आयकर अपीलीय अधिकरण, मुंबई "के" खंडपीठ

Income-tax Appellate Tribunal -"K"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी. एन. प्रसाद,न्यायिक सदस्य

Before S/Sh.Rajendra,Accountant Member and C.N. Prasad,Judicial Member

आयकर अपील सं./I.T.A./7714/Mum/2012,निर्धारण वर्ष /Assessment Year: 2008-09

LÓreal India Private Limited A-Wing, 8th Floor, Marathon Futurex, N.M. Joshi Marg, Lower Parel,Mumbai-400 013. **PAN: AAACL 0738 K**	Vs.	DCIT-6(3) Aayakar Bhavan, M.K. Road Mumbai-400 001.

आयकर अपील सं./I.T.A./1119 /Mum/2014,निर्धारण वर्ष /Assessment Year: 2009-10

LÓreal India Private Limited Mumbai-400 013.	Vs.	DCIT-6(3)Aayakar Bhavan, M.K. Road Mumbai-400 001.

आयकर अपील सं./I.T.A. 976/Mum/2014,निर्धारण वर्ष /Assessment Year: 2009-10

DCIT-6(3)Aayakar Bhavan, M.K. Road Mumbai-4000 01.	Vs.	LÓreal India Private Limited Mumbai-400 013.

आयकर अपील सं. /ITA/.No.518 /Mum/2015, निर्धारण वर्ष /Assessment Year: 2010-11

LÓreal India Private Limited Mumbai-400 013.	Vs.	DCIT-6(3)Aayakar Bhavan, M.K. Road Mumbai-400 001.

आयकर अपील सं./I.T.A. 335/Mum/2015,निर्धारण वर्ष /Assessment Year: 2010-11

DCIT-6(3)Aayakar Bhavan, M.K. Road Mumbai-4000 01.	Vs.	LÓreal India Private Limited Mumbai-400 013.

(अपीलार्थी /**Appellant**) (प्रत्यर्थी / **Respondent**)

Revenue by: Shri N.K. Chand-CIT
Assessee by: Shri Nishant Thakkar and
Ms. Jasmin Amalsaduala

सुनवाई की तारीख / **Date of Hearing: 21.04.2016**
घोषणा की तारीख / **Date of Pronouncement: 04.05.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश
Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the orders of the Assessing Officers/Dispute Resolution Panel (DRP)the assessee and the Assessing Officers(AO.s)have filed the appeals raising various grounds for the above mentioned years.As the issues involved in all the cases are similar,so,we are adjudicating all the appeals by a single order for the sake of convenience.The details of the dates of filing of return, date of order of DRP and assessed income etc.can be summarized as under :

A.Y.	ROI filed on	Returned Income(Rs.)	Assessment dt.	Assessed Income(Rs.)	DRP directions

2008-09	30/09/2008	50,83,74,502/-	30/10/2012	23,40,90,670/-	03/09/2012
2009-10	30/09/2009	26,70,63,290/-	16.12.2013	142,23,48,170/-	30/10/2013
2010-11	15/10/2010	33,28,54,912/-	14/11/2014	164,35,54,912/-	28/10/2014

ITA/7714/Mum/2012,AY.2008-09:

2.Assessee-company was incorporated in India in the year 1991.It is a wholly owned subsidiary of L'Oreal SA France.It is engaged in manufacturing and distribution of cosmetics.

2.1. First ground of appeal is about transfer pricing (TP) adjustment on account of advertisement,marketing and sales promotion expenses(AMP expenses), including mark-up of Rs. 41.74 crores.During the assessment proceedings,the AO found that the assessee had entered into international transactions with its associated enterprises(AEs).For determining the Arm's Length Price (ALP) of such transactions,he made a reference to the Transfer Pricing Officer (TPO),as per the provisions of section 92 of the Act.

