani Business Park
Hiranandani Garden, Powai
Mumbai 400 076 PAN – AACCK8747P ……. Respondent

Revenue by : Shri Anand Mohan
Assessee by : Shri M.P. Lohia

Date of Hearing – 06.07.2020	Date of Order – 14.07.2020

O R D E R

PER SAKTIJIT DEY. J.M.

The aforesaid appeal has been filed by the Revenue challenging the order dated 30th January 2017, passed by the learned Commissioner of Income Tax (Appeals)–56, Mumbai, for the assessment year 2013–14.

2. The effective grounds raised by the Revenue relate to the sole issue of deletion of adjustment made on account of advertisement, marketing and promotion (AMP) expenses.

3. Brief facts are, the assessee, a company incorporated in India, is engaged in the business of atta, semiya (vermicelli), pizza kits, dry cake mix and Indian frozen breads viz. rotis, parathas & nans and trading in canned corn niblets, cream style sweet corn and asparagus spears which are sold under the brand name *"green giant"*. The assessee also provides software development service, business process service and procurement support service to its Associated Enterprises (AEs). It is also evident that the assessee is a 100% subsidiary of General Mills Mauritius Inc. In the audit report submitted in Form no.3CEB, the assessee furnished the details of the international transactions undertaken with the AEs and also the details of benchmarking of such transactions. As per the transfer pricing study report, the assessee benchmarked the import of food products from AEs for resale by applying TNMM as the most appropriate method and the transactions with the AEs were claimed to be at arm's length price. In the course of proceedings before him, the Transfer Pricing Officer noticed that the assessee had incurred certain expenses for promotion and marketing of the products. Therefore, he called upon the assessee to show cause as to why the AMP expenditure incurred by the assessee should not be treated as international transaction and why an adjustment on account of excessive AMP expenses leading to brand building for the AEs should not be made. Though, the assessee objected to the proposed adjustment by submitting that such expenses

were incurred on promotion and marketing of certain new products marketed by the assessee, such as, natural valley granule bar, haagen daz ice cream, corn niblets, sweet corn soup, asparagus, spears, etc. However, the Transfer Pricing Officer was not convinced with such submissions of the assessee. Ultimately, he concluded that by incurring such expenses, the assessee has helped in building the brand of the AE. Thereafter, relying upon the decisions of the Special Bench of the Tribunal in LG Electronics India Pvt. Ltd. v/s ACIT, the Transfer Pricing Officer proceeded to determine the arm's length price by applying Bright Line Test (BLT) and made an adjustment of ₹ 2,53,48,648. In tune with the adjustment made by the Transfer Pricing Officer, the Assessing Officer made the addition while framing the assessment order. The assessee challenged the aforesaid addition before learned Commissioner (Appeals).

4. After considering the submissions of the assessee in the context of the facts and material on record, learned Commissioner (Appeals) found that identical issue had been decided by the first appellate authority in favour of the assessee in assessment year 2011–12 and 2012–13. Facts being identical, following the earlier order passed by him, he deleted the addition made on account of transfer pricing adjustment. Against the aforesaid decision of the first appellate authority, the Revenue is in appeal before the Tribunal.

5. At the very outset, Shri M.P. Lohia, learned Counsel for the assessee submitted that while deciding identical issue in assessee's own case in assessment years 2011–12 and 2012–13, the Tribunal in IT(TP)A no.249/Mum./2017 and ITA no.5668/Mum./2017, dated 14th February 2020, has upheld the decision of learned Commissioner (Appeals) in deleting the addition made on account of adjustment to AMP expenses.

6. Shri Anand Mohan, the learned Departmental Representative, though, fairly submitted that identical issue has been decided in favour of the assessee in assessment year 2011–12 and 2012–13, however, he submitted that the assessee being a distributor, the AMP expenses incurred by him for building the brand of AEs comes within the definition of international transaction. Further, he submitted that since the Revenue has filed a Special Leave Petition before the Hon'ble Supreme Court challenging some of the decisions of the Hon'ble High Courts holding that the AMP expense is not international transaction and the Hon'ble Supreme Court's decision on such SLP is yet to come, the matter may be restored back to the Assessing Officer with a direction to decide the issue after the decision of the Hon'ble Supreme Court.

7. We have considered rival submissions and perused the material on record. After carefully examining the orders passed by the Transfer Pricing Officer, learned Commissioner (Appeals) as well as other facts and materials on record, we are of the view that the facts on the basis of which similar adjustment to AMP expenses incurred by the assessee in assessment years 2011–12 and 2012–13 were made by the Transfer Pricing Officer are identical to the facts involved in the impugned assessment year. In fact, learned Commissioner (Appeals) having found the factual position to be identical has followed his earlier orders while deleting the addition made on account of transfer pricing adjustment to AMP expenses. Notably, while deciding Revenue's appeals against the decision of the learned Commissioner (Appeals) in assessment year 2011–12, in the order referred to above, the Tribunal has upheld the decision of learned Commissioner (Appeals) observing as under:–

> *"11. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. On a perusal of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer, it is evident, he has treated the AMP expenditure incurred by the assessee as a part of international transactions with the AEs primarily on the reasoning that by incurring such expenditure, the assessee has promoted the brand of the AEs. For adopting such line of action, the Transfer Pricing Officer has heavily relied upon the Special Bench decision of the Tribunal in LG Electronics India Pvt. Ltd. (supra). Further, following the said decision, the Transfer Pricing Officer has held that the arm's length price of AMP expenditure has to be determined by applying BLT method. On a careful perusal of the order passed by the Transfer Pricing Officer, we have not found any factual finding by him that there is any*

arrangement/agreement between the assessee and its AEs for incurring AMP expenditure to promote the brand of AEs. As revealed from the facts on record, the assessee has imported certain products from the AEs for reselling to third parties in India. It is also not disputed that the entire AMP expenditure has been incurred in India by making payment to unrelated parties. It is the claim of the assessee that the products imported by the assessee for re–sale in India is comparatively new products in their initial lifecycle and for promoting such products, the assessee had to adopt aggressive marketing strategy to penetrate the targeted market segment, hence, has to incur huge expenditure. It is the claim of the assessee that it is the sole beneficiary of the entire AMP expenditure incurred by it and if there is any benefit to AEs, it is only incidental. It is also the claim of the assessee that the entire purpose of incurring expenditure is to increase the sale and not to create any marketing intangible of the AEs. Further, it is evident, the assessee has also explained the nature of expenditure incurred by furnishing supporting evidences. On a perusal of the facts on record, it is noticed that the AMP expenditure was incurred for giving incentives, free samples, etc. Thus, from the aforesaid facts, it is very much clear that the AMP expenditure was incurred for penetrating the market and increasing the sales. In any case of the matter, no material has been brought on record by the Transfer Pricing Officer to demonstrate that there is an agreement/arrangement with the AEs for incurring AMP expenditure to promote the brand of the AEs. Further, the entire AMP expenditure has been incurred in India and paid to third parties in India. Thus, keeping in perspective the aforesaid factual position, we have to hold that the AMP expenditure incurred by the assessee cannot come within the purview of international transaction.

12. Further, it is evident, the Transfer Pricing Officer has treated the AMP expenditure as part of international transaction following the Special Bench decision of the Tribunal in LG Electronics India Pvt. Ltd. (supra) and has also applied BLT method for computing arm's length price. It is relevant to observe, the aforesaid Special Bench decision of the Tribunal in LG Electronics India Pvt. Ltd. (supra) has been disapproved by the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). The Hon'ble High Court has held that the BLT method is invalid as it is not prescribed in the statute. Various Benches of the Tribunal following the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra), have consistently held that AMP expenditure incurred by the assessee in India cannot come within the purview of international transaction. In this context, we may refer to the decisions cited by the learned Authorised Representative. In fact, the Co–ordinate Bench in Kellogg India

