# IN THE INCOME TAX APPELLATE TRIBUNAL
# MUMBAI BENCH "J" MUMBAI

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)**
**AND**
**SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)**

## ITA No. 2304/MUM/2021
## Assessment Year: 2012-13

| | | |
|---|---|---|
| Dy. CIT, Circle-7(1)(1),<br>Room No. 126, 1st floor,<br>Aayakar Bhavan, M.K. Road,<br>Mumbai-400020. | **Vs.** | M/s Mattel Toys (India) Pvt. Ltd.,<br>Phoenix House, B-Wing, 4th floor,<br>462, Senapati Bapat Marg, Lower Parel,<br>Mumbai-400013.<br>**PAN No. AACCM 2563 P** |
| **Appellant** | | **Respondent** |

## CO No. 124/MUM/2022
## (Arising out of ITA No. 2304/MUM/2021)
## Assessment Year: 2012-13

| | | |
|---|---|---|
| M/s Mattel Toys (India) Pvt. Ltd.,<br>Phoenix House, B-Wing, 4th floor,<br>462, Senapati Bapat Marg,<br>Lower Parel,<br>Mumbai-400013.<br>**PAN No. AACCM 2563 P** | **Vs.** | Dy. CIT, Circle-7(1)(1),<br>Room No. 126, 1st floor,<br>Aayakar Bhavan,<br>M.K. Road,<br>Mumbai-400020. |
| **Appellant** | | **Respondent** |

| | | |
|---|---|---|
| Assessee by | : | Mr. Ketan Ved, AR |
| Revenue by | : | Mr. Jitendra Kumar, Sr. DR |
| Date of Hearing | : | 07/11/2022 |
| Date of pronouncement | : | 29/12/2022 |

**ORDER**

## PER OM PRAKASH KANT, AM

This appeal by the Revenue and cross-objection by the assessee are directed against order dated 08.10.2021 passed by the Ld. Commissioner of Income-tax (Appeals)-57, Mumbai [in short 'the Ld. CIT(A)'] for assessment year 2012-13.

2. The grounds raised by the Revenue in its appeal are reproduced as under:

> *1. i. 'Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in admitting and accepting new evidence on the basis of different PLI of Operating Profit/Operating Income, which was not remanded to the TPO/AO for his report, in contravention to Rule 46A of the Income Tax Rules, 1962?*
>
> *ii. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified accepting the contention of the assessee based on incorrect factual data?*
>
> *iii. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in rejecting the benchmarking done by TPO on the basis of PLI of AMP expenses/Sales, without assigning any cogent reason and adopting and*

*accepting an entirely different PL of Operating Profit/Operating Income?*

*2. The learned CIT(A)'s order is contrary in law and deserves to be set aside.*

*3. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the AO be restored. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary at the time of hearing.*

3. The grounds raised cross-objection of the assessee are reproduced as under:

***1. Transfer Pricing grounds:***

*1.1 On the facts and circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) ["CIT(A)"] erred in rejecting the Respondent's contention that expenditure on Advertising, Marketing and Promotion ("AMP") is not an international transaction.*

*1.2 The Respondent submits that expenditure on AMP is not an international transaction as held by the Hon'ble Tribunal in its own case vide Order(s) dated 8 July 2016 and 10 September 2020 in ITA Nos 4415/M/2014, CO No. 33/M/2015 and CO No. 152/M/2019 for AY 2008-09, 2009-10 and 2010-11 respectively.*

4. Briefly stated facts of the case are that the assessee company is incorporated in India. It is an indirectly wholly owned subsidiary of Mattel Inc., USA and is engaged in manufacturing and sales of 'toys' products of Mattel ground in India. For the year under consideration, the asessee filed return of income on 29.11.2012 declaring total income of ₹9,59,73,110/-. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the assessment order passed u/s 143(3) r.w.s. 144C(3) of the Act, the Assessing Officer made addition for transfer pricing adjustment of advertising marketing and promotion (AMP) expenses of ₹4,80,31,291/- along with disallowance of depreciation on unused plant and machinery of ₹1,73,829/-. Further, the Assessing Officer vide order u/s 154 dated 30.03.2017 rectified the transfer pricing adjustment and added further sum of ₹36,86,308/- making the transfer pricing adjustment to ₹5,20,17,599/-.

5. On further appeal, the Ld. CIT(A) deleted the transfer pricing adjustment following the finding of his predecessor on the issue-in-

dispute. Aggrieved the Revenue is in appeal before the Tribunal and the assessee is by way of cross-objection as reproduced above.

6. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. The issue-in-dispute is with regard to transfer pricing adjustment of AMP expenses. According to the Assessing Officer/Transfer Pricing Officer, the AMP expenses incurred by the assessee for its own business made to promotion of the brand owned by the Associated Enterprises, thereby creating marketing intangible and resultant benefit to the Associated Enterprises, which being an international transaction, the arm's length price was required to be computed by the assessee. The assessee however, contested that AMP expenses were not incurred by the assessee on behalf or for the benefit of the Associated Enterprises and if any it was incidental. The Ld. TPO applied bright line test (BLT) for making adjustment in respect of excess AMP expenditure. The Ld. CIT(A) following the finding of his predecessor, deleted the addition, observing as under:

> *"My predecessor has deleted the addition on the ground that the appellant has higher operating profit t the comparables*

*even after considering AMP expenses and therefore no separate adjustment can be r in respect AMP expenditure. In the current year the assessee submitted that the operating profit of assessee is 15.80% as against 3.34% of the comparables. The details are as under.*

| **Sr. No.** | **Company Name** | **Operating Income** | **Operating Expenses** | **Operating Profit** | **Operating Profit Ratio** |
|---|---|---|---|---|---|
| 1. | Arihant Industrial Corpn. Ltd. | 62,61,85,975/- | 58,07,38,704 | 4,54,47,271 | 7.26% |
| 2. | Cravatex Ltd. | 1,56,57,98,218 | 1,45,15,45,560 | 11,42,52,658 | 7.30% |
| 3. | Funskool (India) Ltd. | NA | NA | NA | NA |
| 4. | Kokuyo Camlin Ltd. | 3,83,90,35,000 | 3,77,22,77,000 | 6,67,58,000 | 1.74% |
| 5. | OK Play India Ltd. | 41,58,59,525 | 44,95,52,125 | -3,36,92,601 | -8.10% |
| 6. | Sanspareils Greenlands Pvt. Ltd. | 91,20,16,886 | 83,44,66,681 | 7,75,50,206 | 8.50% |
| | **Average of comparable selected by TPO** | | | | **3.34%** |
| | | | | | |
| | **Mattel India** | **1,03,92,80,542** | **43,75,63,542** | **16,41,93,07 6** | **15.80%** |

*Considering the above the facts of the current year are almost identical to AY 2010-11. Following my predecessor order it is held that no separate adjustment can be made in respect of AMP expenses.*

*In view of the above no separate finding has been given with respect to other arguments taken by the appellant."*

6.1 We find that the Tribunal in ITA No. 3903/M/2016 along with CO No. 152/M/2019 for assessment year 2010-11 has allowed the cross-objection of the assessee. In the cross-objection, the assessee had raised that the AMP expenditure would not fall within the ambit of an international transaction and no adjustment to arm's length price need to be made thereof. Since, this being a legal issue

and challenging the route of the addition made by the Ld. TPO/AO. Therefore, firstly, we may like to address the cross-objection of the assessee. AS per the definition of international transactions u/s 92B of the Act means a transaction between two or more associated enterprises, either on both of whom are non-residents, in the nature of purchase, sale, etc. or other transactions having bearing on profit, income or loss of such enterprises. The international transaction also include a mutual agreement or arrangement for allocation or apportionment or any contribution to, any cost or expenses incurred or to be incurred in connection with a benefit, service or facility provided or to be provided by any one or more of such enterprises. Further as per section 92B(2) of the Act the transaction entered into between two associated enterprises shall be deemed to be an international transaction if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprises. In the case under consideration, the AO/TPO did not bring on record exists of any formal or informal agreement between the assessee and AE to share/reimburse AMP expenses incurred by the assessee in India.

In absence on any such agreement, the first and primary condition of holding the transaction in question as an international transaction remains to be fulfilled. As the assessee cannot be held liable for expenses incurred on advertising marketing and promotion as an international transaction of AMP, the consequent benchmarking by the Ld. TPO is also not justified. The ITAT in assessment year 2010-11(supra) has allowed the cross-objection of the assessee observing as under:

> *"5. We find that this Tribunal in assessee's own case for the A.Yrs.2008-09 and 2009-10 in ITA No.4350 and 4415/Mum/2014 and ITA No.84/Mum/2015 and Cross Objection No.33/Mum/2015 for A.Yrs 2008- 09 and 2009-10 respectively vide order dated 08/07/2016 already held that AMP expenditure is not an international transaction and hence, no ALP adjustment could be made thereon. This Tribunal had also placed reliance on the decision of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd vs CIT reported in 64 taxmann.com 150 (Delhi HC). The relevant operative portion of the said tribunal order is reproduced as under:-*
>
> > *"7.We have heard the rival submissions and perused the material before us. Before proceeding further, it would be useful to understand the philosophy of the TP provisions. It is said that the purpose and object of*

*introduction of the provisions contained in Chapter X is to prevent an assessee from avoiding payment of tax by transferring income yielding assets to non-residents even while retaining the power to enjoy the fruits of such transactions i.e. the income so generated. The present provisions were been incorporated vide Finance Act, 2001.Same were further amended vide Finance Act,2002 and are being amended from time to time to meet the new challenges thrown up by the dynamism of the current commercial and business realities. Having regard to the object for which provisions have been enacted, applicability of the said provisions has to be limited to situations where there is diversion of profits out of India or where there may be erosion of tax revenue in intra group transaction. So, intra-group transaction is the first pre-condition for invoking the TP provisions. Calculation of ALP is the next and logical step. But,if the first step itself is missing, the AO cannot go to the second stage. Here, we would also like to mention that there exists a fundamental and basic distinction between the provisions of section 37 and section 92 of the Act-as the first is expense oriented and the second is pricing oriented. The TPO and the FAA have tried to incorporate the ingredients of Section 37 while dealing with the TP adjustments, when they talked of the 'higher expenditure'. In our opinion, the approach of both the authorities were not in accordance with the basic philosophy of the TP provisions. In our opinion, it is the assessee who has to decide how much*

*to spend for earning his income. The tax authorities are prevented from entering into the proverbial shoes of the assessee to decide the justification of the expenditure. The Act stipulates that in certain conditions only the so-called higher expenditure can be questioned. The FAA had not proved that the expenditure incurred by the assessee for advertisement etc .was covered by those sections .If it was the case then the transaction would not fall under section 92 of the Act. So, in our opinion the FAA had adopted a totally incorrect approach, while dealing the allowability of AMP expenditure. We further hold that there is no evidence to prove that the claim made by the assessee that it had incurred the AMP expenditure for catering its own business needs.*

*7.1.We hold that there exists a fine but very important distinction between products promoted and nurtured by an assessee and the brand owned and supported by its AE. In the modern world both exist and play different and specified roles. Therefore, until and unless some - thing positive is brought on record about sharing/ incurring AMP expenditure under the head by an assessee on behalf of its AE, it cannot be held that it should have recovered some amount from the AE as the expenditure by it indirectly helped in augmenting the brand value owned by its overseas AE .If the AMP expenditure incurred by an assessee benefits the AE indirectly it would not mean that it was an IT. The basic purpose of introducing the various provisions of chapter*

*X, as stated earlier, was to prevent tax evasion in the transactions undertaken between an Indian entity and its overseas AE. In our opinion, a perceived/ notional indirect benefit to the AE, due to incurring of certain expenditure by an assessee in India, is not covered by the TP provisions. It is a fact that the payment under the head AMP expenditure was made to third parties and that those parties were located in India.*

*7.2.In the cases of Bausch & Lomb Eyecare(India) Pvt. Ltd(supra),the issue of AMP expenses had been deliberated upon extensively and each and every argument raised by the departmental authorities have been analysed thread bare. We would like to reproduce relevant portion of the said judgment and same reads as under:*

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

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

*55. Section 928 defines 'international transaction' as under: "Meaning of international transaction. 928.(1) For the purposes of this section and sections 92,92C,92D and 92E ,"international transaction" means a transaction between two or more associated enterprises, either or both of whom are non- residents; in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost. or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to anyone or more of such enterprises. (2) A transaction entered into by an enterprise with a person other than an associated*

*enterprise shall, for the purposes 'of subsection (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."*

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

*57. Clauses (b) and (c) above cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of BLI is "any other transaction having a bearing" on its "profits, incomes or losses", for a 'transaction' there has to be two parties. Therefore for the purposes of the 'means' part of clause*

*(b) and the 'includes' part. of clause (c), the Revenue has to show that there exists an 'agreement' or 'arrangement' or' 'understanding' between BLI -and B&L, USA whereby BLI is obliged to spend excessively on AMP in order to promote the brand of B&L, USA. As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i) (a) to (e) to Section 92B are described as an 'International transaction'. This might be only an illustrative list, but significantly' it does not list AMP spending as one such transaction.*

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

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

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

*"The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares etc. of a- certain target company, There can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares etc. of the target company, For, de hors the element of the shared*

*common Objective' or purpose the idea of "person acting in concert" is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The relationship' can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition of substantial acquisition of shares etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement' or an understanding, formal or informal; 'the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares etc. or they may agree to, cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sine qua non for the relationship of "persons acting in concert" to come into being. "*

*60. The transfer pricing adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceeding to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred , for the AE. In any event, after the decision in Sony*

*Ericsson (supre), -- the question of applying the BLT to determine the existence-of an-international transaction involving AMP expenditure does not arise.*

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

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

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

*70. What is clear is that it. is the 'price' of an international transaction which is required to be adjusted: The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP,*

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

*71- Since a quantitative adjustment is not permissible for the purposes of a TP adjustment under Chapter X, equally it cannot be permitted in respect of AMP expenses either. As already noticed hereinbetore, what the Revenue has sought to do in the present. case is to resort to a quantitative adjustment by first determining whether the AMP spend of the Assessee on- application of the BLT, is excessive ,thereby evidencing the existence of an international transaction involving the AE. The quantitative determination forms the very basis for the entire TP exercise in the present case.*

*74.The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to Section 928 of the Act. The problem does*

*not stop here. Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?*

*63. Further, in Maruti Suzuki India Ltd. '(supra) the Court further explained the absence of a 'machinery provision qua AMP expenses by the following analogy: "75. As an analogy; and for-no other purpose; in the-context of a domestic transaction involving two or more related parties, reference may' be made to Section 40 A (2) (a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the AO is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods." In such event, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction." The AO in such an instance deploys the 'best judgment' assessment as a device to disallow what he considers to be an excessive expenditure. There is no corresponding 'machinery' provision in Chapter X which enables' an AO to determine what should be the fair 'compensation' an Indian entity would be entitled to if it is found' that there is an International transaction in that regard. In practical terms, absent a*

*clear statutory guidance, this may encounter further difficulties. The strength of a brand, which could be product specific, may be "impacted by numerous other imponderables not limited to the nature of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on. A simplistic approach using one of the modes similar to the ones contemplated by Section 92C may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance."*

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

*65. As already mentioned, merely because there is an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of the foreign AE. As*

*mentioned-in- Sassoon -J David-(supra)- "the--fact that-somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being 'allowed by way of a deduction under Section 10 (2) (xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law".*

*7.3.With regard to the submissions of the AR that the issue of AMP should be restored back to the file of the AO, we want to mention that law as a concept is supposed to evolve with passage of time-it cannot be static always. Nonavailability of a particular decision of the higher forum cannot justify the restoration of issue/cases to the file of AO in each and every case. Unnecessary litigation has to be avoided and issues have to be settled for once and all. We are of the opinion that after the judgments of Maruti Suzuki and Bausch & Lomb (supra)there is no scope of any other interpretation about the AMP expenditure. In the case under consideration, the AO/TPO has not brought anything on record that there existed and agreement, formal or informal between the assessee and the AE to share/reimburse the AMP expenses incurred by the assessee in India. In absence of such an agreement the first and primary precondition of treating the transaction-in-question an IT remains unfulfilled. Conducting FAR analysis or adopting an appropriate method is the second stage of TP adjustments. The first*

*thing is to find out whether the disputed transaction in is IT or not. Without crossing the first threshold second cannot be approached, as stated earlier. In the case under consideration, we are of the opinion that AMP expenditure is not an IT and therefore we are not inclined to restore back the issue to the file of the AO. Considering the facts and circumstances of the case under consideration, we are of the opinion that the FAA was not justified in upholding the order of the TPO. Therefore, reversing his order, we decide second ground in favour of the assessee."*

*5.1. Respectfully following the aforesaid decision of this Tribunal in assessee's own case referred to supra, we hold that the AMP expenditure is not an international transaction and hence no adjustment to ALP need to be made thereon. Accordingly, the grounds raised by the assessee in its cross objections are allowed. Since the issue is adjudicated in favour of the assessee on technical ground, we refrain to give our opinion on the ground raised in the revenue appeal in this regard on merits as the adjudication of the same would become infructuous."*

6.2 Respectfully, following the above, we uphold the finding of the Ld. CIT(A) that AMP expenditure is not an international transaction. The grounds of the cross-objection of the assessee are accordingly allowed.

6.3 Since, we have already held that AMP expenditure is not an international transaction therefore, adjustment to said transaction for arm's length price is rendered infructuous and no adjustment could have been made. The ground of appeal of the Revenue is accordingly dismissed.

6.4 Further, we note that in the ground raised, the Revenue has referred the issue of accepting new evidence on the basis of the different PLI operating profit/operating income, however, perusal of the order of the Ld. CIT(A), we do not find any reference of admission of any additional evidence. Nothing in this regard brought before us by the Ld. DR. Therefore, other grounds raised by the Revenue are also dismissed.

7. In the result, the appeal of the Revenue is dismissed, whereas, the cross-objection of the assessee is allowed.

**Order pronounced in the open Court/under Rule 34(4) of the ITAT Rules, 1963 on 29/12/2022.**

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(VIKAS AWASTHY)** | **(OM PRAKASH KANT)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai;
Dated: 29/12/2022
Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
**ITAT, Mumbai**