During the TP proceedings, the TPO accepted all the international transactions to be at ALP except one and that was the AMP expenses.He held that the expenditure was on the higher side.He applied profits split method (PSM)to arrive at ALP.The TPO held that the consolidated profits of the group could be attributed to 3 major activities i.e.manufacturing(50%)research and develop - ment(15%) and AMP(35%).Considering the above facts,he computed 35% of global profits for determining the ALP.As the AMP expenditure incurred by the assessee was 0.63% of the total AMP expenditure of the group,so,he applied 0.63% on the global profit and computed Rs.348.44crores attributable to the assessee.The assessee had claimed AMP expenditure of Rs.186.05 crores for the year under consideration and had declared profit at Rs. 42.90 crores.The TPO

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deducted 35% of the said profits from the sum computed by him and arrived at AMP adjustment of Rs. 333.43crores.He deducted Rs. 15.01 crores from the total sum i.e. Rs. 348.44 crores.

The TPO was of the opinion that the AMP expenditure incurred by the assessee had resulted in creation of marketing intangibles for its AE,that it should have been compensated by its AEs to the extent of excess AMP incurred vis a vis comparable companies.Accordingly,he applied Bright Line Test(BLT) to determine the ALP of the AMP expenses. The TPO considered the fact that the sales ratio of the Manufacturing Segment(MS)and Distribution Segment (DS) was at 33.15% and 39.59% respectively,that in the Manufacturing Segment the assessee had selected comparables namely Ador Multiproducts Ltd.,Colgate – Palmolive (India) Ltd., Fem Care Pharma Ltd., Henkel India Ltd. and Reckitt Benckiser (India) Ltd. However,the TPO rejected all the comparables chosen by the assessee-except one.He introduced five new comparables namely Dabur India Ltd,Emami Ltd.,Godrej Consumer Products Ltd.,Jyothi Laboratories Ltd., Procter & Gamble Hygiene & Healthcare Ltd. and Procter & Gamble Home Products Ltd.The AMP to sales ratio of the comparables was 12.53%. However, he mentioned that the six comparables considered by him would incur AMP expenditure for brands owned by them and not for the brands owned by the foreign entities.Therefore,to determine the comparable to that of the assessee the arithmetic mean of the AMP expenditure of the comparable was reduced to 8%.

In the DS,the TPO accepted two out of the four comparables selected by t he assessee,having average APL to sales ratio of 4.08%. He arrived at the markup of 8.92%(MS)on the excessive AMP expenses again based on set of comparable companies selected by him for calculating the ALP in respect of the

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services of brand building to the AE. Based on the above the TPO made following AMP adjustments

Particulars	Page ref in TP order	Manufacturing (Amount in Rs.)	Page ref in TP order	Distribution (Amount in Rs.)
Net Sales of the taxpayer	Para 7.7 on Page 22-26 of the TP Order	4,47,84,37,000/-	Para 7.7 on Page 26-28 of the TP Order	113,33,68,000/-
Arm's length % of AMP Expenditure		8%		4.08%
Arm's length AMP Expenditure		35,82,74,960/-		4,62,41,414/-
Expenditure incurred by the tax payer on AMP		1,46,48,41,000/-		44,87,17,000/-
Excessive expenditure incurred for developing the intangibles		90,36,92,844/-		40,24,75,586/-
Mark up @ 8.92%		8,06,09,402/-		3,59,00,822/-
Arm's length value of AMP activity		98,43,02,246/-		43,83,76,408/-
Value received by the taxpayer		Nil		Nil
Difference-TP adjustment		98,43,02,246/-		43,83,76,408/-

After receiving the order of the TPO,the AO sent a draft assessment order to the assessee proposing the adjustment made by the TPO.

