IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCH 'B', CHANDIGARH

BEFORE Ms. SUSHMA CHOWLA, JUDICIAL MEMBER
AND SHRI MEHAR SINGH, ACCOUNTANT MEMBER

ITA No.1238/Chd/2010
(Assessment Year : 2006-07)

M/s Glaxo Smithkline Consumer Healthcare Ltd., Nabha. DLF Plaza Tower DLF City Phase-1, Gurgaon.	Vs.	The Addl.C.I.T. Range IV Chandigarh.
PAN: AACCS0144E (Appellant)		(Respondent)

Appellant by : S/Shri Ajay Vohra & Neeraj Kumar Jain

Respondent by : S/Shri Ritesh Kumar & Ajay Sharma, DR

Date of hearing : 20.10.2011
Date of Pronouncement : 25.01.2012

O R D E R

PER SUSHMA CHOWLA, J.M, :

The present appeal is filed by the assessee against the order of the Assessing Officer dated 28.9.2010 passed under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 relating to assessment year 2006-07. As the impugned assessment order is passed after assessee's objections against the proposed additions to the returned income having been examined by the Dispute Resolution Panel, this is a direct appeal against the assessment order.

2. The assessee has raised following grounds of appeal :

> *"1.1 That the Assessing Officer erred on facts and in law in completing the assessment under section 144C read with section 143(3) of the Income Tax Act (the Act) at an income of Rs.313,86,75,735 as against the returned income of Rs.1,88,22,37,820.*

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2.0 That the Assessing Officer/Transfer Pricing Officer ("AO/TPO") erred on facts and in law in making addition to the income of the appellant to the extent of Rs.1,19,45,81,713 on account of the alleged difference in the arm's length price of reimbursement of advertisement, marketing and brand promotion expenses (AMP expenses).

21. That on the fact and circumstances of the case benchmarking of the international transaction of reimbursement of Advertisement and Promotion (AMP) Expenses as well as Royalty Expenses by the TPO in absence of a reference by the AO is unlawful and beyond jurisdiction.

2.2 That the AO/TPO erred on facts and in law in holding that AMP expenses amounting to Rs.1,40,29,07,000, comprising of (i) advertisement and sale promotion expenses of Rs.12,316.81 lacs; (ii) development and scientific research expenses of Rs.97.41 lacs; (iii) services charges paid to selling agents of Rs.11.49 lacs; (iv) market research expenses of Rs.790.14 lacs; (v) Selling and Distribution expenses of Rs.372.17 lacs and (vi) discount on sales of Rs.441.05 lacs resulted in promotion of brand owned by the associated enterprise, thereby creating marketing intangibles whose ultimate benefit inure to the associated enterprise.

2.3 That the AO/TPO erred on facts and in law in holding that the appellant has developed marketing intangible for the associated enterprise in India by performing all functions and by bearing all economic costs and risks.

2.4 That the AO/TPO erred on facts and in law in not appreciating that advertisement and marketing expenses incurred by the appellant does not result in benefit nor created any intangible for the AE.

2.5 That the AO/TPO erred on facts and in law in not appreciating that the AMP expenses, etc., incurred by the appellant cannot be characterized as an international transaction as per section 92B of the Income Tax Act so as to invoke the provisions of section 92 of the Act.

2.6 That the AO/TPO erred on facts and in law in not appreciating that the associated enterprise was not under obligation to reimburse the alleged AMP expenses incurred by the appellant for sale of its products to the dealers.

2.7 That the AO/TPO erred on facts and in law in not appreciating that expenditure on advertisement and brand promotion could at best be said to be unilateral flow from action of the appellant and

could not be regarded as transaction or "international transaction: as per section 92B of the Income Tax Act so as to invoke the provisions of section 92 of the Act.

2.8 *That the AO/TPO erred on facts and in law in not appreciating that the power of the TPO is restricted to the determination of arm's length price of international transactions and not to make disallowance of business expenses incurred by the appellant.*

2.9 *That the assessing officer/TPO erred on facts and in law in applying Bright Line Test ("BLT") for computing adjustment on account of expenditure on advertisement and brand promotion expenses without appreciating that in absence of specific provision under the Transfer Pricing Regulations in India, adjustment on account of the arm's length price of the advertisement and brand promotion expenses could not be made.*

2.10 *Without prejudice that the assessing officer/TPO erred on facts and in law in not appreciating that even applying developer assister rule as contained in US Transfer Pricing regulations, viz., REG.1482-4, the appellant would be characterized as developer of the marketing intangibles and hence it would not be required to seek reimbursement compensation for such expenditure from the associated enterprise.*

2.11 *That the assessing officer erred on facts and in law in relying upon the decision of the case of DHL Incorporated and Subsidiaries vs. Commissioner of Internal Revenue Tax Court, TCD 1998-461, aff'd in part, rev'd in part 285F.3d.1285. 89AFTR2d 2002-1978 (CA-9,2002); and Glaxo Smith Kline Holding (Americas) Inc. vs. Commissioner, T.C. No.5750-04 and T.C. No.6959-05, which were rendered in the context of specific provision under the Transfer Pricing Regulations of United States of America.*

2.12 *That the AO/TPO erred on facts and in law in holding that the expenses incurred by the appellant on advertisement and brand promotion are required to be benchmarked, vis-à-vis, the comparable companies incurring similar advertisement and brand promotion expenses.*

2.13 *That the assessing officer erred on facts and in law in holding that advertisement and promotion expenses incurred by the appellant ought to be restricted to 2.02% of the sale as against 13.60% incurred by the appellant.*

2.14 *That the assessing officer erred on facts and in law in considering the following companies as*

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comparable companies for benchmarking advertisement and publicity expenses :

- *Kwality Dairy (India) Ltd.*
- *Milkfood Ltd.*
- *Modern Dairies Ltd.*
- *Ravalgon Sugar Farm Ltd.*
- *Mahaan Foods Ltd.*
- *Anik Industries Ltd.*
- *Hastun Agro Products Ltd.*

2.15 Without prejudice that assessing officer/TPO erred on facts and in law in rejecting the following alternate set of comparable companies in FMCG segment identified by the appellant for benchmarking of advertisement and brand promotion expenses :

Companies	***Advertisement expenses (% of sales)***
Cadbury India Ltd.	*17.14%*
Gillette India Ltd.	*17.10%*
Hindustan Unilever Ltd.	*13.09%*
Nestle India Ltd.	*9.98%%*
Procter & Gamble Hygiene & Health Care Ltd.	*13.89%*
Average	***14.24%***

2.16 That the AO/TPO erred on facts and in law in not appreciating that advertisement and promotion expenses of 14.24% of the sale was incurred by the aforesaid companies which was comparable/higher than that of the appellant.

2.17 Without prejudice that the AO/TPO erred on facts and in law in considering expenditure on development and scientific research amounting to Rs.97.41 lacs and services charges paid to selling agent of Rs.11.49 lacs; discount on sales of Rs.441.05 lacs and market research expenses amounting to Rs.790.14 lacs as part of the advertisement and sale promotion expenses.

2.18 Without prejudice that the AO/TPO erred on facts and in law that no adjustment is required to be made in respect of the advertisement expenses attributed to the promotion of brands, viz., Viva, Maltova and Boost, which are owned by the appellant.

2.19 That the AO/TPO erred on facts and in law in not appreciating that the associated enterprises/brand owner has not sold any goods in India and accordingly have not availed any benefit of AMP expenses incurred by the appellant for sale of its products to the dealers.

> *3. That the AO/TPO erred on facts and in law in not appreciating that the payment of royalty to GlaxoSmithKline Asia Pvt. Ltd. is a domestic transaction and not an international transaction within the meaning of Indian transfer pricing regulations.*
>
> *4. That the Assessing Officer erred on facts and in law in not allowing deduction for incremental balance amounting to Rs.25,23,710 lying in PLA under section 43B of the Income Tax Act, 1961 ('the Act').*
>
> *5. That the Assessing Officer erred on facts and in law in disallowing Consumer Product Research expenses of Rs.6,23,17,381 under section 37(1) of the Act alleging the same to be capital in nature.*
>
> *5.1 Without prejudice, that the Assessing Officer failed to appreciate that the market research expenses of Rs.7,90,13,961 which comprised of the impugned expenses amounting to Rs.6,23,17,381 were already disallowed by the Assessing Officer while calculating arms length price, resulting in a double disallowance.*
>
> *6. That the Assessing Officer erred on facts and in law in levying interest under section 234B and 234D of the Act."*

3. The present appeal was fixed for hearing on various dates starting from 14.2.2011 and the matter was adjourned from date to date. On several dates of hearing the matter was adjourned at the request of the learned D.R. for the Revenue. The appeal was fixed for hearing on 3.10.2011, on which date an application was moved by Shri Ajay Kumar Sharma, Addl.CIT, Chandigarh, that because of his attendance in some prosecution proceedings as witness of the department, he was unable to attend the proceedings before the Bench. The matter was adjourned to 12.10.2011. On the appointed date of hearing i.e. 12.10.2011 another application was moved by Shri Ajay Kumar Sharma, Addl. CIT on the plea that the case was being represented by Shri Ritesh Parmar, Addl.CIT, who was busy in disposal of time barring cases. The said request of the learned D.R. for the Revenue was rejected in view of the fact that on the earlier date, the contention of the learned D.R. for the

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Revenue that he was held-up due to his personal appearance before another Court, was accepted. Whereas on the date of hearing, the plea was in respect of non-attendance by Shri Ritesh Parmar. The matter was taken up for hearing on 12.10.2011 and was partly heard on the said date, wherein the learned A.R. for the assessee put forward the contentions and relied on the written submissions. It was further adjourned to 20.10.2011, on which date Shri Ritesh Parmar appeared alongwith Shri Ajay Kumar Sharma for the Revenue and the hearing of the case was concluded.

