**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**DELHI I-2 BENCH, NEW DELHI**
**[Coram: Pramod Kumar AM and Sudhanshu Srivastava JM]**

ITA No. 1906/Del/2014
Assessment years 2009-10

**Moet Hennessy India Pvt Ltd** **……..Appellant**
*Unit No. 1903, Tower 2, 19th floor*
*Indiabulls Financial Centre, Senapati Bapat Marg*
*Mumbai 400 013 [PAN: AACCM4079L]*

***Vs***

**Assistant Commissioner of Income Tax**
**Circle 5(1), New Delhi** **……..….....Respondent**

**Appearances by**

**Sumit Mangal and Rashmi Gupta** *for the appellant*
**Sanjay Kumar Yadav and Vatsala Jha** *for the respondent*

Date of concluding the hearing : May 24, 2018
Date of pronouncement : August 23, 2018

**O R D E R**

**Per Pramod Kumar, AM:**

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 29th January 2014 passed by the Assessing Officer under section 143(3) r.w.s. 144C of the Income Tax Act, 1961, for the assessment year 2009-10.

2. Grievances of the assessee, in substance, is directed against the arm's length price adjustment of Rs 6,64,70,841 in respect of alleged international transaction on account of advertisement, promotion and marketing expenses said to have been incurred on behalf of its parent company. To articulate this grievances, assessee has raised following rather elaborate grounds of appeal:

> **1. On the facts and in the circumstances of the case and in law, the Assistant Commissioner of Income-tax - Circle 5(1) ('AO')/the Transfer Pricing Officer ('TPO')/ Dispute Resolution Panel ('DRP') erred in confirming the adjustment of Rs 6,64,70,841/- by holding that the Appellant ought to have received reimbursement for "alleged excessive" Advertising, Marketing and Promotion ('AMP') expenses from its Associated Enterprises ('AEs').**

**2. On the facts and circumstances of the case and in law, the AO/TPO/DRP erred in:**

**a) not following the binding decision of jurisdictional Tribunal in the case of BMW India Pvt. Ltd. vs. Addl. CIT [TS-230-ITAT-2013(DEL)-TP] ('BMW India');**

**b) disregarding the fact that the premium profits earned by the Appellant compensated for the allegedly excessive AMP expenses, if any, incurred by it;**

**c) disregarding the transfer pricing policy of the Moet Group wherein Moet India is provided with an agreed contribution margin which clearly indicates that Moet Group funds the AMP expenses of Moet India through the import price;**

**d) misinterpreting or placing incorrect reliance on the international guidance in relation to the 'marketing intangibles' and 'bright line test' from Organisation for Economic Co¬-operation and Development ('OECD'), US TP Regulations and Australian Tax Office ('ATO') and relying on several erroneous/factually incorrect and contradictory statements/observations in the TP order, which are not relevant to the instant case, only in order to justify an otherwise inappropriate and unwarranted TP adjustment;**

**e) incorrectly holding the AMP expenses incurred by the Appellant to be "excessive" on the basis of a "bright line limit" arrived at by deriving a distorted and incorrect set of comparable companies;**
**f) by holding that a mark-up of 15% ought to be earned by the Appellant in respect of the "alleged excessive" AMP expenses, without any basis;**

**g) in following the decision of the Hon'ble Special Bench in the case of LG Electronics (152 TTJ 273) (Del) (SB) without appreciating the fact that the said decision was rendered in the context of licensed manufacturer and hence not applicable to the distributor. The legal proposition canvassed by the Appellant has been upheld by the Hon'ble Delhi Tribunal in the case of BMW India.**

**The Appellant therefore prays that the aforesaid adjustment be deleted.**

**3. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the AO/TPO/DRP erred in considering expenses such as discounts, rebates, commission, trade component cost, trade incentives, etc. for computing the AMP spend ratio of the Appellant.**

3. To adjudicate on this appeal, only a few material facts need to be taken note of. The relevant material facts are like this. The assessee company is a subsidiary of Champagne Moet & Chandon France (CMC), one of the leading producers of champagne, which holds 99% equity in the assessee company. The other 1% shareholding in the assessee company is held by another French company by the name of Jas Hennessy & Co (JSC) which is a leading producer of another alcoholic beverage, i.e. cognac. The assessee is engaged in the business

of importing and distribution of the different categories of wines and spirits. As noted by the TPO, "it is assisted by its associated enterprises in carrying out this function" and that the assessee "imports advertising and promotional material from its associated enterprises such as wine glasses, menu holders etc to be given as complimentary products to its esteemed customers". On these facts, the TPO, inter alia, observed as follows:

> **It is seen that the assessee has incurred an extremely high level of advertising and market promotion expenditure. In such cases, there is a possibility thatv 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 increases significantly given the efforts of the assessee. The assessee is thereby creating marketing intangibles in favour of the assessee….**

4. The TPO then, after a long discussion on the transfer pricing implications of transfer pricing intangibles, noted that the total Advertising and Market Promotion expenses of the assessee are as high as Rs 7,93,95,060 which constitute 26.94% of the value of gross sales, as against the average norm, in respect of Indian comparables, at 1.31% of the value of gross sales. Applying the bright line test, and taking 15% mark on expenses taken as incurred on behalf of the AE, the TPO proposed an ALP adjustment of Rs 6,64,70,841. Aggrieved, assessee carried the matter in grievance before the Dispute Resolution Panel but without any success. Following the Special Bench decision of this Tribunal, in the case of LG Electronics India Pvt Ltd Vs ACIT [(2013) 140 ITD 41 (Del)], the DRP confirmed the stand at the assessment stage. The Assessing Officer thus proceeded to make the impugned adjustment of Rs 6,64,70,841, aggrieved by which the assessee is in appeal before us.

5. Learned counsel's basic thrust of arguments is that there is no material whatsoever on record to suggest that there was an international transaction on the facts of the present case, and the impugned adjustment has been made simply because, what has been termed as, AMP expenses are excessive, and by applying bright line test. Learned counsel submits that this approach has been specifically rejected by Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications Vs CIT [2015) 374 ITR 118 (Del)]. It is submitted that the very foundation of the impugned thus ceases to hold good in law. He then contends that there has to be explicit agreement or understanding for promotion of brand of the foreign AE in India and existence of an international transaction cannot be a matter of inference or deduction. In support of this proposition, he relies upon the judgment of Hon'ble jurisdictional High Court in the cases of Maruti Suzuki India Ltd Vs CIT [(2016) 381 ITR 117 (Del)], CIT Vs Whirlpool of India Ltd [(2016) 381 ITR 154 (Del)] and Bausch and Lamb Eyecare India Pvt Ltd Vs ACIT [(2016) 65 taxmann.com 141 (Delhi)]. In support of the proposition that the Tribunal should determine existence of international transaction when all the material facts are on record, the case should not be remitted back to the TPO for that purpose, learned counsel for the assessee relies upon Hon'ble jurisdictional High Court's judgments in the cases of Dainkin Air conditioning India Pvt Ltd VS ACIT (ITA No. 269/2016; judgment dated 27.7.2016), Le Passage to India Tours and Travels Vs DCIT [(2017) 391 ITR 207 (Del)] and Bacardi India Ltd Vs DCIT (ITA No. 417/2017; judgment dated 24.5.2017). It is also pointed out that in the subsequent assessment years from 2011-12 to 2015-16, there is no such ALP adjustment at all, though the Assessing Officer has disallowed the entire AMP expenses on the ground that (i) the AMP expenses is in

contravention of law and hence inadmissible deduction under section 37(1) – so far as assessment year 2011-12 is concerned; (ii) the AMP expenses is capital expenditure as it results in enduring benefit. Learned counsel has filed copies of the assessment orders in support of this factual contention. He submits that once the Assessing Officer himself accepts that there is no ALP adjustment required in respect of these expenses in the assessment years starting with assessment year 2011-12 onwards, and there is no international transaction as such, it cannot be open to the revenue authorities to contend that, on the same set of facts, there was an international transaction in the assessment years 2009-10 and 2010-11. On the strength of these submissions, learned counsel urges us to delete the impugned ALP adjustment and hold that there is no legally sustainable foundation for holding that there was an international transactions, in terms of the provisions of Section 92B, on the facts of this case. Learned Departmental Representative, on the other hand, submits that the Hon'ble Delhi High Court's judgment in the case of Sony Ericson (supra) has not attained finality and the matter is pending before Hon'ble Supreme Court. She suggests that the matter may be remitted to the file of the TPO for examining whether or not there is an international transaction, in the light of the judicial precedents available now. In her letter dated 24th May 2018, learned Departmental Representative has summed up her argument by submitting as follows:

> **1. During the course of hearing today i.e. 24.05.2018, it was argued by the undersigned that the issue of AMP is sub-judice before the Hon'ble Supreme Court in several cases for example Maruti Suzuki Ltd., Sony India, Canon and others. At the outset, the reliance placed by the Ld.AR of the assessee on AMP judgments in the cases of M/s Maruti Suzuki Ltd. and M/s Whirlpool India Ltd. is misplaced as the facts in these cases are that of a 'manufacturer' which is different from the assessee, who is a 'distributor'.**
>
> **2. In the case under consideration, the order of the TPO was much before the judgment of the Hon'ble Delhi High Court in the case of M/s Sony Ericsson Mobile Communications Pvt. Ltd. (374 ITR 118-Del) wherein the Hon'ble Court has held the AMP expenses to be an international transaction and matter of determination of its ALP has been restored to the TPO.**
>
> **3. It is submitted that, coordinate benches of the Tribunal in different cases like M/s Swarovski India Private Limited (ITA No.4080/Del/2015), M/s FUJIFILM Corporation India (ITA No.5826/Del/2011 & 195), M/s Louis Vuitton India Retail Private Limited (ITA No. 980/Del/2017), M/s Haier Appliances India Ltd. (2016), M/s Perfetti Van Melle India Pvt. Ltd. (2016), and the Hon'ble Delhi High Court in recent judgements in the cases of M/s Rayban Sun Optics India Ltd. (2016), M/s Toshiba India Pvt. Ltd. (2016), M/s Bose Corporation India Pvt. Ltd. (2016), in all of which similar issue of AMP adjustment was considered, has been restored to the TPO for fresh determination in the light of the earlier judgment in M/s Sony Ericsson Mobile Communications Pvt. Ltd. as the TPO did not have the benefit of the judicial precedents now available for consideration. Copies of the stated orders are enclosed herewith for your reference.**
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> **4. It is thus prayed that the Hon'ble Bench may consider the above decisions and remand the AMP matter to the AO/TPO in the light of decision of Hon'ble**

**Delhi High Court in the case of M/s Sony Ericsson Mobile Communications Pvt. Ltd.** ***(supra)***

6. Learned counsel for the assessee, in his brief rejoinder, submits that the question of remitting back the matter to the file of the TPO would arise only when there is a categorical finding about the existence of international transaction. In the present case, the international transaction has been inferred on the basis of excessive expenditure on AMP and application of bright line test. That approach, in the light of the legal position prevailing on the basis of binding judicial precedents, is no longer permissible. He once again points out that in the subsequent year, the revenue authorities have abandoned the case for existence of AMP. We are thus urged to uphold the plea of the assessee.

7. We find that out of total advertisement, marketing and promotion expenses of Rs 7,93,95,060 identified by the Transfer Pricing Officer, the expenditure of Rs 1,75,57,511 was incurred on account of warehousing charges, custom duty, clearing and forwarding expenses and transportation charges etc which is, as rightly pointed out by the learned counsel, is in the nature of distribution expenses rather than AMP expenses. That amount of Rs 1,75,57,511 has to be essentially taken out of the expenses in the nature of advertisement, marketing and promotion expenses. As for the remaining amount of Rs 6,18,37,549, which works out to 20.99% of sales. In the immediately following subsequent assessment year, the AMP expenditure was worked out by the TPO was 18.14% but when distribution expenses are excluded, this comes down to 13.34%. Yet, the TPO was of the view that incurring of this expenditure resulted in an international transaction the only basis for coming to the conclusion that there was an international transaction was the following observation made by the TPO in his letter dated 17th January 2013:

> **2. It is seen from audited financial of the assessee company that a sum of Rs.6,18,37,549/- has been incurred by it on advertisement and sales promotion (AMP) which amounts to 26.94% of the total sales of the assessee company. It is proposed that the AMP expenditure incurred by the assessee should be considered as an international transaction for which reimbursement should have been received by the assessee as it leads to creation of marketing intangible for the AEs and not for the business purposes of the assessee.**
>
> **2.1 It has been mentioned Para 4.3.3 of the transfer pricing report that "MHIPL does not own any significant intangible and does not undertake any significant Research and Development on its account that leads to the development of non-routine intangibles. MHIPL uses the trademark, know-how, technical data software, quality standard etc., developed/owned by CMC. All companies of the group leverage from these intangibles for continued growth in revenues and profits. Accordingly, MHIPL does not own any significant non-routine intangibles."**
>
> **2.2 From the quantum of the advertisement and sales promotion expense incurred by the assessee it is apparent that the assessee is involved in the promotion of a Brand which is not owned by it. It is doing it for the benefit of the Brand Owner i.e. the foreign AE CMC, France, hence, it should have been**

**paid for the services being provided by it. However, no agreement between the assessee and the AE for the promotion of the brand has been filed. The transfer pricing regulations require that it is not the 'form' but the overall arrangement/substance of the transactions that must be kept in mind.**

**Section 92F(v) of the Income-tax Act states:**

**"transaction includes an arrangement, understanding or action in concert, whether or not such arrangement, understanding or action is formal or in writing;"**
**Similarly, Rule 10B(2)(c) states:**

**"the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;"**

**2.3 Above provisions read with the well established doctrine of 'substance over form' (applied by the Courts in numerous judicial decisions) indicate that transfer pricing regulations are to be applied keeping in mind the overall scheme of the taxpayer's business arrangement.**

**2.4 in view of the discussions in the foregoing paragraphs I am of the considered view that the expenditure incurred on AMP by the assessee and thereby promoting the brand/trade name owned by CMC, France, the AE is an international transaction and the same has neither been reported in Form 3CEB nor has been benchmarked in transfer pricing study, I am of the considered view that the onus which was on the assessee 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".**

**2.5 It has already been stated in the foregoing paragraphs that the expenditure on AMP has been incurred to promote the brand/trade name owned by CMC, France, the AE and such expenditure has resulted into brand building and increased awareness of the products bearing such brands/trade names. I am of the considered view that the expenditure incurred by the assessee company is for the advantage of its AE, since the brand/trade name is owned by the AE. In such a situation the assessee company should have been suitably compensated by the AE. However the assessee has not received any payment in this regard from the AE. Therefore it is clear that the assessee has not been suitably compensated by the AE in respect of the expenditure incurred by it (the assessee) on Advertising and Sales Promotion expenses (AMP) to penetrate the market and to increase the sales by promoting the brand name.**

8. What the Assessing Officer considers should have been recovered from the AE, the Assessing Officer does not consider recoverable from the assessment year 2011-12 onwards

even though admittedly there is no change in the facts and circumstances of the case. The inference about the international transaction has thus not found favour with the revenue authorities in the subsequent assessment years. While no ALP adjustment has been made in these years, the entire expenditure has been disallowed, firstly as illegal expenditure inadmissible for deduction under section 37(1), and, thereafter, as capital expenditure. As for the stand of the revenue authorities that the AMP expenditure incurred by the assessee was excessive, we have noted that even after assessee's pointing out, vide letter dated 23rd January 2013, that comparable expenses, for the same period, in respect of other similar companies dealing with alcoholic products, is as high as 17.41% in the case of United Breweries Limited (and 11.18% in the case of Jagit Industries Limited, 7.32% in the case of Radio Khaitan Limited, 12.31% in the case of Skol Breweries Limited and 8.27% in the case of Tilaknagar Industries Limited) , the TPO did not even deal with that aspect of the matter. In any case, a higher AMP expenses *per se* cannot be reason enough to infer that there was an international transaction. There has to be something more than the mere quantum of expenditure to indicate, even if not establish, that the said expenditure was incurred on behalf of the AE. That is not the case here and the AO and TPO themselves have abandoned this stand in the later assessment years. Not only the level of expenditure incurred by the assessee is so exorbitantly high that this expenditure has to be essentially for the purposes other than the purposes of the business of the assessee, the nature of the expenses is also not such that it reflects that the expenditure is incurred on behalf of the AE. The nature of the expenses, as set out in page 279 of the paperbook, which is a copy of annexure to the letter dated 23rd January 2013 to the TPO, is as follows:

> **During FY 2008-09, Moet India has spent an amount of INR 6,18,37,549. The nature of this expenditure is as under:**
>
> **1. Expenses incurred for events: The Assessee has tied up with few outlets where in it conducts events and would incur for such events like Guest list manager, decor, invite printing, courier charges for sending the invite, food, bar tender, bottles, photographer, DJ etc.**
>
> **2. Gift: The Assesses has gifted bottles to high profile people.**
>
> **3. Display & visibility: The, assesses has entered into contracts with few outlets, wine shops for displaying bottles for which the Assessee pays rent lo them.**
>
> **4. Purchase of point of sales material ('POSM'): The Assessee purchases POSM material.**
>
> **5. Warehouse rent of POSM godown, custom duty etc; Warehouse rent of POSM warehouse and custom duty, C&F charges etc on POSM.**
>
> **6. PR Agency: The Assessee has hired a PR agency on retainership basis.**
>
> **7. Event Management Co: The Assesses has hired an event management company on retainership basis.**

**8. Training & testing expenses: The Assessee has hired a trainer for providing training.**

**9. Retail schemes : The Assessee offers schemes like "a dollar off" at duty fee shops.**

**10. Market visit expenses of marketing personnel plus guests like accommodation, conveyance, food etc.**

**11. Salary: Staff incentive, brand manager salary at duty free shop, Salary of support staff.**

9. On a careful consideration of all these factors, including the inconsistency in the approach of the AO/TPO with respect to the AMP 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 nature of bonafide business expenditure in furtherance of its legitimate business interests, we are of the considered view that there is no legally sustainable basis for the TPO 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 ALP adjustment was made but that approach has already been negatived by Hon'ble Courts above. We see no reasons to remit the matter to the file of the TPO, 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 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 case of Bacardi India *(supra),* Their Lordships, inter alia, have observed as follows:

**5. Having heard learned counsel for the parties, the Court finds that the case before the ITAT was argued at length and the views of the TPO as well as the Dispute Resolution Panel ('DRP') were already available to the ITAT. Arguments were advanced on the strength of judgments of this Court in Sony Ericsson Mobile Communications India Pvt. Ltd. vs. Commissioner of Income Tax (2015) 374 ITR 118 (Del.) as well as a string of subsequent judgments beginning with Maruti Suzuki India Ltd v. CIT, (2016) 381 ITR 117.**

**6. Nevertheless, the main reason that weighed with the ITAT to remand the matter to the TPO was that the TPO did not have the benefit of the above decisions of this Court when the order was initially passed by the TPO. That can hardly be a ground for remanding the entire matter to the TPO. In fact, this was anticipated by this Court in Sony Ericsson Mobile Communications India Pvt. Ltd.(supra). In para 193 of that judgment, it cautioned that the ITAT should not**

**simply remand the matter to the TPO but examine it itself, particularly when the facts have already been analysed and considered and no new facts have emerged in the meanwhile.**

**7. In the present case, all the facts necessary for the ITAT to form an opinion on the issues before it concerning the AMP expenditure were already before it. In the circumstances, the remand to the TPO of the entire matter for a decision afresh appears to be unwarranted. The assessee thus succeeds in this appeal.**

10. In the present case, no new facts have emerged and all the facts brought to record, during the course of the assessment proceedings, donot indicate legally sustainable basis for coming to the conclusion that there was an internal transaction in respect of AMP 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 transactions, 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 ALP 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 ALP adjustment of Rs 6,64,70,841, accordingly, stands deleted.

11. In the result, the appeal of the assessee is allowed. Pronounced in the open court today on the 23rd day of August, 2018.

*Sd/xx*
**Sudhanshu Srivastava**
(Judicial Member)

*Sd/xx*
**Pramod Kumar**
(Accountant Member)

**New Delhi, Dated the 23rd day of August, 2018**

*Copies to:* *(1)* *The appellant* *(2)* *The respondent*
*(3)* *CIT* *(4)* *CIT(A)*
*(5)* *DR* *(6)* *Guard File*

*By order*

*Assistant Registrar*
*Income Tax Appellate Tribunal*
*Delhi benches, New Delhi*