No TP adjustment in absence of agreement on incurring AMP expenses for promoting AE's brand

Summary – The Mumbai ITAT in a recent case of L'Oreal India (P.) Ltd., (the Assessee) held that where Indian subsidiary incurred AMP expenses for promoting brand owned by French AE, in absence of an agreement between assessee and said AE to share/reimburse AMP expenditure incurred by assessee in India, transaction in question would not be an international transaction

Facts

- The assessee-company was incorporated in India and was a wholly owned subsidiary of L'Oreal SA France. It was engaged in manufacturing and distribution of cosmetics.
- In transfer pricing proceedings, TPO noted clause 8 of the license agreement between the assessee and its AE and held that as per this clause assessee must incur AMP expenses, therefore, there is understanding between the assessee and AE to incur AMP expenses. Accordingly, he took a view that assessee had incurred expenses on advertisement and marketing of said products in India and expenditure so incurred resulted in enhancing brand value of foreign AE in India. He, thus, on basis of Bright Line Test (BLT), made certain adjustment to assessee's ALP.
- The DRP upheld the findings of the TPO.
- On appeal to the Tribunal:

Held

- The similar adjustment was made by TPO for assessment years 2008-09, 2009-10 & 2010-11 and on the objection before the DRP, the adjustment was upheld, however, on appeal before the Tribunal, the entire adjustment was deleted for assessment years 2008-09, 2009-10 & 2010-11 in *L'Oreal India (P.) Ltd.* v. *Dy. CIT*[2016] 69 taxmann.com 419 (Mum. - Trib.) holding that where Indian subsidiary incurred AMP expenses promoting brand owned by French holding company, in absence of an agreement between assessee and said AE to share/reimburse AMP expenditure incurred by assessee in India, transaction in question would not be an international transaction.
- It is further noted that similar adjustment on account of AMP was made by TPO for assessment year 2011-12, however, the DRP accepted the objection of assessee holding that there was no international transaction of AMP expenses and on appeal before the Tribunal, the appeal of revenue was dismissed vide *Loreal India (P.) Ltd.* v. *Dy. CIT*[2019] 101 taxmann.com 37 (Mumbai - Trib.) holding that since order passed by DRP was duly supported by decision of High Court in *Sony Ericsson Mobile Communication (India) (P.) Ltd.* v. *CIT*[2015] 374 ITR 118/231 Taxman 113/55 taxmann.com 240 (Mag.) (Delhi), same did not require any interference.
- The agreement of assessee with its AE dated 4-1-2011 executed between assessee and its AE has also been perused. Clause 7 of the agreement describes about right of distribution of licensed

product in the territory. As per clause 8 of the said agreement the assessee is responsible for the advertising the licensed product in the territory. The 'territory' is defined under clause 1.5 of the agreement, which means the territory of Nepal, Bhutan, Bangladesh, Maldives, Mauritius, India and Sri Lanka. However, it excludes any free trade zone, which may exist or may be created. Further it excludes duty free shops located in the duty free or travel retail area which is specialized in sales against foreign currency to foreigner or diplomatic corps, shipchlanders, airlines companies or shipping companies. Though the AE has reserved its right for the zones of excluded areas. The contention of the assessee is that clause 8 of the agreement does not obligates the assessee to incur expenses on AMP so as to promote the brand owned by its AE's. And that the expenses are incurred by assessee in the normal course of its business. The perusal of the clauses 7 and 8 reveals that there is no agreement between the assessee and the AE's for sharing the expenses and the payments made by the assessee for the expenses of AMP. The TPO has also not brought any fact on record that there exist any agreement between the assessee and its AE to share or reimburse the AMP expenses. Moreover, it is seen that there is no material change in the facts for the year under consideration. Therefore, considering the above factual discussions and the decision of the coordinate bench of Tribunal for assessment years 2008-09 to 2010-11, on the identical issue the grounds of appeal of the assessee are allowed.