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

BEFORE SHRI OM PRAKASH KANT, AM AND
MS. KAVITHA RAJAGOPAL, JM

ITA No. 2269/Mum/2022
(Assessment Year: 2018-19)

L'oreal India Private Limited A-Wing, 8th Floor, Marathon Futurex, N.M.Joshi Marg, Lower Parel, Mumbai-400 013	Vs.	Asst. CIT, Circle-7(1)(1) Mumbai-400 020
PAN/GIR No. AAACL 0738 K		
(**Appellant**)	:	(**Respondent**)

Assessee by	:	Shri Niraj Sheth
Revenue by	:	Dr. Yogesh Kamat

Date of Hearing	:	07.02.2023
Date of Pronouncement	:	03.05.2023

O R D E R

Per Kavitha Rajagopal, J M:

This is an appeal filed by the assessee, challenging the assessment order passed by the Assessing Officer/Transfer Pricing Officer (TPO for short) pursuant to the direction of the Hon'ble Dispute Resolution Panel ('DRP' for short) passed u/s. 143(3) r.w.s. 144C(13) r.w.s. 144B of the Act relevant to the Assessment Year (A.Y. for short) 2018-19.

2. The assessee has challenged the grounds of transfer pricing adjustment on account of advertisement, marketing and promotion (AMP) expenses. Following are the grounds raised by the assessee:

A. ***Transfer Pricing Grounds***

Adjustment on account of Advertisement, Marketing and Promotion (AMP) expenses

Adjustment proposed by incorrectly applying Section 92CA(3) of the Act and disregarding the relevant submissions made during the assessment proceedings

1. Erred in making an addition of Rs.143.56 crore to the total income of the Appellant under Section 92CA(3) of the Act on account of adjustments in the arm's length price (ALP') of the alleged international transactions undertaken by the Appellant.

Presumption of fictitious transaction in the nature of provision of brand promotion sevices' since AMP is not an international transaction

2. Erred in alleging that the AMP expense incurred by the Appellant is an international transaction under Section 92B of the Act.

3. Erred in ignoring that the Appellant has not rendered any service to the Associated Enterprises (AEs) and hence erroneously treating and categorizing AMP expense incurred by the Appellant on its own behalf, as an international transaction of the nature of provision of brand promotion services between the Appellant and AEs under Section 92B of the Act:

4. Failed to appreciate the fact that AMP expenses were incurred wholly and exclusively' for purpose of business of the Appellant in India and no benefit was passed on to the AE and hence, there should not be any reimbursement of such expenses to the Appellant;

5. Erred in ignoring that in absence of a valid international transaction, the adjustment is outside the purview of the jurisdiction of learned AO/ TPO, as the alleged AMP transaction is not covered under Section 92B of the Act;

6. Erred in not appreciating that there is no arrangement whatsoever between the Appellant and its AEs for promotion of AEs brand by incurring AMP expenses on behalf of the AEs;

7. Erred in linking the AMP expenses incurred by the Appellant for its own business in India, as expenses incurred for the purpose of / towards brand building activities for its AEs;

8. Erred in not following the orders of the Hon'ble the ITAT in the Appellant's own case for AY 2008- 09, AY 2009-10, AY 2010-11, AY 2011-12, AY 2012-13, AY 2013-14, AY 2014-15, AY 2015-16, AY 2016-17 and AY 2017-18 which were brought to notice, where on identical facts, the Hon'ble ITAT has held that there is no 'arrangement between the Appellant and AEs and directed to delete the entire AMP adjustment along with mark-up on AMP, holding that the same is not an international transaction;

9. Erred in concluding that the Appellant is engaged in performing development, enhancement, maintenance, protection or exploitation (DEMPE') services which includes market development, value addition, creation of marketing intangibles etc and there is mutual agreement/ arrangement between the Appellant and its AE for discharging market development functions;

10. Erred in overriding the charging provisions of Section 4 of the Act by the machinery provisions of Section 92 of the Act to bring to tax fictional/ assumed/ hypothetical income/ benefit.

Recharacterisation of Appellants Entrepreneur Activities

11. Erred in disregarding the Appellant's contention that the issue of AMP is not applicable to the Appellant, as the Appellant is an entrepreneur licensee in the Indian market and is entitled to entrepreneurial returns in the form of residual profit/ loss associated with India business, remaining after the overseas AEs are compensated with an arm's-length return for royalty, goods and services. Further, the said Entrepreneur characterisation is in line with the economic organisation of L'Oréal Group globally. Therefore, the AMP expenses incurred by the Appellant has to be considered as being incurred for its own entrepreneurial activities and therefore ought not to / cannot be construed as an international transaction which warrants a separate adjustment;

12. Erred in artificially bifurcating the Appellant's entrepreneurial business activities into manufacturing and distribution segment without any cogent reasons for the same and arbitrarily and in an adhoc manner selecting comparable companies for manufacturing and distribution segment without adopting a scientific search process for applying bright line test ('BLT') using 'Other Method to determine the arm's length price of the AMP expenses incurred by the Appellant;

Business and commercial expediency

13. Erred in holding that the Appellant incurred AMP expenses for promoting the brands owned by overseas AE, instead of appreciating that the Appellant was only carrying out its business by using the well-established brands and any benefit derived by the AE is purely incidental;

14. Erred in ignoring that the advertisements by the Appellant are product advertisements to enable higher sales of the products in the Indian market and not brand advertisements for or on behalf of the AE.

Most appropriate method

15. Without prejudice to the above, erred in applying BLT and treating the same as routine ALP determination method under "Other Method" to determine the arm's length price of the AMP expenses incurred by the Appelant;

16. Without prejudice to the above, erred in not appreciating that BLT does not take into account the functional and the accounting differences between the Appellant and the comparable companies;

17. Without prejudice to the above, erred in adhoc and arbitrary cherry picking of comparable companies to apply BLT without following any systematic search process;

Mark-up on AMP expenses

18. Without prejudice to the above, erred in holding that the Appellant should have earned a mark-up of 7.91% on the alleged excessive AMP expenses in relation to manufacturing and distribution segment, which are to be reimbursed to the Appellant by considering comparable company (ies)

19. Without prejudice to the above, erred in not adopting a scientific search process to identify BVG India Limited as a company engaged in marketing activity for computing the mark-up to be applied to the alleged excessive AMP expenses;

20. Without prejudice to the above, erred in computing mark-up over alleged excessive AMP expenses incurred without appreciating that an addition if any, should be commensurate with agency function, undertaken by the Appellant;

B. Assessment order is time-barred

21. Based on the facts and circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("Ld. AO") dated 02nd August , 2022 under section 143 (3) r.w.s. 144B r.w.s 144C(13) of the Income Tax Act, 1961 is bad in law and liable to be quashed since it has been passed after the period of time limitation prescribed in Section 144C(13) the Act.

C. Interest under section 234B and 234C of the Act:

22. Erred in charging interest under section 234B and 234C of the Act amounting to Rs. 31,23,04,628/-

D. Initiation of penalty proceedings

23. Erred in initiating penalty proceedings under section 270A of the Act.

3. The brief facts of the case are that the L'oreal Group is a French conglomerate founded in 1909 by the chemist Eugene Scheller and is now a leading supplier in the global cosmetic industry. L'oreal's is mainly into cosmetic business segments such as make-up, hair care, hair coloring, skincare and fragrances. The assessee is a 100% foreign owned company in which L'oreal, SA holds 99.99% equity shares and remaining 0.01% equity shares is held by Holdial, France which is a subsidiary of L'oreal France. L'oreal group is of French origin and headquartered in France and has its subsidiaries in around 130 countries. The assessee company is mainly engaged in the business of manufacturing of cosmetic products and marketing and sales of cosmetic products manufactured by the assessee and imported from overseas associated enterprises (AE). It is observed that the assessee company which is a subsidiary of L'oreal SA is an entrepreneur licensee for the Indian market where key decisions with respect to the business in India is taken and bears the entrepreneur risk in India. It is also said that the assessee received all residual profit/losses from the sale of goods in India after paying royalty, goods and services suppliers including AE suppliers. The assessee filed its return of income for the impugned year dated 29.11.2018, declaring total income of Rs.3,97,16,77,100/-. The assessee's case was selected for scrutiny only for the reason of

TP risk parameter. The assessee's case was referred to the TPO who passed an order u/s. 92CA(3) of the Act dated 28.07.2021, pursuant to which the draft assessment order u/s. 144C was issued proposing an addition on TP parameters by determining the TP adjustment proposed by the TPO amounting to Rs.143,56,00,000/- and thereby determining the total income at Rs.540,72,77,100/-.

4. The assessee was in appeal before the ld.DRP which vide order dated 20.05.2022 rejected the objections raised by the assessee.

5. The A.O. passed the assessment order dated 02.08.2022 u/s. 143(3) r.w.s. 144C(13) of the Act by determining the total income at Rs.540,72,77,100/- after making TP adjustments of Rs.143,56,00,000/-.

6. The assessee is in appeal before us, challenging the impugned order.

7. Ground no.1 challenges the addition of Rs.143.56 crores made to the total income of the assessee u/s. 92CA(3) of the Act on account of adjustments in the arms length price of the impugned international transaction. As this ground is general in nature, it does not require separate adjudication.

8. Ground nos. 2 to 20 pertains to the advertisement, marketing and promotion expenses incurred by the assessee which is held to be an international transaction as per the provisions of section 92B of the Act. The ld. AR has contended that the assessee has not rendered any service to the AEs and the lower authorities have erroneously treated the AMP expenses as international transaction in the nature of the provision of brand promotion services between the assessee and its AEs. The ld. AR further contends that

the impugned expenses were incurred wholly and exclusively for the purpose of business of the assessee in India and was not benefited to the AE and incurs no reimbursement of such expenses. The ld. AR also contended that there was no arrangement between the assessee and its AE for promotion of AEs brand by incurring AMP expenses on behalf of the AEs. The ld. AR submitted that the lower authorities have not considered the decision of the Tribunal in the assessee's case for A.Ys. 2008-09 to 2017-18 on identical facts where the Tribunal has held that there was no arrangement between the assessee and the AEs and thereby deleted the impugned AMP adjustment along with the mark up on AMP by holding that the same does not pertain to international transaction.

9. The learned Departmental Representative (ld. DR for short) for the Revenue controverted the said fact and stated that the Tribunal's order for earlier years has been challenged by the Revenue before the Hon'ble Jurisdictional High Court and since the said orders have not attained finality, the same cannot be relied upon. The ld. DR relied on the orders of the lower authorities.

10. We have heard the rival submissions and perused the materials available on record. The ld. DRP in its finding has stated that ground nos. 1 to 20 pertaining to the international transaction in the nature of provision of brand promotion service AMP expenditure incurred by the assessee was a recurring issue which was there in the earlier years where the DRP in those cases have rejected the objections raised by the assessee. The ld. DRP relied on the findings of the ld. DRP in A.Y. 2015-16 which has concurred with the finding of the TPO that the expenses incurred in malls and retail outlets for sales were in the nature of advertisement and brand promotion and further stated that the said

expenses was to maintain the brand value of L'oreal and rejected the assessee's contention that these were in the nature of selling expenses, expenses towards customer relation, maintenance which includes photo shoot, BSP, salary, etc. and was also for animations, promotional material, gift, cards, etc. was not in the nature of advertising expenses. The comparables namely Dabur India Ltd., Marico Limited, Godrej Consumer Products Limited, Emami Ltd. and Jyothi Laboratories Limited. selected by the TPO was also not accepted by the assessee for the reason that they were not functionally comparable to the business of the assessee. Further, the ld.DRP held that the international transaction is not merely AMP expenditure but was benefiting the AEs in the form of promotion and brand value of the AE brands. The ld. DRP also stated that in the A.Y. 2011-12, this issue was decided in favour of the assessee by the DRP by placing reliance on the decision of the Hon'ble Delhi High Court in the case of *Maruti Suzuki (I) Ltd., Whirlpool of India Ltd., Bausch and Lom Eyecare (India) Pvt. Ltd. and Honda Siel Power Products*, wherein it was held that when there was no explicit arrangement between the assessee its AEs for incurring expenses, the same cannot be considered as an international transaction with AEs. The Revenue has contended that it had filed appeal against the decision of the *Maruti Suzuki (I) Ltd.* before the Hon'ble Apex Court, the decisions have not attained finality and, hence, the Dispute Resolution Panel ('DRP' for short) has rejected the objections raised by the assessee on these issues. The assessee, on the other hand, has contended that the A.O./TPO has failed to prove by cogent evidence that the existence of an arrangement between the assessee and the AE to discharge market development function and had relied on the decision of the Hon'ble High Court in the case of *Whirlpool of India vs. CIT* (in ITA No. 228 of 2015 & CM No. 5751/2015) and in

the case of *Bausch & Lomb* which has held that the Revenue cannot presume that the assessee was acting for the benefit of the AE, in this case, the marketing activity for promoting the AEs brand in the absence of any arrangement between them. Though the ld. DR had pointed out that the TPO in his order at pg. no. 77 has stated that the terms of the license agreement dated 23.11.2005 between the assessee and the AE implies that the assessee has to incur AMP expenses for the products bearing the licensed trade mark owned by the AE which according to TPO is an agreement between the assessee and its AE pertaining to AMP expenses, the same cannot be said to be a conclusive proof of arrangement between the assessee and the AE which has not been corroborated by any other evidence to conclude the impugned transaction to be for the benefit of AEs. The assessee's contention that the impugned expense related to marketing was only for the benefit of the assessee and not for the AEs holds merit. It is observed that the Tribunal in its earlier years have decided this issue in favour of the assessee by holding that the same does not amount to international transaction and that there was no arrangement between the assessee and its AE pertaining to the AMP expenses. The relevant extract of the decisions in ITA No. 1198/Mum/2021 and 802/Mum/2022 for the A.Y. 2016-17 and 2017-18 vide order dated 29.06.2022 are cited hereunder for ease of reference:

> *6. We have heard learned Departmental Representative and perused the record. We noticed that the issue of primary adjustment relating to AMP expenses and secondary adjustment on account of training, saloon, promotional goods have been deleted by the Coordinate Bench in assessee's own case with following observations :-*
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> > *"9. Ground No. 2 to 18 relates to adjustment on account of advertisement and marketing expenses (AMP). The ld. AR of the assessee submits that these grounds of appeal are covered in favour of assessee by the decision of Tribunal in A.Y. 2008-09 to 2014-15. The ld. AR of the assessee furnished the copy of consolidated decision of Tribunal for A.Y. 2008-09 to 2020-11, order of Tribunal for AYs 2011-12, 2012-13, 2013-14 & 2014-15 respectively. 10.On the other hand, the ld. DR for the revenue relied upon the order of lower authorities. The ld. DR for the revenue further submits that revenue has already filed appeal against the order of Tribunal for various assessment years before the*

jurisdictional High Court and the issue is sub-judice before the Honb'le High Court. 11.We have considered the rival submission of the parties and have gone through the orders of authorities below. We have also gone through the orders of Tribunal for various earlier years. We have noted that the TPO while passing the order under section 92CA basically followed the order for AY 2014-15. We have further noted that in appeal for AY 2014-15 in ITA No. 6448/Mum/2018, the Tribunal while considering the orders for earlier year passed the following order: "9. We have heard both the counsel and perused the records. Learned Counsel of the assessee submitted that identical issues have been considered by the ITAT in assessee's own case for earlier year except for the alternative adjustment on manufacturing segment. Submission of learned counsel in this regard is summarised as under :- (A) Adjustment on account of advertisement, marketing and brand promotion (AMP) expenses :- (i) Covered by appellant's own ITAT order for A.Y. 2013-14 (page No. 31 para 18) (copy of aforesaid orders were submitted during the course of hearing). (ii) Also appellant's own ITAT order for A.Y. 2008-09 to A.Y. 2010-11 (page 16- 17 and para 2.4), A.Y. 2011-12 (page 13 and para 16) and A.Y. 2012-13 (page 23-24 and para 12) (copy of aforesaid orders were submitted during the course of hearing. (B) Alternate adjustment on manufacturing segment on account of payment of royalty for use of technical know-how (Rs. 38.82 crores) and trademark (Rs. 25.16 crores) :- (i) Appellant's own ITAT order for A.Y. 2013-14 : Trademark royalty - page No. 35 para 23 Technical know-how royalty- page No. 37 para 25. (ii) Also appellant's own ITAT order for A.Y. 2012-13 - page No. 29 para 18 (iii) Further the TPO in his order has not examined whether or not the method adopted by the appellant to determine the Arm's length price (ALP) is the most appropriate method and has instead concluded that the payments for trademark and technical know-how royalty are excessive in nature (page 176 of appeal memo) (iv) Accordingly, the TPO has exceeded his jurisdiction by making an addition to the international transaction of payment of royalty for technical know-how and trademark. In this regard, the appellant relies on the Judgment of Bombay High Court in the case of CIT Vs. Lever India Exports Ltd. (78 taxmann.com 88) (copy enclosed as Annexure1) (v) Without prejudice to the above, it is submitted that the TPO has proposed the royalty adjustment, inter alia on the basis of AMP spend of the Appellant (page 141 and 142 of the appeal memo). Therefore, in the event it is held that AMP does not constitute an international transaction, then this adjustment would not survive. (vi) In this connection, a reference may be made to Para 20 on Page 33 of ITAT order for AY 2013-14, wherein an alternate adjustment for the distribution segment (based on AMP) was deleted by the ITAT on the ground that once AMP was held not to be an international transaction, this adjustment which was based thereon, could not survive. (vii) It is further submitted that L'Oreal SA, France (recipient of income) has offered the royalty income received from the Appellant and the said royalty income has been accepted to be at arm's length by the TPO in hands of L'Oreal SA. In view of the above, the appellant prays that the adjustment on account of royalty should be deleted. (C) Alternate adjustment on the distribution segment-international transaction of import of finished goods from AEs for resale. Appellant' own ITAT order for A.Y. 2013-14 (page 33 and para 20). (D) Alternate adjustment on the manufacturing segment- international transaction of payment for availing of marketing support services to AEs. (a brief description of marketing support services availed is described in Annexure 2 to this note). 1. The TPO in his order has instead of examining whether or not the method adopted to determine the ALP is the most appropriate method or whether the comparable companies selected are appropriate or not, has gone into the question of determining the need for such services, proof of rendition of such services, commercial expediency, basis of cost allocation etc. It is submitted that it is not part of the TPO's jurisdiction to consider the above aspects. 2. In this regard, the Appellant relies on the Judgment of Bombay High Court in the case of CIT vs. Lever India Exports Ltd. (supra) 3. In any extent, Appellant has submitted extensive evidences to TPO including advertising

creative/concepts developed by AEs, sample story boards for Television Commercial conceptualized by AEs and adopted by the Appellant, agreements, sample invoices, Organisation structure of Marketing support services team, sample email correspondences, product and marketing dossiers, public relationship guidelines, screenshot of global database and websites of AEs accessible to appellant, etc. along detailed write up on the nature of service/evidences and benefits of the services. [Page 536-642 (Paper book Volume 1 and 2); Page No. 1092-1780 (Paper book Volume 3 and 4); Page 2174-3272 (Paper book Volume 5 and 6)].

Further, the Appellant submitted additional evidences to DRP comprising of cost allocation certificate and tables along copies of invoices [Page No. 3707- 4536 (Volume 7 and 8)]. These have been examined by TPO in remand proceedings and no fault is found with the same [Refer remand report on Page No. 498 to 535 of Paper book (Volume 1)] 4. Accordingly, the Appellant submits that considering that no adverse comments are provided by the TPO as well as the DRP, the said transaction should not be remanded back to the file of the AO/DRP as it would tantamount to giving a second inning to the Department and taking advantage of its own wrong. 5. In this regard, reliance is placed on the following judicial precedents: - Kansai Nerolac Paints Ltd. Vs Deputy Commissioner of Income-tax, [2014] 49 taxmann.com 208 (Bombay High Court) (Copy enclosed as Annexure 3); - K. Rajiv v. Additional Commissioner of Income-tax, [2018] 98 taxmann.com 418 (Madras High Court) (Copy enclosed as Annexure 4). 6. Further, it may be noted that in AY 2011 -12, the ITAT has remanded the issue of marketing support services availed to the DRP since additional evidences were submitted before the ITAT. However, in the year under consideration, all evidences which are filed before the ITAT were filed before the lower authorities and the TPO has himself examined them in remand proceedings and not adversely commented thereon, thereby accepting the same. 7. Further, it is submitted that L'Oreal SA, France (recipient of income) has offered to tax the income received from the Appellant and the said service income has been accepted to be at an arm's length by the TPO in hands of L'Oreal SA. Thus, the provision of services being availed by the Appellant, its rendition and benefits of services etc. stands accepted in the case of the income recipient, L'Oreal SA. 8. In light of the above, it is humbly submitted that the matter should not be remanded back since there were extensive evidences submitted before the lower authorities and the same was accepted by the TPO in remand proceedings. E) Alternate adjustment on the manufacturing segment- international transaction of payment for availing of consulting services. (Brief description). 1. The TPO in his order has instead of examining whether or not the method adopted to determine the ALP is the most appropriate method or whether the comparables selected are appropriate or not, has gone into the question of determining the need for such services, proof of rendition of such services, commercial expediency, basis of cost allocation etc. It is submitted that it is not part of the TPO's jurisdiction to consider the above aspects. 2. In this regard, the Appellant relies on the Judgment of Bombay High Court in the case of CIT vs. Lever India Exports Ltd. (supra) 3. In any event, the Appellant has submitted extensive evidences inter alia including agreements, sample invoices, evidences for technical/ consulting advise provided by AE through sample emails etc. in support of receipt of consultancy services and the benefits derived [Page 536- 678 (Paperbook Volume 1 and 2); Page 1092-1193 (Paperbook Volume 3)]. Further, the Appellant submitted additional evidences before DRP comprising of agreement, certificate for costs allocated, evidences for technical/consulting advise provided by AE through sample emails in relation to Packaging Services, Environmental, Health and Safety Services, Finance Services, Supply Chain Services, HR Services along with a list summarizing the evidences submitted and benefits derived thereof [Page No. 3707- 4536 (Volume 7 and 8)]. 4. After verifying the evidences, the TPO in his remand report has accepted that the services were rendered, that they have benefited the Appellant and were necessary. He has only made a

vague allegation that cost justification in a third- party situation needs to be established. (Refer remand report on Page No. 535 of Paperbook Volume 1) 5. Accordingly, the Appellant submits that the said transaction should not be remanded back to the file of the AO / DRP as it would tantamount to giving a second inning to the Department and taking advantage of its own wrong. 6. In this regard, reliance is placed on the following judicial precedents: - Kansai Nerolac Paints Ltd. Vs Deputy Commissioner of Income-tax (supra); -K. Rajiv v. Additional Commissioner of Income-tax (supra) 7. Further, it is humbly submitted that Transfer Pricing officer allowed identical expenses in earlier years and subsequent years of AY 2015-16 and AY 2016-17 after detailed scrutiny. 10 Per contra, learned Departmental Representative relied upon the orders of the authorities below. 11. Upon careful consideration we hold as under :- As regards the adjustment on account of AMP expenses in manufacturing segment the ITAT has decided the issue in favour of the assessee. In this regard, we may refer to ITAT order in assessee's own case for A.Y. 2013-14 vide order dated 23.8.2019 for following concluding adjudication on this issue:-