Pvt. Ltd. (supra) while deciding identical issue has held as under:–

> *"6. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Undisputed facts are, the assessee is not merely a distributor of the products manufactured by the AE but the assessee itself manufactures its own products in India under license from the AE. It is also a fact that for marketing and promotion of its manufactured products in India, assessee has incurred AMP expenditure by making payments to third parties in India. Therefore, the basic issue which arises for consideration is, whether the AMP expenditure incurred by the assessee in India can come within the purview of international transaction as defined under section 92B of the Act. In this regard, the contention of the assessee before the Transfer Pricing Officer was, since the assessee has incurred the AMP expenditure for products manufactured and sold by it in India, it does not come within the purview of international transaction. Further, the assessee has also submitted that since there is no arrangement/agreement between the assessee and the AE for incurring such expenditure to promote the brand of the AE, it cannot be said that there is an international transaction relating to AMP expenditure. It is worth mentioning, the Transfer Pricing Officer has also agreed with the assessee that the AMP expenditure was incurred with the third parties in India, hence, do not constitute international transaction. Having held so, the Transfer Pricing Officer has still proceeded to determine the arm's length price of the AMP expenditure on the reasoning that the compensation required in the arrangement between the assessee and the AE for improving the brand intangible of the owner has to be determined. Further, he has observed that the AMP expenditure incurred by the assessee not only benefits the assessee but also the AE in terms of increase in the brand value of Kellogg. Thus, the Transfer Pricing Officer has inferred that there is an arrangement between the assessee and the AE with regard to promotion of the brand of the AE by incurring AMP expenditure. However, he has not provided any factual basis on which he has drawn such inference. By merely stating that there is an arrangement between the assessee and the AE, the Transfer Pricing Officer cannot bring the AMP expenditure within the purview of international transaction. If the Transfer Pricing Officer alleges that the AMP expenditure comes within the purview of international transaction by virtue of an arrangement between the related parties, the burden is entirely upon the Transfer Pricing Officer to demonstrate the existence of such arrangement. A careful reading of the impugned order of the Transfer Pricing Officer does not reveal any such factual basis which can*

demonstrate the existence of an arrangement between the assessee and the AE for incurring AMP expenditure to promote the brand of the AE. That being the case, the entire approach of the Transfer Pricing Officer in determining the arm's length price of AMP expenditure is fallacious.

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

8. At this stage, it is relevant to observe, while deciding identical nature of dispute in assessee's own case for the assessment year 2011–12, learned DRP in direction dated 28th December 2015, have deleted the adjustment made by the Transfer Pricing Officer on account of AMP expenditure by recording a factual finding that the Transfer Pricing Officer has failed to demonstrate that there is an agreement/arrangement between the assessee and the AE for incurring AMP expenditure. While doing so, learned DRP has relied upon the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Ltd. (supra). Thus, viewed in the light of the ratio laid down in the decisions cited by the learned Authorised Representative, including the decision of the Hon'ble Delhi High Court in Martuti Suzuki India Ltd. (supra), it has to be concluded that the AMP expenditure incurred by the assessee in India cannot come within the purview of the international transaction. Hence, the Transfer Pricing Officer has no jurisdiction to determine the arm's length price of AMP expenditure.

13. 9. Having held so, it is now necessary to deal with the contention of the learned Departmental Representa–

> *tive to restore the issue to the Assessing Officer for keeping it pending till the issue is settled by the Hon'ble Supreme Court. In our view, the aforesaid contention of the learned Departmental Representative is not acceptable. As per the prevailing legal position, the AMP expenditure incurred by the assessee in India cannot come within the purview of international transaction. That being the case, the adjustment made by the Transfer Pricing Officer cannot survive. Therefore, we do not find any necessity to restore the issue to the Assessing Officer. Grounds are allowed."*
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> *14. Thus, keeping in view the ratio laid down in the decisions referred to above, we have to agree with the conclusion arrived at by learned Commissioner (Appeals) with regard to the taxability of AMP expenditure. Accordingly, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground raised."*

8. There being no material difference in facts in the impugned assessment year, respectfully following the aforesaid decision of the Tribunal in assessee's own case, we uphold the order of learned Commissioner (Appeals) on the disputed issue by dismissing the grounds raised.

9. In the result, Revenue's appeal is dismissed.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963 on 14.07.2020

Sd/-	**Sd/-**
S. RIFAUR RAHMAN	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 14.07.2020

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai