IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1306 OF 2014
WITH
INCOME TAX APPEAL NO. 1307 OF 2014
WITH
INCOME TAX APPEAL NO. 1349 OF 2014

Commissioner of Income Tax-1,
Mumbai .. Appellant

v/s.

M/s. Lever India Exports Ltd. .. Respondent

Mr. Suresh Kumar for the appellant
Mr. Nishant Thakkar a/w Mr. Rajesh Poojary i/b Mulla & Mulla and Craigie Blunt and C for the respondent

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

DATED : 23rd JANUARY, 2017.

P.C.

1. These Appeals under Section 260-A of the Income Tax Act, 1961 (the Act) challenge the order dated 11th February, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The common impugned order is in respect of Assessment Years 2003-04, 2004-05 and 2005-06. Thus, the three appeals before us.

2. The Revenue urges the following re-framed question of law for our consideration:-

"Whether on facts and in the circumstances of the case and in law, the Tribunal was right in accepting the international transaction being reimbursement of advertisement expenses incurred by the Associated Enterprise of the assessee in Dubai, Egypt and Malaysia at arm's length of the basis of the profits earned by the assessee on its entire exports of various products on application of Rule 10B(1)(e) ?

3. The respondent assessee is engaged in the business of manufacture and export of cosmetic and toiletry products. During the subject assessment year, the respondent assessee had reimbursed 20% of the advertisement expenses incurred by its Associated Enterprises in respect of the new products. This expenditure was reimbursed as a part of its business strategy to develop its brands. The respondent assessee applied the Transaction Net Margin Method (TNMM) to determine the Arms Length Price in respect of the advertisement expenditure. For the aforesaid purposes, as the above advertisement expenses were an integral part of export activity, the respondent assessee took into account the profit margin of its entire export activity to determine the ALP not only of its exports but also with regard to the reimbursement of advertisement expenses of its Associated Enterprises. As the operating margin was far in excess of those of the comparables,

no addition was made. However, the Transfer Pricing Officer (TPO) held that as the transaction between the parties were on principal to principal basis, no reimbursement of advertisement expenditure by the respondent assessee to its Associated Enterprises can be allowed. Consequently, determined the Arms Length Price (ALP) at Nil by virtue of disallowing the expenditure. The Assessing Officer passed a final assessment order in accordance with the determination of ALP done by the TPO *inter alia* with regard to the reimbursement of advertisement expenses.

4. Being aggrieved, the respondent filed appeals to the Commissioner of Income Tax (Appeals) [CIT(A)]. The orders of the CIT(A) held that on examination of facts that reimbursement of advertisement expenditure to the Associated Enterprises is a consequence of a business strategy as it results in better profits. On the question of determination of the ALP it held that the TPO has neither challenged the appropriate method for determining the ALP nor the comparables selected by the respondent assessee to determine it. In the above view, it held that addition was made on ad-hoc basis and the same is not permissible. Thus, the appeals were allowed and the addition deleted.

5. On further appeal by the Revenue, the Tribunal held that the TPO has not disputed the comparable selected nor the appropriate method of determining the ALP. It was not a case of the TPO that the ALP of the advertisement expenses is nil on application of some other comparables or invoking some other method to determine the ALP. In the aforesaid circumstances, the appeal of the Revenue was dismissed.

6. Mr. Suresh Kumar, learned Counsel for the Revenue urges that the transaction between the respondent assessee and its Associated Enterprises were on principal to principal basis. In that view, no party would reimburse the expenditure incurred by the other party. Hence, in fact no expenditure was allowable. Therefore, the ALP of advertisement expenses taken as Nil by the TPO should not have been disturbed by the CIT(A) and the Tribunal.

7. We note that the Tribunal has recorded the fact that the respondent assessee has launched new products which involved huge advertisement expenditure. The sharing of such expenditure by the respondent assessee is a strategy to develop its business. This

results in improving the brand image of the products, resulting in higher profit to the respondent assessee due to higher sales. Further, it must be emphasized that the TPO's jurisdiction was to only determine the ALP of an International Transaction. In the above view, the TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee passed the test of Section 37 of the Act and / or genuineness of the expenditure. This exercise has to be done, if at all, by the Assessing Officer in exercise of his jurisdiction to determine the income of the assessee in accordance with the Act. In the present case, the Assessing Officer has not disallowed the expenditure but only adopted the TPO's determination of ALP of the advertisement expenses. Therefore, the issue for examination in this appeal is only the issue of ALP as determined by the TPO in respect of advertisement expenses. The jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an International Transaction in terms of Chapter X of the Act read with Rule 10A to 10E of the Income Tax Rules. The determination of the ALP by the respondent assessee of its advertisement expenses has not been disputed on the parameters set out in Chapter X of the Act and the relevant Rules. In fact, as found both by the CIT(A) as well as the Tribunal that neither the method selected as the most appropriate method to determine the ALP is challenged nor the comparables taken by the respondent assessee is challenged by the TPO. Therefore, the ad-hoc determination of ALP by the TPO *dehors* Section 92C of the Act cannot be sustained.

8. In the above view, the question as proposed does not give rise to any substantial question of law.

9. Therefore, all the three appeals raising identical issue in the context of similar facts are dismissed. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**