"8. We find that in the backdrop of our aforesaid observations that de hors any 'understanding' or an 'arrangement' or 'action in concert', as per which the assessee had agreed for incurring of AMP expenses for brand building of its AE, viz L'Oreal S.A., France, the provisions of Chapter-X could not have been invoked for undertaking TP adjustment exercise. Apart there from, we find that a similar view had been taken by the Tribunal while disposing off the appeals of the assessee for the preceding years viz. A.Ys 2008-09 to 2011-12. In fact, the Tribunal while disposing off the appeal of the assessee for A.Y 2012-13 in M/s L'Oreal India Pvt. Ltd. Vs. ACIT-7(1)(2), Mumbai [ITA No. 1417/Mum/2017; dated 30.01.2019], had followed the view earlier taken in the preceding years and had vacated the adjustment of 304.69 crores that was made by the TPO by alleging that the AMP expenses incurred by the assessee was an international transaction under Sec. 92B of the Act. The Tribunal while so concluding had observed as under: "12. We have also perused the agreement of assessee with its AE dated 4th January 2011 executed between assessee and its AE. Clause 7 of the agreement descries about right of distribution of licensed product in the territory. As per Clause 8 of the said agreement the assessee is responsible for the advertising the licensed product in the territory. The territory is defined under clause 1.5 of the agreement, which means the territory of Nepal, Bhutan, Bangladesh, Maldives, Mauritius, India and Sri Lanka. However, it excludes any free trade zone, which may exist or may be created. Further it excludes duty free shops located in the duty free or travel retail area which is specialized in sales against foreign currency to foreigner or diplomatic corps, ship chlanders, airlines companies or shipping companies. Though the AE has reserves its right for the zones of excluded areas. The contentions of the ld. A.R for the assessee is that clause 8 of the agreement does not obligates the assessee to incur expenses on AMP so as to promote the brand owned by its AE,,s. And that the expenses are incurred by assessee in the normal course of its business. The perusal of the Clause 7 and 8 reveals that there is no agreement between the assessee and the AEs for sharing the expenses and the payments made by the assessee for the expenses of AMP. The TPO has also not brought any fact on record that there exist any agreement between the assessee and its AE to share or reimburse the AMP expenses. Moreover, we have seen that there is no material change in the facts for the year under consideration. Therefore, considering the above factual discussions and the decision of the coordinate bench of Tribunal for A.Y. 2008-09 to 2010-11, on the identical issue the ground No. 2 to 21 of the appeal is allowed." We thus in terms of our aforesaid observations, finding ourselves to be in agreement with the view taken by the Tribunal in the assesses own case for A.Y 2012-13 viz M/s L'Oreal India Pvt. Ltd. Vs. ACIT-7(1)(2), Mumbai [ITA No. 1417/Mum/2017; dated 30.01.2019], therefore, respectfully follow the same. Accordingly, being of the considered view that as the revenue had failed to discharge the onus that was cast upon it as regards proving that

> *there was any 'understanding' or an 'arrangement' or 'action in concert' as per which the assessee had agreed for incurring of AMP expenses for brand building of its AE, viz. L'Oreal S.A., France, the TP adjustment of Rs. 354.73 crores in respect of AMP expenses cannot be sustained and is liable to be vacated." 12. Since the facts are identical we set aside the order of authorities below and direct that the TP adjustment of Rs. 198.18 crores is to be deleted." 12. Considering the consistent decision of Tribunal on identical set of fact on identical issue for earlier years, wherein no factual difference for the year under consideration is brought to our notice, nor any contrary law is shown to us, to take any other view, therefore, respectfully following the orders for earlier years the Ground No.2 to 18 are allowed.*

11. From the above observation, it is evident that this recurring issue raised in this appeal has been decided in favour of the assessee wherein it was held that there was no arrangement between the assessee and the AE pertaining to AMP expenses. The tribunal in the earlier years has held that the onus of proof lies on the Revenue to prove that there was an international transaction in existence. The Tribunal further held that the proposition laid down in the case of *Maruti Suzuki India Ltd.* (supra) is that the absence of a machinery provision *qua* AMP expenses, the A.O. is not at liberty to levy tax on an imagined transaction. In such case, the provisions of Chapter X cannot be invoked for making a TP adjustment. The Tribunal has also relied on the decision of the Hon'ble Delhi High Court in the case of *Bausch and Lomb (India) Pvt. Ltd.* and held that the impugned transaction is not an international transaction for which the TPO was not entitled to invoke the provision of Chapter X of the Act.

12. By respectfully following the above said decision, we are of the considered opinion that this issue is no longer resintegra and has been decided by the Tribunal in its earlier decision in favour of the assessee by holding that the impugned transaction is not an international transaction as per the provisions of the law. As there has been no change in the factal matrix of this case inorder to have a consistent view on this issue, we hereby allow these grounds of appeal raised by the assessee. Ground nos. 1 to 20 raised by the

assessee are allowed. The ld. AR during the appellate proceeding said that the assessee will not press the ground no. 21 if the other grounds are decided in favour of the assessee. Hence, ground no. 21 is not adjudicated.

13. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 03.05.2023.

Sd/-	Sd/-
(Om Prakash Kant) Accountant Member	(Kavitha Rajagopal) Judicial Member

Mumbai; Dated : 03.05.2023
Roshani, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai