Pcit-1, New Delhi vs Beam Global Spirits & Wine (India) ... on 19 February, 2025

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ ITA 155/2022
PCIT-1, NEW DELHI
Through:

versus

BEAM GLOBAL SPIRITS & WINE (INDIA) PVT.LTD. .....Respon
Through: Mr. Deepak Chopra, Mr. Harpreet Singh Ajmani and Ashmita Sharma, Advs.

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BEAM GLOBAL SPIRITS & WINE (INDIA) PVT. LTD. .....Resp
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CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

ORDER

% 19.02.2025

1. Having heard Mr. Gupta, learned counsel appearing for the appellant at some length, we take note of the following position which emerges from the record.

2. The respondent-assessee is stated to be one of the companies under the Beam Global Group and was engaged in the business of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 25/02/2025 at 21:40:35 manufacture, sale, marketing and trading of Indian Made Foreign Liquor1. The IMFL was sold under brands owned and licensed to the Beam Global Group of which Fortune Brands is stated to be the ultimate holding company. Fortune Brands was the parent entity of Beam India Holding.

3. In the course of undertaking a Transfer Pricing Study, the Transfer Pricing Officer2 took note of the following international transactions which are stated to have been entered into by the respondents. The said international transactions are noted in paragraph 6 of the order of the Income Tax Appellate Tribunal3 and which reads thus: -

> "6. The international transactions entered into by the assessee during the year are as under:
>
> | S.No. | Nature of transaction | Value

Internati transacti |
> |---|---|---|
> | 1 | Purchase of compound Alcoholic Preparation | 159120097 |
> | 2 | Distribution of Imported Liquor | 17280852 |
> | 3 | Provision of Marketing Support services | 10782778 |
> | 4 | Re-imbursement of expenses | 19067033 |
> | 5 | Recovery of expenses | 721078 |
>
> 4. The Tribunal records that although the TPO did not interfere with the benchmarking in respect of transactions listed at S. No. 1, 4 and 5, it came to the conclusion that the assessee had incurred "an extremely high level of advertising and market promotion expenditure [AMP]". It thus proceeded to come to the conclusion that the aforesaid would be liable to be treated as an international transaction IMFL TPO Tribunal This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 25/02/2025 at 21:40:35 and, consequently, an Arm's Length Pricing4 study being commenced.
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> 5. The Tribunal has, however, faulted the procedure as adopted by the TPO by observing as follows: -
>
> "29. In our understanding of the facts and law, mere agreement or arrangement for allowing use of their brand name by the AE on products does not lead to an inference that there is an "action in concert" or the parties were acting together to incur higher

> expenditure on AMP in order to render a service of brand building. Such inference would be in the realm of assumption/surmise. In our considered opinion, for assumption of jurisdiction u/s 92 of the Act, the condition precedent is an international transaction has to exist in the first place. The TPO is not permitted to embark upon the bench marking analysis of allocating AMP expenses as attributed to the AE without there being an 'agreement' or 'arrangement' for incurring such AMP expenses.
>
> 30. The aforesaid view that existence of an International transaction is a sine qua non for invoking the transfer pricing provisions contained in Chapter X of the Act, can be further supported by analysis of section 92(1) of the Act, which seeks to benchmark income / expenditure arising from an international transaction, having regard to the arm's length price. The income /expenditure must arise qua an international transaction meaning thereby that the (i) income has accrued to the Indian tax payer under an international transaction entered into with an associated enterprise; or (ii) expenditure payable by the Indian enterprise has accrued / arisen under an international transaction with the foreign AE. The scheme of Chapter X of the Act is not to benchmark transactions between the Indian enterprise and unrelated third parties in India, where there is no income arising to the Indian enterprise from the foreign payee or there is no payment of expense by the Indian enterprise to the associated enterprise. Conversely, transfer pricing provisions enshrined in Chapter X of the Act do not seek to benchmark transactions between two Indian enterprises."

6. As is manifest from the above, the Tribunal was constrained to interfere with the view expressed by the TPO, bearing in mind a failure on the part of the Department to have alluded or referred to any arrangement which may have qualified as a "transaction" as defined ALP This is a digitally signed order.

 in the Act. It is in the aforesaid context that the Tribunal has observed that it was impermissible for the TPO to have embarked upon a benchmarking analysis pertaining to Advertising, Marketing and Promotion5 expenses in the absence of an agreement or arrangement for incurring of AMP having been found to exist.

7. We note that Section 92B of the Income Tax Act, 19616 speaks of a transaction between two or more Associated Enterprises7 in the nature of purchase, sale or lease of tangible or intangible property or provision of services, lending or borrowing of money or any other transaction having a bearing on the profits income, losses or assets of such enterprises. The expression "transaction", which appears in the principal part of Section 92B (1) would have to draw colour from its definition comprised in Section 92F(v) and which reads thus: -

> "92F. In sections 92, 92A, 92B, 92C, 92D and 92E, unless the context otherwise requires,--

(i) "accountant" shall have the same meaning as in the Explanation below sub-section (2) of section 288;

(ii) "arm's length price" means a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions;

(iii) "enterprise" means a person (including a permanent establishment of such person) who is, or has been, or is proposed to be, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights, or the provision of services of any kind, [or in carrying out any work in pursuance of a contract,] or in investment, or providing loan or in the business of acquiring, AMP Act AEs This is a digitally signed order.

 holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, whether such activity or business is carried on, directly or through one or more of its units or divisions or subsidiaries, or whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or places;

(iiia) "permanent establishment", referred to in clause (iii), includes a fixed place of business through which the business of the enterprise is wholly or partly carried on;

(iv) "specified date" means the date one month prior to the due date for furnishing the return of income under sub-section (1) of section 139 for the relevant assessment year;]

(v) "transaction" includes an arrangement, understanding or action in concert,--

(A) whether or not such arrangement, understanding or action is formal or in writing; or (B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding."

It is the aforesaid statutory provision which appears to have constituted the foundation for the findings ultimately returned by the Tribunal and which have been referred to hereinabove.

8. Although the appellants also seek to draw sustenance from the Explanation which came to be inserted in Section 92B by virtue of Finance Act, 2012 with retrospective effect from 01 April 2002 and in terms of which AMP came to be included in the ambit of an international transaction, the question which would still survive for consideration and merit an answer would be whether absent

an agreement or arrangement for incurring AMP expenses, an international transaction could be said to have come into existence so as to trigger the further process of ALP analysis in accordance with Section 92C of the Act.

9. We also bear in consideration the following pertinent This is a digitally signed order.

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> "44. However, in the present appeals, the very existence of an international transaction is in issue. The specific case of MSIL is that the Revenue has failed to show the existence of any agreement, understanding or arrangement between MSIL and SMC regarding the AMP spend of MSIL. It is pointed out that the bright line test has been applied to the AMP spend by MSIL to (a) deduce the existence of an international transaction involving SMC and (b) to make a quantitative "adjustment" to the arm's length price to the extent that the expenditure exceeds the expenditure by comparable entities. It is submitted that with the decision in Sony Ericsson having disapproved of bright line test as a legitimate means of determining the arm's length price of an international transaction involving AMP expenses, the very basis of the Revenue's case is negated.
>
> 45. Since none of the above issues that arise in the present appeals were contested by the assessees who appeals were decided in the Sony Ericsson case, it cannot be said that the decision in Sony Ericsson, to the extent it affirms the existence of an international transaction on account of the incurring of the AMP expenses, decided that issue in the appeals of MSIL as well. In this context, para 52 of the decision in Sony Ericsson has to be read as a whole. It reads as under (page 157 of 374 ITR):
>
> "The contention that AMP expenses are not international transactions has to be rejected. There seems to be an incongruity in the submission of the assessee on the said aspect for the simple reason that in most cases the assessee have submitted that the international transactions between them and the associated enterprise, resident abroad included the cost/value of the AMP expenses, which the assessee had incurred in India. In other words, when the assessee raise the aforesaid argument, they accept that the declared price of the international transaction included the said element or function of AMP expenses, for which they stand duly compensated in their margins or the arm's length price as computed."

46. The said passage has to be read in the context of the discussion preceding it which concerns the assessees whose appeals were being disposed of by the said judgment. It is in the context of those assessees that para 52 notes that "in most cases the assessee have submitted that the international transactions between them and the 2015 SCC OnLine Del 13940 This is a digitally signed order.

 associated enterprise, resident abroad included the cost/value of the AMP expenses. .. .".

47. As regards the submission regarding the bright line test having been rejected in the decision in Sony Ericsson is concerned, the court notes that the decision in Sony Ericsson expressly negatived the use of the bright line test both as forming the base and determining if there is an international transaction and secondly for the purpose of determining the arm's length price. Once bright line test is negatived, there is no basis on which it can be said in the present case that there is an international transaction as a result of the AMP expenses incurred by MSIL. Although the Revenue seems to contend that the bright line test was used only to arrive at the quantum of the transfer pricing adjustment, the order of the Transfer Pricing Officer in the present case proceeds on the basis that an international transaction can be inferred only because the AMP expenses incurred were significantly higher that what was being spent by comparable entities and it was also used for quantifying the amount of the transfer price adjustment. Consequently, the court does not agree with the submission of the learned Special counsel for the Revenue that dehors the bright line test, which has been rejected in the Sony Ericsson judgment, the existence of an international transaction on account of the incurring of the AMP expenses can be established.

48. The submission also proceeds on the basis that since MSIL pays royalty to the foreign associated enterprise and makes payment in respect of the use of copyright and patent, the benefit emanating from the AMP function cannot be said to be enjoyed by MSIL alone. It also proceeds on the basis that the benefits to the associated enterprise from AMP function would be same as in the case of a distributor namely increase in sale of raw material, increase in royalty, and increase in copyright and patent payments, etc. The court finds that these submissions are not based on any empirical data and proceeds more on the basis of surmises. Royalty payments have been separately assessed for transfer pricing purposes. Likewise, payments for copyrights and patents have also been separately treated.

49. As far as the benefit to the associated enterprise, i.e., SMC, is concerned, the Revenue has been unable to counter the submission on behalf of the MSIL that by the time SMC acquired a controlling interest in MSIL in 2002, the Maruti brand had already built a huge reputation. A significant amount of AMP expenses had already been incurred by MSIL on its products. These products carried the co-branded mark "Maruti-Suzuki" which had a high degree of name recognition. The Revenue has been unable to dispute that MSIL has the highest market share of automobiles manufactured in India (about 45 per cent.) and year on year growth of turnover of about 21 per cent. In other words, the AMP expenses incurred by it have substantially benefitted MSIL.

50. The second aspect which the Revenue has been unable to dispute is that SMC's AMP expenditure worldwide has been 7.5 per cent. of its sales whereas MSIL is spending only 1.87 per

cent. of its total sales towards AMP. Therefore, this belies the possibility of any "arrangement" or "understanding" between MSIL and SMC whereby MSIL is obliged to incur the AMP expenditure for and on behalf of SMC.

51. The result of the above discussion is that in the considered view of the court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL. Secondly, the court is of the view that the decision in Sony Ericsson holding that there is an international transaction as a result of the AMP expenses cannot be held to have answered the issue as far as the present assessee MSIL is concerned since finding in Sony Ericsson to the above effect is in the context of those assessees whose cases have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding AMP expenses.

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57. The court next turns to the principal contention of the Revenue that in a particular situation of independent distributors/licensed manufacturers matters relating to promotion of a brand of a foreign associated enterprise would necessarily be a matter of negotiation between the parties and not necessarily be reduced to writing as part of an agreement between them.

58. It is necessary at this juncture to discuss the reasons for enactment of Chapter X in the Act with the whole new scheme of provisions concerning transfer pricing in the form of sections 92B to 92F.

59. Nevertheless, there is no specific mention of AMP expenses as one of the items of expenditure which can be deemed to be an international transaction. For this purpose, section 92B(1) read with section 92(1) becomes significant. Under section 92B(1) an "international transaction" means:--

> "(a) a transaction between two or more associated enterprises, either or both of whom are nonresident This is a digitally signed order.

(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 associated enterprises 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."

60. As far as clause (a) is concerned, SMC is a non-resident. It has, since 2002, a substantial share holding in MSIL and can, therefore, be construed to be a non-resident associated enterprise of

MSIL. While it does have a number of "transactions" with MSIL on the issue of licensing of IPRs, supply of raw materials, etc. the question remains whether it has any "transaction" concerning the AMP expenditure. That brings us to clauses (b) and (c). They cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of MSIL 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 MSIL and SMC whereby MSIL is obliged to spend excessively on AMP in order to promote the brand of SMC. 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 "international transaction". This might be only an illustrative list, but significantly it does not list AMP spending as one such transaction.

61. The submission of the Revenue in this regard is : "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". 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 92B(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.

Step wise analysis of statutory provisions

62. If a step by step analysis is undertaken of sections 92B to 92F, the sine qua non for commencing the transfer pricing 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 arm's length price 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 the arm's length price and make the transfer pricing adjustment by substituting the arm's length price for the contract price.

63. A reading of the heading of section 92 of Chapter X ("Special provisions relating to avoidance of tax") and section 92(1) which states that any income arising from an international transaction shall be computed having regard to the arm's length price, section 92C(1) which sets out the different methods of determining the arm's length price, makes it clear that the transfer pricing adjustment is

made by substituting the arm's length price 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 arm's length price.

64. 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 proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the associated enterprise. and, yet, that is what appears to have been done by the Revenue in the present case. It first arrived at the "bright line" by comparing the AMP expenses incurred by MSIL with the average percentage of the AMP expenses incurred by the comparable entities. Since on applying the bright line test, the AMP spend of MSIL was found "excessive" the Revenue deduced the existence of an international transaction. It then added back the excess expenditure as the transfer pricing "adjustment". This runs counter to legal position explained in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi), which required a Transfer Pricing Officer "to examine the 'international transaction' as he actually finds the same". In other words the very existence of an This is a digitally signed order.

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65. As already noticed, the decision in Sony Ericsson has done away with the bright line test as means for determining the arm's length price of an international transaction involving AMP expenses.

The Revenue's contentions

66. It is contended by the Revenue that the mere fact that the Indian entity is engaged in the activity of creation, promotion or maintenance of certain brands of its foreign associated enterprise or for the creation/promotion of new/existing markets for the associated enterprise, is by itself enough to demonstrate that there is an arrangement with the parent company for this activity. It is urged that merely because MSIL and SMC do not have an explicit arrangement/agreement on this aspect cannot lead to the inference that there is no such arrangement or the entire AMP activity of the Indian entity is unilateral and only for its own benefit. According to the Revenue, "the only credible test in the context of transfer pricing provisions to determine whether the Indian subsidiary is incurring AMP expenses unilaterally on its own or at the instance of the associated enterprise is to find out whether an independent party would have also done the same." It is asserted : "An independent party with a short-term agreement with the multi- national company will not incur costs which give long-term benefits of brand and market development to the other entity. An independent party will, in such circumstances, carry out the function of development of markets only when it is adequately remunerated for the same".

67. Reference is made by Mr. Srivastava to some sample agreements between Reebok (UK) and Reebok (South Africa) and IC Issacs and Co and BHPC Marketing to urge that the level of AMP spend is a matter of negotiation between the parties together with the rate of royalty. It is further suggested that it might be necessary to examine whether in other jurisdictions the foreign associated enterprise, i.e., SMC is engaged in AMP/ brand promotion through independent entities or their subsidiaries without any compensation to them either directly or through an adjustment of royalty payments.

Absence of a machinery provision

68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a "mirage". First of all, there has to be a clear statutory mandate for such an exercise. The court is unable to find one. To the question whether there is any "machinery" provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to section 92F(ii) which defines arm's length price to mean a price "which is applied or proposed to be applied in a transaction between persons other than associated enterprises in uncontrolled conditions". Since the reference is to "price" and to "uncontrolled conditions" it implicitly brings into play the bright line test. 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 arm's length price. The court does not see this as a machinery provision particularly in light of the fact that the bright line test has been expressly negatived by the court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established dehors the bright line test.

69. There is nothing in the Act which indicates how, in the absence of the bright line test, one can discern the existence of an international transaction as far as AMP expenditure is concerned. The court finds considerable merit in the contention of the assessee that the only transfer pricing adjustment authorised and permitted by Chapter X is the substitution of the arm's length price for the transaction price or the contract price. It bears repetition that each of the methods specified in section 92C(1) is a price discovery method. Section 92C(1) thus is explicit that the only manner of effecting a transfer pricing adjustment is to substitute the transaction price with the arm's length price so determined. The second proviso to section 92C(2) provides a "gateway" by stipulating that if the variation between the arm's length price and the transaction price does not exceed the specified percentage, no transfer pricing adjustment can at all be made. Both section 92CA, which provides for making a reference to the Transfer Pricing Officer for computation of the arm's length price and the manner of the determination of the arm's length price by the Transfer Pricing Officer, and section 92CB which provides for the "safe harbour"

> rules for determination of the arm's length price, can be applied only if the transfer pricing adjustment involves substitution of the transaction price with the arm's

> length price. Rules 10B, 10C and the new rule 10AB only deal with the determination of the arm's length price. Thus for the purposes of Chapter X of the Act, what is envisaged is not a quantitative adjustment but only a substitution of the transaction price with the arm's length price.

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 arm's length This is a digitally signed order.

 price, an "adjustment" has 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 arm's length price. If the answer to that is in the negative the transfer pricing adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the associated enterprises involved may seek to shift from one jurisdiction to another. An "assumed" price cannot form the reason for making an arm's length price adjustment.

71. Since a quantitative adjustment is not permissible for the purposes of a transfer pricing adjustment under Chapter X, equally it cannot be permitted in respect of AMP expenses either. As already noticed hereinbefore, what the Revenue has sought to do in the present case is to resort to a quantitative adjustment by first determining whether the AMP spent by the assessee on application of the bright line test, is excessive, thereby evidencing the existence of an international transaction involving the associated enterprise. The quantitative determination forms the very basis for the entire transfer price exercise in the present case.

72. As rightly pointed out by the assessee, while such quantitative adjustment involved in respect of AMP expenses may be contemplated in the taxing statutes of certain foreign countries like U.S.A., Australia and New Zealand, no provision in Chapter X of the Act contemplates such an adjustment. An AMP transfer pricing adjustment to which none of the substantive or procedural provisions of Chapter X of the Act apply, cannot be held to be permitted by Chapter X. In other words, with neither the substantive nor the machinery provisions of Chapter X of the Act being applicable to an AMP transfer pricing adjustment, the inevitable conclusion is that Chapter X as a whole, does not permit such an adjustment.

73. It bears repetition that the subject matter of the attempted price adjustment is not the transaction involving the Indian entity and the agencies to whom it is making payments for the AMP expenses. The Revenue is not joining issue, the court was told, that the Indian entity would be entitled to claim such expenses as revenue expense in terms of section 37 of the Act. It is not for the Revenue to dictate to an entity how much it should spend on AMP. That would be a business decision of such entity keeping in view its exigencies and its perception of what is best needed to promote its products. The argument of the Revenue, however, is that while such AMP expense may be wholly and exclusively for the benefit of the Indian entity, it also enures to building the brand of

the foreign This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 25/02/2025 at 21:40:36 associated enterprise for which the foreign associated enterprise is obliged to compensate the Indian entity. The burden of the Revenue's song is this : an Indian entity, whose AMP expense is extraordinary (or "non-routine") ought to be compensated by the foreign associated enterprise to whose benefit also such expense enures. The "non-routine" AMP spent is taken to have "subsumed" the portion constituting the "compensation" owed to the Indian entity by the foreign associated enterprise. In such a scenario what will be required to be benchmarked is not the AMP expense itself but to what extent the Indian entity must be compensated. That is not within the realm of the provisions of Chapter X.

74. The problem with the Revenue's approach is that it wants every instance of an AMP spent by an Indian entity which happens to use the brand of a foreign associated enterprise 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 92B of the Act. The problem does not stop here. Even if a transaction involving an AMP spend for a foreign associated enterprise 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 Transfer Pricing Officer proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for ?

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 40A(2)(a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the Assessing Officer "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 Assessing Officer 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 Assessing Officer 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 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 25/02/2025 at 21:40:36 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.

76. As explained by the Supreme Court in CIT v. B. C. Srinivasa Setty (1981) 128 ITR 294 (SC) and PNB Finance Ltd. v. CIT (2008) 307 ITR 75 (SC) in the absence of any machinery provision, bringing an imagined international transaction to tax is fraught with the danger of invalidation. In the present case, in the absence of there being an international transaction involving AMP spend with an ascertainable price, neither the substantive nor the machinery provision of Chapter X are applicable to the transfer pricing adjustment exercise."

10. As is manifest from a reading of the aforesaid passages appearing in Maruti Suzuki, the existence of an international transaction cannot be presumed to have been consummated merely because the quantum of expenditure incurred exceeds the spend under that head by comparable entities. It was this which constrained our Court to observe that it would be wholly impermissible to decide the issue of an international transaction on mere inference and the fact that the expenditure incurred was "significantly higher". Of equal import are the conclusions of the Court of no matter how wide the expanse of the word transaction may be assumed to be, it would still be incumbent upon the respondents to establish that there was in fact in existence an understanding, arrangement or steps taken by AEs' which would satisfy the test of acting in concert.

11. More importantly and prima facie, the appellants clearly appear to ignore the note of caution which was struck in Maruti Suzuki and when the Court observed "The problem with the Revenue's approach is that it wants every instance of an AMP spent by an Indian entity which happens to use the brand of a foreign associated enterprise 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 92B of the Act".

12. In order to enable Mr. Gupta, learned counsel, to address submissions in the aforesaid light, let the appeal be called again on 25.02.2025 as part heard in the category of "End of Board".

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

FEBRUARY 19, 2025/nd