2.2. Aggrieved by the order of the AO,the assessee filed objections before the DRP.It was stated that AMP expenditure incurred by it was not an international transaction at all, that the payment for AMP expenses were made to third parties in India, that there was no agreement between the assessee and the AEs in respect of brand building/AMP expenses,that such expenses were incurred in the course of carrying on its business in India, that the AMP expenditure was not incurred at the instance of the AE.s,that there was no agreement/ understanding/arrangement as to allocate/contribute towards reimbursement of any part of AMP expenditure incurred by the assessee for its business, that the TPO had not brought any evidence on record to prove the there was an arrangement between the assessee and the AE, that it had furnished a certificate from AE showing that there was no arrangement between the parent company

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and the assessee,that the benefits of AMP expenditure were solely derived by the assessee and no benefit was derived from the AE, that the advertisements by the assessee were for products of the assessee and not for brand of the group, that certain products were developed specifically for the Indian markets as per the requirements/ preferences of Indian people, that none of the AE.s of the group would be benefited at any time in future by the advertisement/ marketing/promotion of the products of the assessee, that the assessee was independent risk bearing entity, that it alone enjoyed the increased sales of the product as a result of AMP expenditure,that even if some benefits were derived from the AE.s same were incidental and ancillary, that the purpose of AMP expenses was essentially to create product awareness among the Indian customers,that the AMP expenses were incurred for commercial considerations, that same could not be anyway linked to the development of brands owned by the AE,that residual PSM applied by the TPO was in fact the global formulary apportionment approach ,that it should not be adopted to determine the ALP,that PSM was not the most appropriate method and was not applicable in the instant case,that the facts of the case of Rolls Royce were totally different from the facts of the case under consideration,that the TPO had wrongly applied BLT, that the TPO had cherry-picked the comparables,that the brands/products selected by TPO were not comparable to those of assessee,that the assessee had selected six comparables for MS and four comparables for DS, that the TPO had rejected the comparables in MS without giving adequate reasons,that it had requested the TPO to provide the systematic search process for identification of the comparables,that no such search process was provided by the TPO to the assessee,that the AMP expenses included merchandising expenses as well as sales promotion expenses,that the same did not lead to brand building, that after excluding such expenses the actual AMP expenditure of the assessee was only Rs.21.80% on sales,that same was in line with other companies in the industry,that the mark up of 8.92% on AMP cost was based on cherry picking of

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the comparables,that the comparables were inappropriate and functionally dissimilar,that the approach of the TPO in arriving at two alternate ALPs by adopting two different method was inappropriate and bad in law.

2.3. During the course of hearing before us, the Authorised Representative (AR) contended that AMP expenses was not an international transaction as per the provisions of section 92B of the act, that there was no express provision in the act deeming the AMP expenditure to be an international transaction, that the TPO had not shown any existence of an agreement/arrangement/understanding between the assessee and its AE's whereby the assessee was obliged to incur AMP expenditure in excess of the bona fide requirements of its own business, that the TPO had considered BLT for determining existence of international transactions and held that the assessee had provided brand promotion services to its AEs, that the assessee was risk bearing entity, that it had total turnover of Rs. 561.17crores during the year under consideration,that the manufacturing turnover was of rupees for 47.84 crores and that it had distribution turnover of Rs.113.33 crores,that the expenditure was incurred to promote its own products, that it had not advertise the brand owned by its AEs. He relied upon the cases of Maruti Suzuki India Ltd.(64 Taxmann.com 150), Honda Ciel Power Products (64Taxmann.com328),Whirlpool of India Ltd.(64 Taxmann.com 324), delivered by the Hon'ble Delhi High Court.Referring to the case of Sony Ericsson Mobile Communication India private limited(231 taxmann 113),he stated that matter should not be remanded back to the file of the TPO in view of the said decision.
The Departmental Representative (DR)stated that in the case of LG Electronics (140ITD41)the special bench of the Tribunal had held that AMP was a separate international transaction,that it had approved the BLT for the purposes of determination of ALP of international transaction of AMP,that subsequently Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communica - tion(supra)held AMP to be an international transaction,that BLT was not

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approved by the Court,that the Hon'ble court had laid down certain important principles of TP, that the court had laid emphasis on conducting detailed functional analysis that would include AMP functions/ expenses,that the court had observed that selection of comparables also required to be matched with the functions and obligations performed by tested parties including AMP expenses, that bundled transaction approach had to be followed in such cases and that detailed functional analysis had to be conducted. He referred to eight cases, decided by the Delhi Tribunal,wherein the issue of AMP expenditure was restored back to the file of the AO in light of the judgment of Sony Ericsson. With regard to the decision of Hon'ble Delhi High Court in the case of Maruti Suzuki,the DR stated that up to the date of decision i.e.11/12/2015,the departmental authorities did not have the benefit of the decision,that they were following the order of the LG Electronics (supra)using BLT, that in some cases BLT had been followed and the expenditure on AMP had been sliced into two portions,that the non routine expenditure in excess of BLT was considered separately as international transaction and benchmarked accordingly for the purpose of ALP,that non-routine excess expenditure taken out for benchmarking of AMP would be required to be considered as the part of cost base/expenditure relating to distribution segment/ manufacturing segment as the case may be. He referred to the cases of Toshiba India Private Limited, India Medtronics Private Limited, Johnson & Johnson India Ltd,Essilor India Private Limited and Molson Coors India Ltd.and stated that the Tribunal had restored back the issue of AMP expenses to the file of the AO in all the cases,that the case under consideration should also be sent back to the file of the AO.

2.4. We have heard the rival submissions and perused the material before us.We find that the assessee had bench marked the International transactions in two different segments i.e.Manufacturing Segment(MS) and Distribution Segment (DS),that the financial of MS had net sales of Rs.447.84 crores and the DS had

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net sales of Rs.113.33 crores,that for the MS the assessee had adopted Cost Plus Method(CPM) as the most appropriate method,that gross margin of the assessee was bench marked against the gross margins of comparable manufacturing companies,that the arithmetic mean of the comparables was taken @83.69% on input-cost,as against 146.71% on input-cost of the assessee, that the it had claimed that transaction in the MS were at arm's-length,that for DS it had adopted RPM,that the gross margin in the DS was bench marked against the gross margin of the comparable distribution companies,that the arithmetic mean of the comparables was 33.37% on sales as against 61.01% on sales of the comparables,that it had also bench marked the transactions using TNMM,that the operating expenses(other than the direct expenses) were allocated between the two segments on the basis of turnover, that the operating margin in MS was 7.46% on sales as against that of the comparables of 9.12%, that the assessee has used the latest available year's data,that the operating margin of the assessee in DS was 8.37% on sales as against the 8.03% of the comparables,that the TPO had held that none of the above methodologies had given reliable results,that the assessee had incurred an expenditure of Rs. 186 crores on AMP on net sales of Rs.561 crores,that the expenditure was 33.15% of the net sales,that he further observed that the assessee was developing and promoting the brands that were not owned by it though same were manufactured and distributed by it,that he had also held that the assessee had incurred huge expenses for promoting the brands owned by its AEs and that it was a deemed international transaction, that he further observed that the transactions involved significant intangibles and that the PSM was the most appropriate method.We find that he had relied upon the decision of the ITAT, Delhi Bench in the case of Rolls Royce Plc(1310/Del/2015; A.Y 2010-11 dt.03/ 12/2015)and had computed 35% of Global profit of the group at Rs. 55308. 91 crores for arriving at the figure of Rs.333.43 crores as the compensation receivable by the assessee for promoting and enhancing the brands owned by the AEs.Alternatively,he made the

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computation of compensation receivable on account of AMP expenditure,using the Bright Line Standard (BLS).In the MS, he had rejected five out of the six comparables selected by the assessee and identified five other companies that were engaged in manufacturing cosmetics and were of similar size.The arithmetic mean of the AMP expenditure of the six comparables (on Net sales) was computed @12.53%. Considering the fact that the companies would be incurring AMP expenses for the purpose of brand owned by them,the TPO held that BLS for the routine AMP expenditure should be taken at 8% of the net sales.It is found that the assessee had objected to the figure of 8% and that the TPO rejected the five other comparables suggested by the assessee.

It is also observed that he had rejected two of the four comparables selected by the assessee in DS and had determined the excess AMP of Rs.40.25 crores for the year under appeal,that after applying mark-up of 8.92%,he determined an adjustment of Rs.43.84 crores in the second segment.

We also find that the sales of the assessee had increased 19 time since the year 1999,that the average annual growth of the cosmetic industry in India was reported to be about 15-20%, that the TPO had not compared the market share of the assessee for the year under consideration.Now,if the expenditure incurred by the assessee is considered in the back ground of the growth achieved by it one has to agree with the argument of the assessee that it made rapid progress in the Indian market and AMP played an important role in it.The assessee was manufacturer and distributor of cosmetic products.The very nature of the business carried out by the assessee was such that to establish its product it had to spend huge expenses.The TPO had ignored the fact that expenditure was incurred for products launched especially for the Indian market and that the brand of the AEs was not promoted.The manufacturing unit of the assessee had shown a huge turnover.Thus,we do not find force in the arguments of the TPO / DRP that AMP expenses incurred by the assessee were primarily or secondarily aimed to benefit the AE.s.and that it was entitled to a reasonable compensation

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for such AMP expenses.Secondly,the important issue raised by the assessee that it had huge amount on account of sales promotion had not been dealt with by the TPO/DRP.In our opinion,it is an important factor for determining the ALP.

We further find that the TPO has not brought on record any evidence to prove that the assessee had rendered any services to its AE.s under the head AMP.On the contrary,payment on account of advertisements etc.was made to unrelated domestic third parties.In our opinion,these basic facts compelled the TPO to hold that in the case under consideration the international transaction was not the actual AMP expenditure,but the real issue was the benefit conferred by it to its AE.s in form of promotion and brand value augmentation of the brands owned by them.

In these circumstances,in our opinion,the fundamental question to be answered is to decide as to whether in absence of any agreement for payment of AMP expenses by the AE.s can it be held that there was an international transaction only on the basis that AMP expenditure,incurred by the assessee,would have benefitted the AE.s.,who owned the brands used by the assessee.In our opinion, the arguments suffers from the very basic flaw that it presumes that the assessees would incur AMP not to promote its own business.In other words,the TPO has failed to prove that the real intention of the assessee in incurring advertisement and marketing expenses were to benefit the AE.s.and not to promote its own business.The turnover of the assessee proves that during the year under consideration the assessee had done a reasonably good business,as state earlier.The resultant profit was offered for taxation in India.Therefore, transferring of profit from India,the basic ingredient to invoke the provisions of section 92 of the Act,remains unproved.

We find that in the cases of Maruti Suzuki(supra)Whirlpool India(supra), Bausch & Lomb Eyecare(India) Pvt.Ltd(ITA 643 of 2014 of Hon'ble Delhi HC),the issue of AMP expenses had been deliberated upon extensively and each and every argument raised by the TPO/DRP have been analysed thread bare.We

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would like to reproduce relevant portion of the judgment of Bausch & Lomb Eyecare (India) Pvt.Ltd.(supra) and same reads as under:

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

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

55. Section 928 defines 'international transaction' as under:

"Meaning of international transaction. 928.(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 anyone or more of such enterprises. (2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes 'of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to' the relevant transaction between such other person and the associated enterprise, or

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the terms of the relevant transaction are determined in substance between such other person and the associated enterprise."

56.Thus, under Section 92B(1) an 'international transaction' means- (a) a transaction between two or more AEs, either or both of whom are non-resident (b) the transaction is in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, incomes or losses of such enterprises, and (c) shall include a mutual agreement or arrangement between two or more AEs for allocation or apportionment or contribution to the any cost or expenses incurred or to be incurred in connection- with the - benefit, service or facility provided or to be provided to one or more of such enterprises.

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

58. In Maruti Suzuki India Ltd. (supra), one of the submissions of the Revenue was: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for the same has been paid or remains payable or there is a mutual agreement to not charge any compensation for the service or benefit. "This was negatived by the Court by pointing out; "Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to Section 92F (v), which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means',

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part and the 'includes' part of Section 928 (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC."

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

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

60. The transfer pricing adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceeding to make the adjustment of the difference in order to determine the

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value of such AMP expenditure incurred , for the AE. In any event, after the decision in Sony Ericsson (supre), -- the question of applying the BLT to determine the existence-of an-international transaction involving AMP expenditure does not arise.

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

62. In the present case, the mere fact that B&L, USA through B&L, South Asia, Inc holds 99.9% of the share of the Assessee will not ipso facto lead to the conclusion that the mere increasing of AMP expenditure by the Assessee involves an international transaction in that regard with B&L, USA. A similar contention by the Revenue, namely the fact that even if there is no explicit arrangement, the fact that the benefit of such AMP expenses would also encure to the AE is itself self sufficient to infer the existence of an international transaction has been negatived by the Court in Maruti Suzuki India Ltd. (supra) as under:

"68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an· exercise. The Court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions", Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly -in-light of the fact that -the-BLT has been expressly negatived by the Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT,

70. What is clear is that it. is the 'price' of an international transaction which is required to be adjusted: The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an adjustment had to be made. The -burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment. "

71- Since a quantitative adjustment is not permissible for the purposes of a TP adjustment under Chapter X, equally it cannot be permitted in respect of AMP expenses either. As already noticed hereinbetore, 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. BL T, is excessive, thereby evidencing the existence of an international transaction involving the AE. The quantitative determination forms the very basis for the entire TP exercise in the present case.

74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to Section 928 of the Act. The problem does not stop here. Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?

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

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

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

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

65. As already mentioned, merely because there is an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of the foreign AE. As mentioned-in- Sassoon -J David-(supra)- "the--fact that- somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being 'allowed by way of a deduction under Section 10 (2) (xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law".

Considering the facts-like absence of an agreement between the assessee and the AE.s.for sharing AMP expenses,payment made by the assessee under the head AMP to the domestic parties,failure of the TPO prove that expenses were

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not for the business carried out by the assessee in India-and following the judgments of the Hon'ble Delhi High Court delivered in the case of Bausch and Lomb(India)Pvt.Ltd(supra),we are of the opinion that the transaction in question was not an international transaction and that the TPO had wrongly invoked the provisions of Chapter X of the Act for the said transaction.

With regard to the submissions of the AR that the issue of AMP should be restored back to the file of the AO,we want to mention that law as a concept is supposed to evolve with passage of time-it cannot be static always.Non-availability of a particular decision of the higher forum cannot justify the restora -tion of issue/cases to the file of AO in each and every case.Unnecessary litigation has to be avoided and issues have to be settled for once and all.We are of the opinion that after the judgments of Maruti Suzuki and Bausch & Lomb (supra)there is no scope of any other interpretation about the AMP expenditure. In the case under consideration,the AO/TPO has not brought anything on record that there existed and agreement,formal or informal,between the assessee and the AE to share/reimburse the AMP expenditure incurred by the assessee in India.In absence of such an agreement the first and primary precondition of treating the transaction in question an international transaction remains un - fulfilled.Conducting FAR analysis or adopting an appropriate method is the second stage of transfer pricing adjustments.The first thing is to find out whether the disputed transaction in is international transaction or not.Without crossing the first threshold second cannot be approached.In the case under consideration,we are of the opinion that AMP expenditure is not an international transaction and therefore we are not inclined to restore back the issue to the file of the AO.

Considering the peculiar facts and circumstances of the case,first effective ground of appeal is decided in favour of the assessee and the additions made by the AO, including the mark-up adjustments,are directed to be deleted.

3.Second ground of appeal is about set of off unabsorbed depreciation, amounting to Rs.1.52 crores.While finalising the assessment order,the AO did not allow set off in relation to brought forward unabsorbed depreciation,though in the draft assessment order same was allowed.Relying upon the decision of the Mumbai Special Bench in the case of Times Guaranty Ltd.(131 TTJ 257), the AO made a disallowance. As the AO had not disallowed the brought forward unabsorbed depreciation in the draft assessment order, as stated earlier, so,the assessee did not agitate the issue before the DRP.

3.1. Before us,the AR contended that the unabsorbed depreciation from AY. 1995-96 to AY.1996-97 had become part of the unabsorbed depreciation for the AY.1997-98, that the unabsorbed depreciation from that year up to AY.2001-02 got carried forward to the AY.2002-03 as per the amended section 32 (2) of the act, that it was available for carryforward and set off without any limit.He referred to the case of General Motors India Private Limited(257CTR123), Confidence Petroleum India Ltd. (1937/ MUM/2012),Associated Cables Private Limited(ITA/5556/MUM/2012).The DR supported the order of the AO.

3.2. We have heard the rival submissions and perused the material before us.We find that the AO had made the disallowance following the order of the Tribunal delivered in the case of Times Guaranty Ltd.(supra),that the Hon'ble Gujarat High Court had discussed the issue of set off of brought forward depreciation at length while delivering the judgment in the case of General Motors(supra).We find that in the cases,relied upon by the AR,the Tribunal had followed the said judgment.We would like to reproduce the relevant portion of the order of the tribunal in the case of Associated Cables Private Limited (supra) and same reads as under:

"5. We have considered the submissions of ld. Representatives of the parties and orders of authorities below. We hold that the above issue is covered in favour of assessee by the decision of Hon'ble Gujarat High Court in the case of General Motors India

Pvt.Ltd (supra) which has been followed by ITAT, Mumbai Bench in the case of Confidence Petroleum India Ltd (supra) to which both of us are the parties. Further, said issue was also considered by ITAT Mumbai in the case of ITO V/s Graham Firth Steel Products (I) Ltd (2008) 24 SOT 106(Mum). In the said case the unabsorbed depreciation in AYs 1997-98 to 2001-2002 was added to the amount to the allowance of depreciation for the assessment year 2002-03 and held that be deemed to be part of that allowance, or if there is no such allowance for that previous year i.e. assessment year 2002-03 be deemed to be allowance for that previous year, and so on for the succeeding previous year, which means unabsorbed depreciation up to assessment year 2001-02 could be carried forward for set off for indefinite period. We consider it prudent to reproduce para 8 of the said order as under :

"8. On reading the provisions of section 32(2) as it stood prior to the amendment made by the Finance (No. 2) Act, 1996, i.e., operative up to and including assessment year 1996-97, it is seen that where, in the assessment of assessee, full effect cannot be given to the depreciation allowance owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable being less than the allowance, then subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years. The effect of these provisions is that the unabsorbed depreciation for a particular year becomes, by legal fiction, part of the depreciation allowance for the succeeding year and so on without any time limit. What section 32(2) as operative up to and including assessment year 1996-97 contemplates is that current depreciation is deductible, in the first place, from the income of the business to which it relates; if such depreciation amount is larger than the amount of the profits of that business, then such process is deductible from the profits or gains of any other business/es, if any, carried on by the assessee, and if a balance is left even thereafter, that comes for absorption from the income from any source under any of the other heads of income during that year; and in case there is still a balance left over, it is to be treated as unabsorbed depreciation and it shall be carried forward to the next succeeding year, and where there is current depreciation

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for such succeeding year, the unabsorbed depreciation brought forward from earlier year is added to the current depreciation for such, succeeding year and is deemed, by legal fiction, a part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for succeeding year. In this view of the matter, section 32(2) contained an independent provision for setting off unabsorbed depreciation carried forward from a preceding year. The unabsorbed depreciation can be allowed to be carried forward and set off against income from other sources in a subsequent year notwithstanding the fact that the business in respect of which it arose ceased to exist in the year of such set off. However, certain restrictions have been put, for and from assessment year 1997-98 by an amendment made by the Finance (No. 2) Act, 1996, on allowance of unabsorbed depreciation as the old section 32(2) operative up to assessment year 1996-97 has been substituted. According to section 32(2), as substituted by the Finance (No. 2) Act, 1996 with effect from 1-4-1997, the unabsorbed depreciation of earlier years can be carried forward to the following assessment year and can only be set off against the profit and gains, if any, of any business or profession carried on by the assessee and assessable for that assessment year and following assessment year not being more than eight assessment years immediately succeeding the assessment year for which the aforesaid allowance was first computed. However, for availing the benefit of carried forward of unabsorbed depreciation, it is essential that the business or profession for which the allowance was originally computed continued to be carried on by the assessee in the previous year relevant for that assessment year as stipulated in the 1st proviso to section 32(2)(iii) as substituted with effect from 1-4-1997. In this context, it may be observed that amended section 32(2) as substituted by the Finance (No. 2) Act, 1996 (with effect from 1-4-1997) has been substituted by the Finance Act, 2001, with effect from 1-4-2002 and status quo ante has been restored with effect from assessment year 2002-03. The new sub-section (2) of section 32 as substituted by the Finance Act, 2001 with effect from 1-4- 2002 has restored the sub-section (2) of section 32 as it stood in the assessment year 1996-97. In other words, the restrictions imposed by the Finance (No. 2) Act, 1996 with effect from 1-4-1997 in the matter of set-off of unabsorbed depreciation has been dispensed with by substituting the section 32(2) by the Finance Act, 2001 with effect from 1-4-2002 and status quo ante, i.e., status quo of section 32(2) as existed prior to the amendment made by Finance (No. 2) Act, 1996 with effect from 1-4-1997 has been restored."

Further, the said issue has also been considered by ITAT, Mumbai Bench in the case of M/s Arch Fine Chemicals Pvt.Ltd. V/s ACIT in ITA Nos.2414 and 2415/Mum/2012(AYs 2005-06 & 2006-07) order dated 9.10.2013 to which one of us (JM) is also party. In view of above, we hold that the assessee is entitled to claim set off of unabsorbed depreciation pertaining to assessment years 1997-98 to 1999-2000 against business income of the assessment years under consideration. Hence, Ground of appeal taken by assessee is allowed by reversing the orders of authorities below."

Respectfully,following the above order,second ground of appeal is decided in favour of the assessee.

ITA/1119/Mum/2014,AY.2009-10:

4.Effective ground of appeal,for the year under appeal,deals with additions made by the AO on account of TP adjustment under the head AMP expenses, amounting to Rs.1,69,25,00,000(including mark-up).Following our order for the earlier AY.for the identical issue,we decide the effective ground in favour of the assessee .

ITA/976/Mum/2014,AY.2009-10:

5.In his appeal,the AO has challenged the order of the DRP wherein it had directed the AO not to included the selling expenses for determining the value of the brand.The second issue is about the direction given by the DRP about bright line method. While deciding the appeal of the assessee for the earlier AY.,we have held that AMP expenditure is not an international transaction. Therefore, the issue of excluding of certain items for making adjustments becomes infructuous.The second issue of application of Bright Line method has to be decided against the AO because the Hon'ble Delhi High Court has held that the said method cannot be applied to determine the ALP of the international transactions. As stated earlier, the issue of AMP expenditure has already been decided in favour of the assessee,therefore, the second ground has to be decided against the AO.In short, both the grounds raised by the AO stand dismissed.

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ITA/518/Mum/2015,AY.2010-11:

6.In the effective ground for the year under consideration,the assessee has challenged the addition made by the AO with regarding to AMP expenses of Rs.1,31,07,00,000/-.Following our orders for the earlier two years,effective ground stands decided in favour of the assessee .

ITA/335/Mum/2015,AY.2010-11:

7.The AO has challenged the order of the DRP with regard to AMP expenses and selection of the comparables. Following our order for the earlier years, all the grounds raised by the AO are decided against him, for the year under consideration.

As a result appeals filed by the assessee for all the three AY.s.stand allowed and the appeals of the AO for both the AY.s.are dismissed.

फलतः निर्धारिती द्वारा दाखिल की गई तीनों नि. व. की अपीलें मंजूर की जाती हैं और निर्धारिती अधिकारी द्वारा दोनों नि.व.के लिए दाखिल की गई अपीलें नामंजूर की जाती है.

Order pronounced in the open court on 4th,May, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 4 मई , 2016 को की गई ।

Sd/-	**Sd/-**
(सी. एन. प्रसाद **/ C.N. Prasad**)	(राजेन्द्र **/ Rajendra**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांकDated : 04.05.2016.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "A " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**

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