4. We proceed to dispose off the grounds of appeal raised by the assessee.

5. Ground No.1 raised by the assessee being general is dismissed as such.

6. The issue in ground No.2 i.e. ground Nos.2.0 to 2.19 is against the addition made on account of alleged difference in arm's length price of reimbursement of advertisement,, marketing and brand promotion expenses (AMP expenses) and different facets of the said addition.

7. The brief facts of the case are that the assessee had furnished return of income declaring total income of Rs.188,22,37,820/-. The Assessing Officer vide letter dated 3.10.2008 referred the international transactions entered into by the assessee during the financial year 2005-06 as reported in Audit Report furnished in Form No.3CEB, under section 92CA(1) of the Income Tax Act, to the Transfer Pricing Officer (TPO) as enlisted under para 2.1 of the order of TPO. The Assessing Officer vide letter dated 3.10.2008 had referred the international transactions in respect of export of malted food, biscuits, export of packing material, provision of I.T. services, reimbursement of expenses

(receipts) and reimbursement of expenses (payments) as enlisted under para 2.1 of the order of TPO. Thereafter another reference was made by the Addl. CIT vide letter dated 11.9.2009 in respect of the international transactions under section 92CA(1) of the Act, to the TPO, as enlisted under para 2.2 of the order of TPO.

8. The TPO was of the view that the assessee company is incorporated under the Laws of India and is 40% owned by Horlicks Ltd., U.K., which is part of GSK Group. The TPO vide para 5 thus held that it is an associated enterprise within the meaning of Section 92A (2)(a) of the Income Tax Act. The TPO vide para 6 of his order acknowledged the assessee to have adopted Transaction Net Margin Method (TNMM) for transfer pricing analysis with operating profit/total cost ratio as profit level indicator. Similar method was used by the assessee in the preceding years. The TPO thereafter analyzed the transfer pricing approach of the assessee and show caused the assessee to explain why the data of the relevant financial year only should not be used, as against three years data adopted by the assessee. The questionnaire issued by the TPO and the explanation of the assessee are incorporated under paras 7.1 to 7.4 at pages 5 to 7 of the order of TPO. Thereafter vide para 7.5 the TPO noted that the assessee had sales turnover of Rs.103,131.33 lacs and had debited the following expenses :

S.No.	Name of Expenses	Amount (Rs.Lacs)
1.	Advertisement expenses	8640.06
2.	Selling & Distribution	372.17
3.	Market Research	790.14
4.	Sales Promotion	3676.75
5.	Service charges paid to selling agent	11.49
6.	Discount - sales	441.05
7.	Development & Scientific research	97.41
8.	Royalty	4115.79
9.	Total	18144.86

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9. The submissions of the assessee in respect of various expenses is reproduced under para 7.6 at pages 8 to 11 of the order of TPO. The contention of the assessee, as per the TPO, was misplaced, because of the shareholding pattern of two companies and it was observed that *GSK Asia Pvt. Ltd. is subsidiary of S.B. Port Louis Ltd., Mauritius, an Associated Enterprise. Similarly Glaxo Group Ltd., U.K. (an Associated Enterprise) has 35.99% share holding in GSK Pharmaceuticals Ltd. Thus the provisions of section 92A(2)(b) of the I.T. Act are attracted.* The observation of the TPO thereafter was that *thus the payment of royalty by the assessee is an international transaction between the assessee and its A.E. and I do not find any merit in the submission of the assessee on this issue.* He further observed as under :

> *"7.9 Since royalty payment is a deemed international transaction and the assessee has not benchmarked this transaction to prove if transaction is at arm's length price, I have examined arm's length of the royalty. In this context, is important to note that on one hand, the assessee is making royalty payment to its AE for the use of 'Horlicks' trademark and from its audited financials, it is seen that it has incurred expenditure of Rs.18144.86 Lakhs on advertisement, marketing and promotion. Thus in the year the assessee has created marketing intangibles by incurring expenditure of Rs.18144.86 Lakhs on advertisement, marketing and promotion of the AE brand and products, however, the AE has not compensated the assessee for this cost pertaining to the brand promotion of the AE in India. In order to examine the arm's length price it is necessary to compare total expenditure incurred by the assessee on behalf of the AE in India and amount paid by the assessee to India as contribution for advertisement expenditure by the AE. Accordingly, I have examined all the advertisement marketing and sale promotion expenditure (in short AMP expenditure) incurred by the assessee in India."*

10. The assessee was thus show caused as to why it should not be inferred that it had incurred both routine and non-routine advertisement and marketing expenses on brand promotion and development of

marketing intangibles for the associated enterprises (in short 'AE'). The questionnaire issued by the TPO is reproduced at page 13 and part at page 14 of the order of TPO. The submission of the assessee in reply is reproduced under para 17.10 at pages 14 to 26 of the order of TPO. The main plea of the assessee was that *the expenses on advertisement and brand promotion are not incurred at the instance or direction of the AE nor the AE is to benefit from such expenditure incurred by the assessee in India. Further, it will be appreciated that in absence of any transaction which results in transfer of the benefit of advertisement and brand promotion expenses which otherwise belong to and is exploited by the assessee company to the associated enterprise, the question of transfer of the intangibles or payment by the AE to the assessee company for transfer of such intangibles does not arise.* Further contention by the assessee was that *from the conjoint reading of provisions of clause (v) of section 92F and sub-section (I) of section 92B of the Act it could be inferred that Transfer Pricing regulation would be applicable to any "transaction", being an arrangement, understanding or action in concert, inter alia, in the nature of purchase, sale or lease of tangible or intangible property or any other transaction having bearing on profits, income, losses or assets of such enterprises. Therefore, in order to be characterized as an 'international transaction', it would have to be demonstrated that the same arises pursuant to an arrangement, understanding or action in concert.* The main plea of the assessee was that it had incurred expenditure for brand promotion in India to cater to local requirements and the said expenditure was not at the instance of AE. If any benefit did arise to the AE but without any arrangement or understanding could not be termed as international transaction. The next plank of argument before the TPO by the assessee was that rebates/incentives were paid to other Indian parties and the second

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requirement in the application of transfer pricing regulation i.e. existence of international transaction and transaction of payment between associated enterprises, one of whom is non-resident, was not fulfilled and thus provisions of section 92B(1) of the Act could not be invoked.

11. The alternate plea of the assessee vide para 7.11 of the order of TPO was that various expenses incurred were for the promotion of not only Horlicks but other brands i.e. Viva, Maltova and Boost. The break-up of the expenditure in tabulated form is incorporated under para 7.13 at page 27 of the order of TPO. The TPO thereafter has held that in view of the terms and conditions of the Agreement between the assessee and authorized AE, the payment of royalty by the assessee was held to be deemed international transaction as per section 92B(2) of the Income Tax Act. The tax auditors had reported expenditure of Rs.4115.79 lacs by the assessee on payment of royalty to its AE, which was an international transaction, as per the TPO. However, the assessee had not determined the arm's length price of the said transaction, as observed by the TPO. He was of the view that on one hand, the assessee was making royalty payment to its AE for the use of trademark and on the other hand, it had incurred expenditure of Rs.140.29 crores on AMP (excluding royalty). The TPO thus observed that during the year the assessee had created marketing intangibles by incurring expenditure of Rs.140.29 crores on AMP of AE brand and products, however, the AE had not compensated the assessee for this cost pertaining to the brand promotion of the AE in India. The TPO was of the view that *in order to examine the arm's length price it is necessary to compare total expenditure incurred by the assessee on behalf of the AE in India and amount paid by the assessee to India as contribution for advertisement expenditure by*

the AE. Accordingly, I have examined all the advertisement marketing and sale promotion expenditure (in short AMP expenditure) incurred by the assessee in India. In light of these facts, it is incorrect to say that AMP expenditure is not an international transaction. The TPO vide para 8.2.2 further observed as under :

> *8.2.2 The assessee has claimed that the TPO has no jurisdiction over the examination of this issue as he has no powers to make disallowances not referred to him. It has been contended in the Audit Report for the assessee that AMP expenditure is third party expenditure accordingly, the same can not be held as international transaction. It is pertinent to mention here that in this case AMP expenditure has been examined in order to determine arm's length price of international transactions of reimbursements of advertisement expenditure of 140.29 crores as discussed in paragraph above. Accordingly, on the international transaction and reference by the AO, no objection can be raised on the issue.*

12. In the alternative the TPO observed that from the findings of facts, the assessee had incurred huge AMP expenditure to promote trademark owned by its AE and develop marketing intangibles for the product of AE. The AE having received benefit in form of enhanced brand value in India and accordingly, AMP expenditure of Rs.140.29 crores was held to be international transactions within the meaning of section 92B(1) of the Act. As per para 8.2.3 of the order of TPO, the assessee was found to have incurred said AMP expenditure for the benefit of its AE and it was further held that the same was incurred in connection with a benefit and service provided to the AE under mutual agreement, which was not in writing, but such arrangements were proved from the conduct of the assessee and hence, AMP expenditure was held to be an international transaction under section 92B(1) read with clause (v) of section 92F. The claim of the assessee that AMP expenditure of Rs.140.29 crores was

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not an international transaction, was rejected by the TPO. The TPO thereafter observed that multiple years data was not to be used to bench mark the international transactions and only data of financial year was to be used for the said bench marking of international transaction as per para 8.3 onwards. Further the TPO vide para 8.5.2 observed that AMP expenditure vis-à-vis sales of the year, accounted for 13.60% of income as compared to AMP expenditure to income ratio of 0.22% to 3.20%, in the case of comparables, selected by the assessee. The TPO thus observed that *factually this by itself has established that the assessee had incurred huge non-routine expenditure to develop marketing tangible for the AE.* The TPO vide para 8.5.3 further held as under :

> *"8.5.3 From the audited financials of the assessee, it is seen that it has incurred expenditure of Rs.1,40,29,07,000 on advertisement, marketing and promotion of the 'Glaxo & Horlicks' brand and to develop market for the product of the AEs in India. Since AMP expenditure has resulted in increased in the value of "Glaxo & Horlicks" brand in India and helped penetration of Glaxo & Horlicks products in India. It is held that benefit of AMP expenditure was enjoyed by the AE who is legal owner of the brand. However, it is noted that the assessee has not been compensated for incurring cost and assuming risk of promoting brand of the AE in India and developing marketing intangible for the AE. Since, the assessee is manufacturer-cum-distributor of products in India, it is required to incur certain routine AMP expenditure as limited risk distributor but it is noted that the assessee has incurred certain non-routine expenditure for the AE."*

13. The contention of the assessee that the advertisements in print media, press or otherwise was in relation to products aimed to benefit only the products sold by the assessee in India and any benefit accruing to AEs being incidental, was rejected by the TPO, as the thrust of AMP expenditure was to popularize the brand name of the AE and the same

was to promote business activities of the parent company and to enhance brand value, for which no compensation was paid to the assessee in return. The TPO observed that the thrust of AMP expenditure was to promote the brand of AE and to develop market and customer loyalty for the AEs brand. The claim of the assessee that it had incurred AMP expenditure also on brands owned by it, was rejected by the TPO. Under para 8.6.11 of the order the TPO has enlisted the functions performed by the assessee, which in turn has resulted in development of marketing intangible by the assessee for its AE. The TPO thus was of the view that because of the intangible developed by the assessee by way of enhanced sale or production in India, in turn led to the increased profitability of the parent AE. The TPO was of the view that the above said required recomputation at arm's length price, as the assessee had not been compensated for the said services. Thereafter the TPO under para 9 had discussed the selection of comparables for benchmarking of routine AMP expenditure and applied bright line method to determine arm's length price. The ten comparable companies selected by the assessee in its transfer pricing report, were selected as bench mark. The TPO was of the view that though AMP expenditure of the assessee accounted for 13.60% of its income as compared to average AMP expenditure to income ratio of 2.02% for the comparables in view of the comparable uncontrolled price method, by itself established that the assessee had incurred huge non-routine expenditure to develop marketing intangible for the AE and the same was in excess. The TPO thus determined the arm's length price of reimbursement received by the assessee for the brand promotion and marketing intangible of AE in India @ 2% of AMP expenditure and held that the adjustment of Rs.1,19,45,81,713/- was to be made to the income of the assessee being difference between arm's length price of subsidy and the subsidy

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received by the assessee from its AE. The income of the assessee was thus enhanced by the said figure and the assessee was held not to be entitled for deduction under section 10A, 10AA, 10B or under Chapter VIA in respect of the amount of income which has been enhanced.

14. The assessee filed its objections dated 27.1.2010 in form No.35A before the Dispute Resolution Panel. Directions under section 144C of the Act were issued by the Dispute Resolution Panel, New Delhi vide its order dated 9.9.2010. The explanation of the assessee before the Dispute Resolution Panel was that the TPO had erred in observing that the assessee had developed marketing intangible for AE in India by developing of functions and by incurring of economical cost and risk. The Dispute Resolution Panel held that only such comparables which were engaged in the distributions business and were incurring routine AMP expenditure were to be selected. The said concept was observed by the Dispute Resolution Panel to be very scientific and acceptable in many developed countries including USA. The contention of the assessee that the concept of bright line test should not be applied to its case, was found to be not tenable by the Dispute Resolution Panel, observing that TPO had simply applied a well devised, scientific, already in use and a sound taxation concept. The Panel further observed that while working out the excess payment to its associated enterprise, the TPO had already given set off of Rs.20.83 crores, which in fact are the expenditure relating to AMP. Further observation of the Panel was that the total amount paid by the assessee to its AE comprised of different heads and as the TPO had held that expenses of Rs.20.83 crores are at arm's length and required to be incurred for AMP expenses, no further adjustment is warranted. The order of the TPO was thus upheld.

15. The Assessing Officer during the assessment proceedings confronted the report of TPO to the assessee. The objections raised by assessee are incorporated at pages 21 to 24 of the assessment order. The Assessing Officer vide para 7 observed that a reference was made to the TPO under section 92CA of the Act for computation of arm's length price of the international transactions of over Rs.5 crores as per Form No.3CEB filed by the assessee. In view of the order of the TPO the difference in the amount of arm's length subsidy and the value of international transaction undertaken being more than 5%, adjustment of Rs.1,19,45,81,713/- was made to the income of the assessee, after considering the reply of the assessee on the issue.

16. The assessee is in appeal against the order of the Assessing Officer passed under section 143(3) r.w.s. 144C of the Act and has raised various grounds of appeal. The learned A.R. for the assessee pointed out that though multiple grounds of appeal have been raised but the broad propositions to be considered regarding ground No. 2 to 2.19 are as under:

1. *Whether international transaction?*
2. *Whether interference by TPO permissible without Reference from the AO?*
3. *Allowability as revenue expenses if indirect benefit to third party/AE?*
4. *Whether capital expenditure/results in creation of an intangible asset?*
5. *If yes, whether such intangibles are created on behalf of/transferred to AE?*
6. *Applicability of US Regulations and OECD Guidelines/No deeming provision as in US Regulations.*
7. *On facts, expenditure normal/not extraordinary and in line with the industry spend.*
8. *Comparables considered by the TPO not relevant for AMP expenses.*
9. *In any case, AMP expenses demonstrated to be at arm's length apply entity wide basis.*

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> *10. Adjustment, even otherwise, not sustainable, not being based on any of the methods prescribed in Transfer Pricing regulations.*
>
> *11. Without prejudice, no adjustment for AMP expenses for Viva Maltova and Boost.*

17. Elaborate submissions were made by the learned A.R. for the assessee in respect of each of the aforesaid propositions including relevant case laws, which shall be referred to in paras hereinbelow. The learned A.R. for the assessee has filed written submissions in respect of several propositions advanced by him and complete reliance was placed by the learned A.R. for the assessee on the said written submissions.

18. The learned D.R. for the Revenue has filed comments of TPO in respect of various grounds of appeal raised by the assessee and has in turn relied upon on the order of the TPO. The written submissions of the learned A.R. for the assessee and comments of TPO while arguing the present appeal shall be referred to by us at the appropriate juncture.

19. We have heard the rival contentions and perused the record. The issue raised vide ground Nos. 2.0 to 2.19 is in respect of adjustment made on account of arm's length price in view of the provisions of Chapter-X of the Income Tax Act.

20. The assessee is engaged in the manufacturing and selling of malted food products and drinks under the brand names of Horlicks, Boost, Maltova and Viva. The assessee claimed that during the year under consideration it had exported malted milk food to its group companies, which in turn was manufactured by third party vendors in India. In addition, the assessee claimed to have carried on certain administrative support services such as marketing/sales inputs I.T. support and training, accounting, etc. to its group companies. The manufacturing units of the assessee are located in Nabha and Rajahmundry. The assessee had also

set up manufacturing facility for malted food at Sonepat in Haryana. The said plant is established with a capacity to manufacture 26000 tpa of malted food and is the largest spray drying plant in Asia meeting European GMP and safety standards. The facilities provided by the assessee have been accredited with the prestigious ISO certification. The assessee had in the Audit Report furnished in Form No.3CEB declared the details of its international transactions with the associated enterprise in respect of its export of malted products and other allied services.

21. The Assessing Officer during the course of assessment proceedings had made a reference under section 92CA(1) of the Act. The Addl. CIT, Range – IV, Chandigarh in her letter No. Addl.CIT/R-IV/2007-08/232, dated 03.10.2008 had referred the following 'International Transaction' u/s 92CA(1) of the IT Act:-

S.No.	**Transaction**	**Associated Enterprise**	**Amount in Rs.**		
			As per books	**Arm's length price (as determined by the assessee)**	**Method adopted**
1	Export of Malted Food/ Biscuits	S.B. Ltd., Sri Lanka	15,65,29,175	15,65,29,175	TNMM
		SB, Mauritius	33,44,687	33,44,687	
		GSK SDN BHD, Malaysia	1,87,29,390	1,87,29,390	
		GSK, Hong Kong	19,63,158	19,63,158	
	Export of packing material	S.B. Ltd., Sri Lanka	6,97,430	6,97,430	
2.	Provision of I.T. services	GSK Unlimited UK PLC, UK	23,67,455	23,67,455	TNMM
		SB Corporate Centre, USA	64,01,551	64,01,551	
		GSK Services Unlimited, UK	18,02,701	18,02,701	
		Smithkline Beecham, USA	10,56,132	10,56,132	
		SB Pharma Services, USA	15,82,384	15,82,384	
		Tianjin SKF,China	2,53,281	2,53,281	

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		SB Research Ltd., Philippines	2,14,181	2,14,181	
		GSK China Investment Co. Ltd., China	99,965	99,965	
3.	Reimbursement of expenses (receipts)	GSK Financial Services, UK	32,66,181	32,66,181	
		GSK CH LP, USA	14,22,227	14,22,227	--
		GSK Sdn Bhd. Malasia	8,50,000	8,50,000	
		GSK, Negeria	2,02,415	2,02,415	
		GSK Australia	5,65,728	5,65,728	
		Sterling Durg Malaya Sdn Bhd. Malasia	18,43,191	18,43,191	
		SB Ltd., Sri Lanka	47,50,970	47,50,970	
		GSK Pte Ltd., Singapore	4,27,460	4,27,460	
		GSK CH.Korea	18,048	18,048	
		GSK Ltd., Hong Kong	1,04,80,046	1,04,80,046	
		GSK K.K. Japan	15,000	15,000	
		GSK Export Ltd., UK	9,37,574	9,37,574	
4.	Reimbursement of expenses (payment)	GSK Services Unlimited, UK	20,41,532	20,41,532	--
		SB Crop. CB, USA	1,80,090	1,80,090	

22. Subsequently vide letter No. Addl.CIT/R-IV/CHD/2009-10/1182 dated 11.09.2009, the Addl. CIT, Range IV, Chandigarh had referred the following 'International Transactions' under section 92CA(1) of the IT Act.

Name of Associated Enterprises : M/s GSK Asia Pvt. Ltd.

S. No.	Description of the transaction	Amount (in Rupees)
1	Net Consignment sales	12,062.86
2	Rendering of services (cross charges recovered)	2,403.53
3	Reimbursement of expenses (received/receivable)	413.90
4	Selling commission income	80.30
5	Rent paid	129.58
6	Rent received	0.66
7	Royalty paid/payable	4,323.43
8	Interest received	17.32
9	Loan advanced	250.00

<u>Name of Associated Enterprises : M/s GSK Pharmaceuticals Ltd.</u>

S. No.	**Description of the transaction**	**Amount (in Rupees)**
1	Net Consignment sales	5,251.96
2	Purchase of goods	3.58
3	Rendering of service (cross charges recovered)	374.44
4	Shared services	7.85
5	Reimbursement of expenses (received/receivable	259.95
6	Selling commission income	289.38

23. The assessee had based its working on international transactions of three years data pertaining to financial years 2003-04, 2004-05 and 2005-06 and had analyzed the operating profits/total cost ratio of 11 comparable companies. Arithmetic meaning of operating profit margins, earned by the comparable companies was 6.38% and the assessee had computed the said margins at 16.68%. The TPO during the proceedings had show caused the assessee as to why the data of relevant financial year 2005-06 of the said companies should not only be used. In reply the working for operating profit margins relatable to financial year 2005-06 for the comparable companies was furnished and it was claimed that no adjustment is warranted. The TPO has accepted the contention of the assessee and has not made any adjustment on account of international transactions reported by the assessee in Form No.3CEB of Audit Report. However, from the Profit & Loss Account, the TPO noted the assessee to have incurred expenditure totaling Rs.18144.86 lacs on account of royalty and AMP expenses, details of which are as under :

S.No.	Name of Expenses	Amount (Rs.Lacs)
1.	Advertisement expenses	8640.06
2.	Selling & Distribution	372.17
3.	Market Research	790.14
4.	Sales Promotion	3676.75
5.	Service charges paid to selling agent	11.49
6.	Discount – sales	441.05
7.	Development & Scientific research	97.41
8.	Royalty	4115.79
9.	Total	18144.86

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24. The TPO had accepted the plea of the assessee in respect of royalty expenses of Rs.4115.79 lacs and had not made any adjustment on account thereof. However, in respect of AMP expenses aggregating to Rs.14029.07 lacs, the TPO noted that the same was at the ratio of 13.60% of the sales. For undertaking the bench marking analysis of AMP expenditure incurred by the assessee, the TPO observed that the average selling and distribution expense incurred by the following comparable companies was only 2.02% of sales:

S.No.	**Name of the comparable companies**	**Industrial sales**	**Selling & distribution expenses**	**Selling & distribution expenses as % age of sale**
1	Kwality Dairy (India) Ltd.	95.44	0.21	0.22
2	Milk Food Ltd.	204.14	3.99	1.95
3	Modern Dairies Ltd.	92.16	0.61	0.66
4	Ravalgon Sugar Farm Ltd.	48.59	1.18	2.43
5	Mahaan Foods Ltd.	52.15	1.67	3.20
6	Anik Industries Ltd.	123.35	3.94	3.19
7	Milk Specialities Ltd.	64.09	1.18	1.84
8	Hatsun Agro Products Ltd.	544.82	14.75	2.70
	Average			2.02

25. The TPO held that as the ratio of selling and distribution expenses as a percentage of sales at 13.06% was higher than 2.02% incurred by the comparable companies, the assessee having incurred routine and non-routine AMP expenses, resulted in creation of marketing intangibles on account of promotion and development of brand, viz., 'Horlicks' owned by the associated enterprise. The TPO, applying Bright Line test, computed an adjustment of Rs. 1,19,45,81,713/-, being the alleged difference on account of development and sales promotion expenses incurred by the assessee, for which, according to the TPO subsidy ought to be received by the assessee from the associated enterprise.

26. The assessee is in appeal against the aforesaid adjustment made by the TPO, which was upheld by the Dispute Resolution Panel and was

applied by the Assessing Officer in making addition in the hands of the assessee . The said issue has been agitated by the assessee vide ground Nos.2.0 to 2.19 raised in the present appeal. The issue before us needs to be adjudicated in line with the broad propositions raised by the learned A.R. for the assessee for the assessee during the course of hearing, which in turn have been replied by the learned D.R. for the Revenue. We proceed to dispose of the present grounds of appeal raised by the assessee in line with the proposition raised before us.

27. The first proposition raised in the case is whether the transaction considered by the TPO is an international transaction?

28. The learned A.R. for the assessee in addition to the provisions of section 92B of the Act also referred to the definition of clause (v) of section 92F of the Act wherein the term "transaction" is defined. It was submitted by the learned A.R. for the assessee in its written submissions in this regard as under :

> *"From conjoint reading of provisions of clause (v) of section 92F and sub-section (1) of section 92B of the Act it can be inferred that Transfer Pricing regulation would be applicable to any "transaction", being an arrangement, understanding or action in concert, inter alia, in the nature of purchase, sale or lease of tangible or intangible property or any other transaction having bearing on profits, income, losses or assets of such enterprises. Therefore, in order to be characterized as an 'international transaction', it would to be demonstrated that the same arises pursuant to an arrangement, understanding or action in concert."*

29. Thereafter meaning of term "arrangement", "understanding" of "action in concert", as provided in the dictionary/court rulings were referred by the leaned A.R. for the assessee.

30. Further contention of the learned A.R. for the assessee was that the Indian company had incurred expenditure on advertisement, marketing and publicity to cater to local market needs. Such AMP expenditure was

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neither incurred at the instance of overseas associated enterprise, nor was there any mutual agreement or understanding or arrangement as to allocation or contribution by the associated enterprise towards reimbursement of any part of AMP expenditure incurred by the domestic enterprise for the purpose of its business. In absence of any understanding, arrangement, etc., no ‘transaction’ or ‘international transaction’ could be said to be involved with respect to such AMP expenditure incurred by the domestic enterprise, which may be covered within the ken of Transfer Pricing regulations.

31. The learned A.R. for the assessee further submitted that the payment for advertisement and sale promotion was made by the assessee to other Indian parties and the twin requirements under section 92B of the Act were non-existing in the present case. In the absence of any understanding between the associated enterprises, no international transaction was entered into by the assessee. As per the learned A.R. for the assessee the alleged benefit from the expenditure on advertisement and brand promotion can, at best, be said to unilaterally flow from the action of the assessee and could not, therefore, be characterized as an ‘international transaction’ so as to invoke the provisions of section 92 of the Act. Reliance was placed on the decision of Pune Bench of the Tribunal in the case of Patni Computer Systems Ltd. vs. DCIT (ITA No.426 & 1131/PN/06), wherein the Tribunal deleted similar adjustment made by the TPO in respect of expenditure incurred on consultancy charges paid to third party allegedly on the basis the same resulted in benefit to the foreign associated enterprise who was liable to compensate the Indian entity.

32. The learned D.R. for the Revenue in his written submissions pointed out that international transaction of payment of royalty of the

assessee was held to be a deemed international transaction as per section 92B of the Act. It was further pointed out by the learned D.R. for the Revenue that AMP expenditure is itself an international transaction for the detailed reasons in para 8.2 of TPO's order and further for the reasons in para 8.6.16 and 8.6.17 (page No.41 of TPO's order). The assessee had provided intra group service to the AE which required remuneration. As per the definition in section 92B of the Act, the requirements are two fold i.e. a) the transaction between two or more associated enterprises, either or both of whom are non-resident and b) further the said transaction shall be by way of mutual agreement or arrangement between two or more associated enterprises.

33. Under Chapter-X of the Income Tax Act Special Provisions relating to Avoidance of tax are provided. Section 92(1) of the Act stipulate that any income arising from international transaction shall be computed having regard to the arm's length price. As per Explanation under section 92(1) of the Act, allowance for any expenses or interest arising from an international transaction shall also be determined having regard to the arm's length price. Section 92A of the Act defines the term 'associated enterprise' for the purpose of sections 92, 92B, 92C, 92D, 92E and 92F of the Income Tax Act. Section 92B of the Act defines the term of 'international transactions' for the purpose of sections 92, 92C, 92D and 92E and the said section reads as under:

> ***"Meaning of international transaction**.*
> ***92B.** (1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.*

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

34. For computing the arm's length price, resort is to be made to section 92C of the Act which reads as under:

"***Computation of arm's length price***.

92C. *(1) The arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely :—*

(a) comparable uncontrolled price method;

(b) resale price method;

(c) cost plus method;

(d) profit split method;

(e) transactional net margin method;

(f) such other method as may be prescribed by the Board.

(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed :

*[**Provided** that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:*

Provided further *that if the variation between the arm's length price so determined and price at which the international transaction has actually been undertaken does not exceed [five per cent of the latter], the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price.]*

(3) Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that—

(a) the price charged or paid in an international transaction has not been determined in accordance with sub-sections (1) and (2); or

(b) any information and document relating to an international transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or

(c) the information or data used in computation of the arm's length price is not reliable or correct; or

(d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D,

the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him:

Provided *that an opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the arm's length price should not be so determined on the basis of material or information or document in the possession of the Assessing Officer.*

(4) Where an arm's length price is determined by the Assessing Officer under sub-section (3), the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined :

Provided *that no deduction under section 10A [87][or section 10AA] or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section :*

Provided further *that where the total income of an associated enterprise is computed under this sub-section on determination of the arm's length price paid to another associated enterprise from which tax has been deducted [88][or was deductible] under the provisions of Chapter XVIIB, the income of the other associated enterprise shall not be recomputed by reason of such determination of arm's length price in the case of the first mentioned enterprise."*

35. Section 92C(1) of the Act specifies the method to be applied for determining the arm's length price in relation to international transaction and it is provided under section 92C(2) of the Act that the most appropriate method having regard to the nature of transaction is to be applied for computing the arm's length price. It is further provided under section 92C(3) that primarily it is the duty of the Assessing Officer to compute the arm's length price on the basis of material or information or documents in his possession for which the Assessing Officer is duty bound to give an opportunity to the assessee to show cause as to why the arm's length price should not be so determined on the basis of the material or information or documents in the possession of the Assessing Officer. Under sub-section (4) of section 92C of the Act it is provided that where arm's length price is determined by the Assessing Officer under sub-section (3) the Assessing Officer may compute total income of the assessee having regard to such determination. It is further provided that no deduction under section 10A or 10AA or 10B or under Chapter-VIA is to be allowed in respect of the said amount which is included in the total income of the assessee. However, where the Assessing Officer considers it necessary or

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expedient, he may, with the previous approval of the Commissioner, refer the computation of arm's length price in relation to the international transaction to the Transfer Pricing Officer, as per the provision of section 92CA(1) of the Act. Sub-section (2) to 92CA entails where reference is made under sub-section (1), the TPO shall serve a notice to the assessee requiring him to produce evidence in support of the computation made by him of arm's length price in relation to the international transactions referred to in sub-section (1) to section 92CA. Sub-section (2A) to section 92CA of the Act has been inserted by the Finance Act, 2011 w.e.f. 1.6.2011, under which it is provided that where any international transaction other than the one referred to by the Assessing Officer, comes to the notice of the TPO, the provisions of Chapter shall apply to such other international transactions as to an international transaction referred to him under sub-section (1). The provisions of section 92CA of the Act reads as under:

"***Reference to Transfer Pricing Officer.***

92CA. *(1) Where any person, being the assessee, has entered into an international transaction in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said international transaction under section 92C to the Transfer Pricing Officer.*

(2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction referred to in sub-section (1).

[(2A) Where any other international transaction [other than an international transaction referred under sub-section (1)], comes to the notice of the Transfer Pricing Officer during the course of the proceedings before him, the provisions of this Chapter shall apply as if such other international transaction is an international transaction referred to him under sub-section (1).***]***

(3) On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.

[(3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation referred to in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires.]

[(4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer.]

(5) With a view to rectifying any mistake apparent from the record, the Transfer Pricing Officer may amend any order passed by him under sub-section (3), and the provisions of section 154 shall, so far as may be, apply accordingly.

(6) Where any amendment is made by the Transfer Pricing Officer under sub-section (5), he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer.

*(7) The Transfer Pricing Officer may, for the purposes of determining the arm's length price under this section, exercise all or any of the powers specified in clauses (*a*) to (*d*) of sub-section (1) of section 131 or sub-section (6) of section 133 [*or section 133A*].*

Explanation.—*For the purposes of this section, "Transfer Pricing Officer" means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorised by the Board to perform all or any of the functions of an Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons.]"*

36. From the combined reading of provisions of Chapter-X of the Act it is clear that it is the duty of the Assessing Officer to compute any income arising from an international transaction having regard to the arm's length price. The Assessing Officer may determine the arm's length price of an international transaction on its own or where the Assessing Officer considers it necessary, subject to the approval of the Commissioner, he may refer the said computation of arm's length price in relation of international transaction under section 92CA of the Act to the TPO. In view of the relevant provisions of the Act the Assessing Officer is to determine whether the transaction involved is an international transaction and he may either determine the arm's length price of the said transaction on its own or where necessary, subject to approval of the Commissioner, refer the same to the TPO.

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37. Without going into the issue whether the transaction involved is an international transaction, we first refer to the second proposition raised by the assessee. The second proposition raised by the assessee is that whether inference by TPO was permissible without reference from the AO? In the facts of the present case the Assessing Officer had made a reference under section 92CA(1) of the Income Tax Act in respect of the transactions reported in Audit Report in form No.3CEB, which are referred to by us in paras 21 and 22 hereinabove. The TPO had accepted the said transactions and held that no adjustment on account of arm's length price was to be made in respect of the aforesaid transactions. However, while perusing the details furnished vis-à-vis such international transactions and other allied information available before him, the TPO had raised the issue of the expenditure incurred on payment of royalty and AMP expenses, to be international transactions. Though the payment of royalty was held to be deemed international transactions by the TPO, but no adjustment was proposed on account of the said payment. However, in respect of the AMP expenditure incurred by the assessee aggregating to Rs.14029.07 lacs, the TPO had held that such expenditure had resulted in creation of advertising intangibles in favour of the AE and consequently the said expenditure is to be computed on arm's length price.

38 The ambit of section 92CA of the Act flows where the Assessing Officer, with the previous approval of the Commissioner, refers, the computation of arm's length price, in relation to the international transactions, to the TPO. The provision of sub-section (1) of section 92CA of the Act provides that reference by the Assessing Officer, which in turn is subject to previous approval of the Commissioner, is in relation to an international transaction and where there are several

international transactions vis-à-vis same entity, the duty of the Assessing Officer is to refer each such international transactions to the TPO. In other words, the reference by the Assessing Officer under section 92CA(1) of the Act is transaction based and not entity based. There may be several international transactions with the same entity, but the reference made by the Assessing Officer is each transaction specific i.e. only the international transactions which have been referred to by the Assessing Officer after taking the approval of the Commissioner, can be looked into by the TPO. In the absence of the reference being made by the Assessing Officer to the TPO, the suo moto action taken by the TPO in working out the arm's length price of a particular international transaction, not referred to him by the Assessing Officer, is not warranted under the provisions of section 92CA of the Act.

39.The aforesaid position in law has also been clarified by the CBDT vide Instruction No. 3 of 2003, dated 20-05-2003, which read as under:

> *"Subject : Computation of income from international transaction having regard to arm's length price – section 92 of the Income tax Act – Reference to Transfer Pricing Officer and his role –Regarding.*
>
> *The provisions relating to transfer price contained in sections 92 to 92F of the Income Tax Act have come into force with effect from assessment year 2002-03. In terms of the provisions, income from an international transaction is to be computed having regard to arm's length price between the associated enterprises. Further, in terms of section 92CA, a Transfer Pricing Officer, on a reference received from the Assessing Officer, is required to determine arm's length price of an international transaction by an order and the Assessing Officer is required to compute the income having regard to the price so determined by the TPO. The notification regarding jurisdiction of TPOs and their controlling officers have been issued by the Central Board of Direct Taxes and the copies thereof are enclosed for ready reference as annexure II. In order to maintain uniformity of procedure and to ensure that work in this important area proceeds smoothly and effectively, the following guidelines are hereby issues:*
>
> *(i) Reference to Transfer Pricing Officer (TPO):*
>
> *The power to determine arm's length price in an international transaction is contained in sub-section (3) of section 92C. However, section 92CA provides that where the Assessing Officer considers it necessary or expedient so to do, he may refer the computation of arm's length price in relation to an international transaction to the TPO. Sub-section (3) of section 92CA provides that the TPO after taking into account the material available with him shall, by an order in writing, determine the arm's length price in accordance with sub-section (3) of section 92C. Sub-section (4) of section 92CA provides that on receipt of the order of the TPO, the Assessing Officer shall*

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proceed to compute the total income of the assessee having regard to the arm's length price determined by the TPO. Thus, whereas the determination of the arm's length price, wherever reference is made to him, is required to be done by the TPO under sub-section (3) of section 92CA read with sub-section (3) of section 92C, the computation of total income having regard to the arm's length price so determined by the TPO is required to be done by the Assessing Officer under sub-section (4) of section 92C read with sub-section (4) of section 92CA.

In order to make a reference to the TPO, the Assessing Officer has to satisfy himself that the taxpayer has entered into an international transaction with an associated enterprise. One of the sources from which the factual information regarding international transaction can be fathered is Form No. 2CEB filed with the return which is in the nature of an accountants report containing basic details of an international transaction entered into by transaction is entered into, the nature of documents maintained and the method followed. Thus, the primary details regarding such international transactions would normally be available in the accountant's report. The Assessing Officer can arrive a prima facie belief on the basis of these details whether a reference is considered necessary. No detailed enquiries are needed at this stage and the Assessing Officer should not embark upon scrutinising the correctness or otherwise of the price of the international transaction at this stage. In the initial years of implementation of these provisions and pending development of adequate date base, it would be appropriate if a small number of cases are selected for scrutiny of transfer price and these are dealt with effectively. The Central Board of Direct Taxes, therefore, have decided that wherever the aggregate value of international transaction exceed Rs. 5 crores, the case should be pricked up for scrutiny and reference under section 92CA be made to the TPO. If there are more than one transaction with an associated enterprise or there are transactions with more than one associated enterprise the aggregate value of which exceeds Rs. 5 crores. the transactions should be referred to the TPO. Before making reference to the TPO, the Assessing Officer has to seek approval of the Commissioner/Director as contemplated under the Act. Under the provisions of section 92CA reference is in relation to the international transaction. Hence all transactions have to be explicitly mentioned in the letter of reference. Since the case will be selected for scrutiny before making reference to the TPO, the Assessing Officer may proceed to examine other aspect of the case during pendency of assessment proceedings but await the report of the TPO on the value of international transaction before making final assessment.

The threshold limit of Rs 5 crores will be reviewed depending upon the workload of the TPOs.

The work relating to selection of cases for scrutiny and reference to TPO on the above basis in respect of pending returns filed for the assessment year 2002-2003 should be completed by June 30, 2003.

(ii) Role of Transfer Pricing Officer:

The role of the TPO begins after a reference is received from the Assessing Officer. In terms of section 92CA this role is limited to the determination of arms's length price in relation to the international transaction(s) referred to him by the Assessing Officer. If during the course of proceedings before him it is found that there are certain other transactions which have not been referred to him by the Assessing Officer, he will have to take up the matter with the Assessing Officer so that a fresh reference is received with regard to such transactions. It may be noted that the reference to the TPO is transaction and enterprise specific.

The transfer price has to be determined by the TPO in terms of section 92C. The price has to be determined by any one of the method stipulated in subsection (1) of section (2)

thereof. There may be occasi9ons where application of the most appropriate method provides results which are deferent but equally reliable. In all such cases, further scrutiny may be necessary to evaluate the appropriateness of the method, the correctness of the data, weight given to various factors and so on. The selection of the most appropriate method will depend upon the facts of the case and the factors mentioned in rules contained in rule 10C. The TPO after taking into account all relevant facts and data available to him shall determine arm's length price and pass a speaking order after obtaining the approval of the DIT(TP). The order should contain details of the data used, reasons for arriving at a certain price and the applicability of methods. It may be emphasized that the application of method including the application of the most appropriate method, the data used, factors governing the applicability of respective methods, computation of price under a given method will all be subjected to judicial scrutiny. It is, therefore, necessary that the order that of the TPO contains adequate reasons on all these counts. Copies of the documents or the relevant data used in arriving at the arm's length price should be made available to the Assessing Officer for his records and use at subsequent stages of appellate or panel or proceedings."

40. The learned A.R. for the assessee in this regard had placed reliance on the undermentioned case laws:

1) Amadeus India Pvt. Ltd. Vs. ACIT, ITA No.5203/Del/10

2) 3i Infotech Limited Vs. DCIT, 136 TTJ 641 (Mum)

3. Diageo India Private Limited Vs. DCIT, ITA No.8602/Mum/2010 (47 SOT 252 (Del)

41. The Tribunal in Amadeus India Pvt. Ltd. (supra) had held as under:

"10. On bare perusal of sub-section(1) of section 92CA it reveals certain conditions i.e. the assessee should have entered into an international transaction in any previous year. The Assessing Officer may considered it necessary and expedient to verify the arm's length price of the international transactions. The Assessing Officer would taken previous approval from the Commissioner for referring the computation of the arm's length price in relation to the said international transaction. The expression "said international transaction" employed at the end of the sub-section would indicate that operative force of this expression related to that international transaction which has been considered by the Assessing Officer for computation of the arm's length price and for which he took approval from the Commissioner. The role of the TPO has been restricted to that transaction which has been referred to him by the Assessing Officer for computation of the arm's length price. The plain reading of this section nowhere reveals that Ld. TPO can take any transaction suo moto for verification and then suggested necessary adjustment. On a plain reading of sub section (1) according to its language this meaning alone is

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discernable. Apart from that, we find support from the CBDT instructions vide Instrument No.2/2003 wherein role of TPO has been explained. These instructions have been placed on record by the Ld. Counsel of the assessee at page no.331 of the PB. The relevant part of the instructions read as under:-

"Role of Transfer Pricing Officer :

The role of the TPO begins after a reference is received from the Assessing Officer. In terms of section 92CA this role is limited to the determination of arm's length price in relation to the international transaction(s) referred to him by the Assessing Officer. If during the course of proceedings before him it is found that there are certain other transactions which have not been referred to him by the Assessing Officer, he will have to take up the matter with the Assessing Officer so that a fresh reference is received with regard to such transactions. It may be noted that the reference to the TPO is transaction and enterprise specific"

"12. In view of the above discussion, we are of the view that as per Section 92CA(1), the TPO can suggest adjustment on the international transaction entered into by an assessee with its associate enterprises which were sent to him for computation of the arm's length price by the Assessing Officer. Suo moto, he cannot take cognizance of any international transaction for suggesting adjustment in arm's length price."

42. The Mumbai Bench of the Tribunal in Diageo India Private Limited (supra), in turn relying on the ratio laid down by Coordinate benche of the Tribunal in 3i Infotech Limited (supra) vide paras 23 and 24 held as under :

***23.** As far as this adjustment is concerned, it is an undisputed position that the Assessing Officer had not made any reference to the Transfer Pricing Officer for ascertaining ALP in respect of advertising, marketing and promotion expenses alleged to have been incurred for brand strengthening of the brands owned by the AE. The question whether TPO can make adjustments in such a situation is squarely covered by a decision of the Coordinate Bench in the case of 3i Infotech Ltd. v. Dy. CIT [2010] 136 TTJ 641 /[2011] 129 ITD 422 (Mum.) wherein Coordinate Bench has, inter alia, observed as follows:*

38. …… Under the provisions of section 92E, an assessee who has entered into an international transaction during a previous year has to obtain a report from an accountant and furnish such report in the prescribed form, i.e., Form No. 3CEB. Section 92C(3) provides as follows:

"(3) Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that—

(a)the price charged or paid in an international transaction has not been determined in accordance with sub-sections (1) and (2); or

(b)any information and document relating to an international transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or

(c)the information or data used in computation of the ALP is not reliable or correct; or

(d)the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D,

the Assessing Officer may proceed to determine the ALP in relation to the said international transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him :

***Provided** that an opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the ALP should not be so determined on the basis of material or information or document in the possession of the Assessing Officer."*

Section 92CA(1) to (3) empowers the Assessing Officer to make a reference to the TPO and it reads as follows:

"92CA. Reference to TPO.—(1) Where any person, being the assessee, has entered into an international transaction in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the CIT, refer the computation of the ALP in relation to the said international transaction under section 92C to the TPO.

(2) Where a reference is made under sub-section (1), the TPO shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the ALP in relation to the international transaction referred to in sub-section (1).

(3) On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the TPO may require on any specified points and after taking into account all relevant materials which he has gathered, the TPO shall, by order in writing, determine the ALP in relation to the international transaction in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee."

In the present case, the Assessing Officer referred to the TPO for determination of ALP the transactions set out in Form No. 3CEB by his letter dated 29-9-2003. The details of these transactions have already been set out above in the earlier paras. The transaction by which the assessee deputed three of its employees to ICICI Infotech, USA, was not considered as an international transaction to be set out in Form No. 3CEB by the assessee. The Assessing Officer therefore never referred the computation of ALP to the TPO the transaction of deputation of three of its employees by the assessee to ICICI Infotech, USA. The jurisdiction of the TPO is therefore restricted to the transactions referred to him by the Assessing Officer under

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section 92CA(1). The TPO therefore could not under section 92CA(3) determine the ALP in relation to an international transaction not referred to him by the Assessing Officer under section 92CA(1). In this regard Instruction No. 3 of 2003, dated 20-5-2003 issued by the CBDT regarding computation of income from international transaction having regard to ALP, is very clear. In the said instructions, the CBDT explaining the role of TPO has instructed that in terms of section 92CA of the Act, the TPO's role is limited to the determination of ALP in relation to the international transactions referred to him by the Assessing Officer and if during the course of proceedings before him it is found that there are certain other transactions which have not been referred to him by the Assessing Officer, he will have to take up the matter with the Assessing Officer so that a fresh reference is received with regard to such transaction. The Board has further opined that reference to the TPO is transaction specific and not enterprise specific. In the present case, the determination of ALP in respect of the transaction by which the assessee deputed three of its employees to ICICI Infotech, USA, by the TPO is therefore non est to that extent and cannot form the basis for making an addition to the total income. The Assessing Officer therefore could not have made the impugned addition on the basis of the order of the TPO. Since the impugned addition has been made by the Assessing Officer only by placing reliance on the report of the TPO, the addition cannot be sustained.

***24.** We are in respectful agreement with the views so expressed by the Coordinate Bench. It is only elementary that as the reference to the TPO is transaction specific and not enterprise specific, the Transfer Pricing Officer has no powers to go into a matter which has not been referred to him by the Assessing Officer, and even the instructions issued by the Central Board of Direct Taxes, which are binding on all field authorities, make that position very clear and unambiguous. To that extent, TPO's order is to be treated as non est, and any ALP adjustments made on the basis of such a TPO order cannot be legally sustained. We, therefore, direct the Assessing Officer to delete the impugned addition of Rs. 31.54 crores in respect of, what the authorities below have termed as, building brand of the AE. However, as we have deleted the impugned addition on this short ground of jurisdiction, we see no need to deal with the matter on merits."*

43. We further find that the Hon'ble Delhi High Court in ITA 938/2011 in CIT Vs. Amadeus India Pvt. Ltd., vide judgment delivered on 28.11.2011 had dismissed the appeal of the Revenue upholding the order of Tribunal, holding as under:

17. A plain reading of Section 92CA makes it clear that the Assessing Officer, if he considers it necessary or expedient so to do, may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to an international transaction under Section 92C to the Transfer Pricing Officer. At this juncture, we may reiterate that it is primarily the duty of the Assessing Officer to compute any income arising from an international transaction having regard to the arm's length price. He may determine the arm's length price of an international transaction himself or, if he feels that it is necessary or expedient so to do, he may seek the approval of the Commissioner

and, thereafter, refer the computation of the arm's length price in respect of an international transaction to the Transfer Pricing Officer. This makes it clear that it is the Assessing Officer who has to determine, first of all, whether a transaction is an international transaction under Section 92B of the said Act. Secondly, if it is an international transaction in his view, he has to proceed to determine the arm's length price in terms of Section 92C of the said Act. However, if, for any reason, he feels that it is necessary or expedient so to do, he may seek the approval of the Commissioner and then refer the computation of the arm's length price in relation to the said international transaction to the Transfer Pricing Officer. The role of the Transfer Pricing Officer, as indicated in Section 92CA, is restricted to determining the arm's length price in relation to the international transaction which has been referred to him by the Assessing Officer and such computation of the arm's length price in relation to the said international transaction has to be done in terms of Section 92C of the said Act. On a plain reading, we are of the view that it is not within the domain of the Transfer Pricing Officer to determine whether a particular transaction, which has come to his notice, but which has not been referred to him, is or is not an international transaction and then to go on and determine the arm's length price thereof. That, we feel is in the exclusive jurisdiction of the Assessing Officer. It ought to be pointed out that these views are on the basis of the provisions of Section 92 CA, as applicable to the assessment year 2006-07, that is, prior to the introduction of sub-section (2A) of Section 92CA by virtue of the Finance Act, 2011 with effect from 1.6.2011. Insofar as the present appeal is concerned, Section 92CA would have to be read without sub-section 2A. We agree with Mr Syali that sub-section (2A) cannot have retrospective effect inasmuch as it deals with the jurisdiction of the Transfer Pricing Officer and, therefore, sub-section (2A) cannot be regarded as being a mere procedural provision.

24. We do not agree with the submission made by the learned counsel for the revenue that when a reference is made by an Assessing Officer to the Transfer Pricing Officer, the reference includes the entire gamut of transactions between the assessee and its associated enterprise. The Assessing Officer is the person who has been entrusted with the duty to determine as to whether a transaction is an international transaction or not. Then, if it is an international transaction of the nature specified in Section 92B of the said Act, the Assessing Officer has to determine the income of the assessee having regard to the arm's length price by following the method prescribed in Section 92C. If, for some reason, the Assessing Officer feels that it is necessary or expedient so to do, he may refer the

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> *computation of the arm's length price of specific international transactions, after obtaining the prior approval of the Commissioner of Income-tax, to the Transfer Pricing Officer. It is quite possible that in the case of a particular assessee, there may be several international transactions and the Assessing Officer may only wish to refer some of those international transactions for the purposes of computing the arm's length price while in respect of others, he may compute the arm's length price himself. Thus, the jurisdiction of the Transfer Pricing Officer is limited and restricted to computing the arm's length price of only those international transactions which have been specifically referred to him by the Assessing Officer. We once again clarify that this is the position prior to the introduction of sub-section (2A) of the said Act which we have held to be prospective in operation."*

44. The Hon'ble Delhi High Court in respect of sub-section (2A) introduced w.e.f. 1.6.2011 held that the said section was to be applied only prospectively by observing as under:

> *"20. Similarly, in the case before us, we find that there is nothing in the statute to indicate that sub-section (2A) was introduced in a manner so as to operate with retrospective effect. Sub-section (2A) expands the jurisdiction of the Transfer Pricing Officer by empowering him to determine the arm's length price of any international transaction other than an international transaction referred to him by the Assessing Officer under sub-section (1) of Section 92CA. This is clearly an expansion of the jurisdiction of the Transfer Pricing Officer and, therefore, sub-section (2A) can only have prospective effect from 01.06.2011 and would have no application to the present appeal which is in respect of the assessment year 2006-07."*

45. The learned D.R. for the Revenue in the written submissions pointed out that references were made by the Assessing Officer in respect of certain transactions but the international transaction of payment of royalty was not disclosed by the assessee as the international transaction with AE. It was further pointed out by the learned D.R. for the Revenue that in view of the expenditure incurred by the assessee on behalf of the AE in India for brand promotion of the brands of AE in India, it could not be presumed that the TPO suo moto assumed

jurisdiction. We find no merit in the proposition forwarded by the TPO in view of the ratio laid down by the Coordinate Benches of the Tribunal and also the judgment in the case of Amadeus India Pvt. Ltd.(supra). We are in agreement with the ratio laid down by the Coordinate Benches of the Tribunal, which in the case of Amadeus India Pvt. Ltd. has been upheld by Hon'ble Delhi High Court. In the absence of any reference being made by the Assessing Officer under section 92CA(1) of the Act, in respect of the AMP expenditure, the assumption of jurisdiction by the TPO in working out arm's length price in respect of the aforesaid AMP expenditure, is not justified and the order of the TPO in this regard is non-est. We have decided the present issue on applicability of the provisions of section 92CA of the Act without adjudicating the first proposition raised by the assessee that the transaction in question is not an international transaction. The Assessing Officer is, therefore, directed to delete the impugned addition of Rs.11945.81 lacs. The assessee is also in appeal in respect of the computation made by the TPO by holding several expenses as AMP expenditure and manner of computation and also the comparables picked up by the TPO. The assessee has raised several grounds of appeal against the same and both the authorized representatives had made elaborate submissions on the said issues. However, in view of our decision in holding the order of TPO to be non est, we are not addressing the said issues. The grounds of appeal Nos. 2.0 to 2.19 raised by the assessee are thus partly allowed.

46. The issue in ground No.3 raised by the assessee is in relation to royalty payment. The learned A.R. for the assessee pointed out that there was no revenue impact on account of observations of Assessing Officer/TPO. He further fairly admitted that the ground of appeal is premature. In view thereof, the same is dismissed.

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47. The issue raised in ground No.4 against non-allowance of deduction for incremental balance lying in Profit & Loss Account under section 43B of the Act was considered by the Special Bench of Chandigarh Tribunal in assessee's own case, reported in 107 ITD 343 (SB)(Chd). The Special Bench had held the said deposits as eligible for deduction under section 43B of the Act. The Assessing Officer had not applied the said ratio as the Revenue had preferred an appeal before the Hon'ble High Court against the order of the Special Bench.

48. The learned A.R. for the assessee pointed out that the issue stands covered by the decision of Hon'ble Punjab & Haryana High Court in CIT Vs. Raj & San Deeps Ltd. [293 ITR 12 (P&H)].

49. The present issue is covered by the decision of Special Bench in the case of the assessee itself. Further the Jurisdictional High Court in Raj & San Deeps Ltd. (supra) has held that where the assessee had deposited the excise duty payable in advance in account-current, after the goods were manufactured, such amount was deductible. Following the same, we direct the Assessing Officer to allow the claim of the assessee in respect of incremental balance amounting to Rs.25,23,710/- lying in PLA Account, under section 43B of the Act. The ground No.4 is allowed.

50. The issue raised vide ground No.5 is in relation to deduction of Consumer Product Research Expenses amounting to Rs.623,17,381/-.

51. The learned A.R. for the assessee pointed out that similar expenditure has been allowed in the hands of the assessee by the Tribunal in appeals relating to assessment years 1998-99 to 2002-03.

52. The learned D.R. for the Revenue has failed to controvert the same.

53. We find that similar issue of deduction of Consumer Product Research Expenses arose before the Tribunal in assessee's appeal in ITA No.379/Chd/2004 relating to assessment year 1998-99. The Tribunal vide order dated 21.3.2007 allowed the claim vide paras 7 to 13 of the said order holding as under:

> *7. We have considered the submissions carefully. First of all we may refer to the details of the expenditure incurred by the assessee which has been placed in the paper-book at page 42. The details of expenditure incurred by the assessee are as follows:*

Particulars	*Amount (Rs.)*
A. Promotional and Trade Marketing Expenses	
Boost badminton rackets	*5319600*
Boost cricket bat	*5040000*
Tennis Balls for Boost	*2146001*
Everfresh containers for packing Horliks GP for Nepal	*980724*
Printing for stickers	*8710*
Purchase of Horliks Baskets	*88000*
Hix glow sign board	*648050*
Outdoor Publicity	*98022*
GP Packaging material	*140000*
RSO-North Trade Mktg.	*26703*
RSO-West Trade Mktg.	*21059*
Souvenir Advertising	*636993*
	15781862
B. Product Development Expenses	
Development Exp. for Nutribar chocolate	*1441589*
Nutribar Stock written off	*1043028*
Nutribar Trials	*112216*
Lotus Nutribar Expenses	*1297430*
Nutribar research expenses	*2923870*
Development exp. for Ribena softdrink	*158938*
Development exp. for Ribena	*4225539*
Horlicks 3-in-1 packaging expenses For free samples	*700620*
Market research & consumer analysis for new produces – viz.	*1567281*
Development exp. Existing products (Horlicks relaunch)	*2850497*

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16321008

Total : Rs.321,02,870/-

8. A bare perusal of the aforesaid details of expenditure incurred by the assessee shows a fact position that the expenditure is in relation the business of the assessee. This aspect has also not been disputed by the revenue, as is evident from the orders of the lower authorities. Now the issue whether a particular expenditure is capital or revenue has been a subject matter of numerous judicial pronouncements. It is also a well accepted proposition that there is no single definite criterion which by itself can determine whether a particular expenditure is capital or revenue. It is a trite law that what is relevant is to evaluate the purpose of the outgoing and its intended object and effect and considered in the light of business realities. The Apex court in the case of Alembic Chemicals Works Co. Ltd (Supra) observed that even the test of "enduring benefit" could fail while determining the true nature of expenditure. In other words what is of relevance is to appreciate the peculiar facts and circumstances of each case to determine whether a particular outgoing is capital or revenue.

9. In this background we may peruse the expenses incurred by the assessee under the head 'Promotional and Trade Marketing Expenses'. Such expenditure has been incurred on existing products of the assessee and include cost of presentation items, gifts, etc. given to the customers on the sale of the product, expenditure on advertisement material etc. The expenditure can be viewed as in actuality discount-in-kind allowed to the customers and expenditure on advertisement of the existing products of the assessee. Clearly the expenses incurred are of revenue nature. The expenses in question have merely facilitated the carrying on the business of the assessee more fruitfully. The argument of the revenue that such expenditure result in enduring benefit in as much as the expenditure results in enhancing of the brand, in our view, cannot be taken to mean that the expenditure is capital in nature. As we have noted earlier, it is not each and every enduring benefit which is to be concluded as a capital outgoing. At this point it is pertinent to refer to the decision of the Hon'ble Apex Court in the case of Empire Jute Co.Ltd. (Supra). According to the Hon'ble Apex Court what has to be seen is the nature and import of the expensed in question in a commercial sense. In this case although we are of the view that the said expenditure does not result in any enduring benefit to the assessee yet even if one is to concede to this argument of the revenue, still it is not possible to deduce that the expenditure is capital in nature. This is for the reason that such enduring benefit is not in the capital field but is in the revenue field, thereby imbibing the said expenditure with character of a revenue expenditure. We may refer to the following observations of

the Hon'ble Supreme Court in the Case of Empire Jute Co. (Supra)

"There may be cases where expenditure even if incurred for obtaining an advantage of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is nature of the principle laid down in this test. What is material to consider is nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be of revenue account, even though the advantage may endure for an indefinite future".

The aforesaid decision of the Hon'ble Apex court clearly shows that the test of enduring benefit is not conclusive to judge true nature of expenditure. One has to go further and ascertain as to whether particular expenditure results into an advantage of enduring nature in the capital field or revenue filed. In the instant case having regard to the nature and details of expenditure it is clear that the expenditure under the head "Promotional and Trade Marketing Expenses" is an expenditure which is incurred wholly and exclusively for the purposes of business and is in the revenue field. The same is allowable as a revenue expenditure.

10. Now we may examine the expenditure under the head "Product Development Expenses". The details of the expenditure show that the same has been incurred for introducing and developing new products. The assessee is engaged in the business of manufacture and sale of food and health care products under a well known brand. The expenses include development expenses for new products namely nutirbar chocolate, Ribena soft drink, Horlicks re-launch expenses. Certainly such expenditure has the potential to improve the profitability of the assessee. However the issue to be considered is whether the expenditure seeks to enlarge the profit yielding capacity or it increases the efficiency of the business. This aspect, in our considered opinion, is to be decided in the light of the business realities under which the assessee is operating. The assessee is engaged in the business of manufacturing of fast moving consumer goods. The business of the

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assessee is subjected to volatility in consumer preferences, tastes and wants. The assessee is therefore required to perennially study the market and launch new varieties in its products line and meet the competition in the market. It is in this background one has to examine as to whether the impugned expenditure incurred on development, introduction and launching of newer products is an advantage in the revenue filed or not. In our humble opinion the expenditure in question has merely enabled the assessee to remain competitive in the market and retain the customer preferences and loyalty towards its brand of products. The said advantage certainly is not limited to the period under consideration but spills over to the future also. So however this is not conclusive to hold that the expenditure in question is a capital expenditure. The parity of reasoning laid down by the apex court in the case of Empire Jute Co. Ltd. (Supra) discussed by us in the earlier paragraph is squarely applicable with respect to such expenditure also.

11. We may mention here the stand of revenue that the development and introduction of new products create a new line of business for the assessee and thus expenditure related thereof is to be treated as capital expenditure. On this aspect we are unable to appreciate as to how can it be said that mere development and introduction of new varieties of products result in creation of a new line of business. Factually speaking, prior to the development and introduction of the impugned new products the assessee was in the business of manufacturing and sale of food and health care products. Even post development and introduction of new products, the business of the assessee remains that of manufacturing and sale of food and health care products. Therefore it is erroneous to conclude that the assessee acquired a new line of business by merely developing and introducing new products in the existing line of business. The new products clearly relate to the same line of business that the assessee has been hitherto carrying on. Therefore, on above consideration also the plea of the assessee that the expenditure in question is a revenue expenditure deserves to be upheld.

12. As a matter of passing we may refer to the judgement of the Hon'ble Karantaka High Court in the case of CIT vs. Bharat Earth Movers Limited 155-ITR-353(Kar) wherein it has been held that expenditure incurred on development of products is a revenue expenditure. The ld. Counsel for the assessee relied upon an unreported decision of the Delhi Bench of Tribunal in the case of M/s Honda Siel cars India Limited (ITA No.3688 & 3689/Del/2005) dated 21.02.2006 to argue that expenditure incurred in introduction of a new Model of Car by an existing car manufacture is a revenue expenditure. To the similar effect reliance has been placed on the judgment of the Amritsar Bench of the Tribunal in the case of DCIT vs. Max India Ltd. (ITA No.230/Asr/2000) dated 9.6.2006.

13. In conclusion, we hold, that having regard to the aforesaid discussion the claim of the assessee for allowability of impugned expenditure as revenue

> *expenditure is justified. We, therefore set-aside the order of the CIT(A) and direct the Assessing Officer to delete the addition. "*

54. The said proposition was followed by the Tribunal in assessment years 1999-2000, 2000-01 and 2002-03 in ITA Nos. 575/Chd/2004, 320/Chd/2005 and 29/Chd/2007 vide order dated 21.9.2007. The said expenditure has also been allowed by the Tribunal in assessment years 2003-04 and 2004-05. Following the precedent, we direct the Assessing Officer to allow the claim of the assessee. The ground No.5 is allowed.

55. The ground No.5.1 raised by the assessee is an alternate plea and the same does not survive in view of our decision to ground Nos.2 to 2.19 hereinabove.

56. The ground No.6 raised by the assessee against charging of interest under section 234B and 234D of the Act, as admitted by learned A.R. for the assessee for the assessee is consequential. Hence the same is dismissed being consequential.

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

Order Pronounced in the Open Court on 25th day of January, 2012.

Sd/-	Sd/-
(MEHAR SINGH)	**(SUSHMA CHOWLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated 25th January, 2012

Rati

Copy to: The Appellant/The Respondent/The CIT(A)/The CIT/The DR.

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