IN THE INCOME TAX APPELLATE TRIBUNAL
"A"BENCH: BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBERAND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

IT(TP)A No.2809/Bang/2017
AssessmentYear:2013-14

Nike India Private Limited Ground & 1st Floor Olympia Building No.66/1, Bagmane Tech Park CV Raman Nagar Bangalore 560 093 **PAN NO :AABCN9612K**	**Vs.**	ACIT, Circle 5(1)(1) Bengaluru
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri K.R. Vasudevan, A.R.
Respondent by	**:**	Ms. Neera Malhotra, D.R.

Date of Hearing	**:**	21.04.2021
Date of Pronouncement	**:**	30.06.2021

O R D E R

PERB.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the order dated 28.12.2016 passed by the A.O. for assessment year 2013-14 u/s 143(3) r.w.s. 144 C of the Act in pursuance to the directions given by Ld. Dispute Resolution Panel (DRP).

2. The assessee company is engaged in the business of wholesale trading of footwear, apparel and sports equipment in India of NIKE Brand. The assessee is a wholly owned subsidiary of

NIKE Holding B.V. Netherlands, which in turn is held by M/s. NIKE Inc., USA.

3. The first issue urged by the assessee relates to transfer pricing adjustment made in respect of sourcing commission. The assessee had claimed Rs.14.06 crores as payment of commission for sourcing of materials. The assessee paid commission of 7% on the value of products sourced. The assessee bench marked the same under CUP method and in this regard, it had selected 12 companies which had paid commission ranging from 5% to 12%. Accordingly, the assessee claimed that the payment of commission is at arm's length. The TPO however, determined the ALP of commission payment as Nil and accordingly made transfer adjustment of entire claim of Rs.14.06 crores. Ld DRP also confirmed the same.

3.1 The Ld A.R submitted that an identical issue was examined by the coordinate bench in the assessee's case in IT(TP)A No.3321/Bang/2018 relating to assessment year 2014-15 and the coordinate bench, vide its order dated 14.10.2020, has restored the issue to the file of the TPO for examining it afresh.

3.2 We heard Ld. D.R. on this issue and perused the record. We notice that an identical issue has been examined in the assessee's own case by the coordinate bench in A.Y. 2014-15 and the matter has been restored to the file of the AO/TPO for examining it afresh. The relevant observations made by the coordinate bench in 2014-15 are extracted below.

> *"19. The next issue relates to the Transfer pricing adjustment made in respect of Sourcing Commission payment. This issue is being urged in AY 2014-15.*

19.1 During the year relevant to the assessment year 2014-15, the assessee has paid sourcing commission of Rs.22.24 crores to its Associated Enterprise named M/s Nike Global Trading Pte., Singapore (NGTPS). The rate of commission paid by the assessee was 7% of the value of products sourced. The assessee benchmarked the same under CUP method by selecting certain comparable companies, which had paid sourcing commission in the range of 5% to 12%. Accordingly, the assessee claimed the payment to be at arms length.

19.2 The TPO observed that the comparable companies selected by the assessee has not been proved to be really comparable. The TPO has also analysed the agreements entered by the comparable companies with their respective agents and took the view that they are materially different. Accordingly, the TPO took the view that the CUP method adopted by the assessee is not suitable to the assessee. Hence he called for various details from the assessee. After considering those details, the TPO came to the conclusion that the assessee has not been able to show that NGTPS did all those activities as mentioned in the agreements. Accordingly he came to the conclusion that that the agreements are nothing but make belief arrangements. The TPO reinforced his views by observing that the assessee did not pay any commission till AY 2013-14 and did not mention about any sourcing agent till that year. In the absence of evidences proving that the services were provided by the sourcing agents, the TPO determined the ALP at NIL. Accordingly he made transfer pricing adjustment of Rs.22.24 crores. The Ld DRP also confirmed the same.

19.3 The Ld A.R submitted that the assessee has furnished various evidences to prove that the sourcing agent has provided services to the assessee. He submitted that the assessee has utilized services of one USA entity and one Singapore entity. However, the assessee has paid commission only to the Singapore entity. He submitted that the assessee has furnished copies of agreements entered with the agents, confirmation letter obtained from the agents, e-mail communications, summary of e-mail communications etc., before the TPO in this regard. He submitted that the TPO, however, did not examine these important evidences, but came to the conclusion that the agent has not provided services to the assessee. Accordingly he prayed that this issue may be restored to the file of TPO for examining it afresh by duly considering various evidences furnished by the assessee.

19.4 We heard Ld D.R. Having regard to the submissions made by Ld A.R, we are of the view that this issue requires fresh examination at the end of TPO. Accordingly we restore this issue to the file of AO/TPO for examining it afresh by duly considering

the various evidences furnished by the assessee. After affording adequate opportunity of being heard, the AO/TPO may take appropriate decision in accordance with law.

3.3 Consistent with the view taken by the coordinate bench, we remand this issue to the file of the AO/TPO with similar directions for examining this issue afresh.

4. The next issue relates to transfer pricing adjustment made in respect of payment of interest on debentures. It is also a recurring issue. The assessee has claimed a sum of Rs.65.18 crores as expenditure on payment of interest on debentures. The TPO, by relying on certain rulings/RBI Circular, took the view that the CCDs are in the nature of equity capital and accordingly, held that the arm's length price of interest payment on CCDs is Nil. Accordingly, he made transfer pricing adjustment of entire amount of interest claim of Rs.64.18 crores.

4.1 We heard the parties on this issue and perused the record. It was brought to our notice that an identical issue was examined by the coordinate bench in the assessee's own case in assessment year 2014-15 referred (supra) and also in assessment year 2012-13. We notice that the coordinate bench has restored this issue to the file of the AO/The TPO for examining it afresh. The Ld. A.R. submitted that this issue may be restored to the file of the AO/TPO for examining the same afresh along with assessment year 2012-13 & 2014-15.

4.2 We notice that the coordinate bench has restored this issue to the file of AO/TPO for examining it afresh with the following observations:-

"*18. The next issue relates to transfer pricing adjustment made in respect of interest paid on Compulsorily Convertible Debentures*

(CCD). This issue is being contested by the assessee in AY 2012-13 and 2014-15.

18.1 During the year relevant to AY 2012-13, the assessee had issued debentures to the tune of Rs.527.54 crores to M/s Nike India Holding B V (Netherlands). The Debentures carried interest rate @ 12% p.a. The TPO noticed that the average Base rate of interest determined by State Bank of India during the financial year 2011-12 worked out to 9.31%. Accordingly he proposed to make transfer pricing adjustment by adopting the rate of interest @ 9.31% under CUP method by taking the base lending rate determined by State Bank of India. The assessee submitted that the base rate is the minimum rate set by Reserve Bank of India and the bank is free to charge higher rate of interest depending upon credit risk of the customer. It also submitted that the bank lending rate cannot be considered to be comparable with the rate charged on debentures. The TPO did not accept the contentions of the assessee and accordingly made transfer pricing adjustment of Rs.4,09,95,719/- by adopting the rate of interest @ 9.31%.

18.2 In AY 2014-15, the TPO took the view that the Compulsorily convertible Debentures is a controversial financial product called "hybrid instrument". He further observed that the CCD suffer different tax treatment in different jurisdictions,, i.e., it is treated as loan in one country and dividend receipts in another country. Such hybrid instruments are criticized strongly by Organisation for Economic Cooperation and Development. The TPO referred to certain case laws and held that the CCD is in the nature of equity. Accordingly he held that the ALP of interest payable on CCD at NIL.

18.3 The Ld DRP upheld both the views taken by TPO in the above said years.

18.4 The Ld A.R submitted that the TPO has considered the interest payment made in the year relevant to AY 2015-16 and held it to be at arms length. In this regard, the TPO has made enquiries with foreign authorities and it was ascertained that the interest paid by the assessee has been offered as income by the AE in its hands.

18.5 We notice that the TPO has been taking different stand in different years. While he accepted the CCD as debentures in AY 2012-13 and reduced the rate of interest only, the TPO treated CCD as equity in AY 2014-15. However, in AY 2015-16, the TPO has accepted the rate of interest of 12% to be at arms length. We notice that the TPO has made certain enquiries in AY 2015-16 and accordingly came to the conclusion that the interest payment is at

arms length. The benefit of those enquiries was not available with the TPO in the two years under consideration. Since the issue is the same in all the years and further, in view of the conflicting stands taken by TPO, we are of the view that this issue requires fresh examination at the end of TPO. Accordingly, we restore this issue in both the years under consideration to the file of AO/TPO for examining it afresh."

4.3 Consistent with the view taken by the coordinate bench in the assessee's own case for assessment year 2012-13 & 2014-15, we restore this issue to the file of AO/TPO with similar directions.

5. The next issue relates to transfer pricing adjustment of Rs.5.33 crores in respect of reimbursement of expenses.

5.1 The Ld. A.R. fairly admitted that an identical issue was decided against the assessee by the Tribunal in the assessee' own case in assessment year 2010-11, 2012-13 & 2014-15.

5.2 The TPO noticed that the reimbursement of expenses of Rs.5.33 crores are in the nature of salary cost of the employees deputed by the parent company, which has been cross charged by the parent company. The TPO noticed that the jurisdictional ITAT, Bengaluru bench has examined an identical issue in assessment year 2005-06 and 2006-07 and has held that the nature of these expenses is such that they cannot be attributed solely and exclusively incurred by parent company for distribution business of the assessee. Accordingly, the TPO, following the decision of ITAT, determined the ALP of reimbursement of expenses at NIL. Accordingly, he made transfer pricing adjustment of Rs.5.33 crores.

5.3 We notice that an identical issue was examined in A.Y. 2010-11, 2012-13 & 2014-15 and the Tribunal following the decision rendered by the coordinate bench in A.Y. 2005-06 & 2006-07 has

decided this issue against the assessee. The relevant observations made by the Tribunal in 2014-15 are extracted below:

"15.2 However, we notice that an identical issue has been examined by the co-ordinate bench in the assessee's own case in IT(TP)A Nos.653 & 654/Bang/2011 relating to AY 2005-06 & 2006-07 – Order dated 10-05-2013. We further notice that this issue has been decided against the assessee with the following observations:-

"5.5.1 We have heard both the parties and carefully perused and considered the rival contentions and the material on record. The main issue for consideration before us is whether or not the expenses incurred by the parent company, Nike Inc., USA can be attributed solely and totally to the business of distribution undertaken by the assessee. It is the contention of the assessee that these expenses incurred towards cross payment charges in the relevant period amounting to Rs.4,79,96,697 are solely related to the business of the assessee in India. Per Contra, revenue's view is that the assessee has failed to establish and demonstrate that these expenses are to be attributed to the business operations of the assessee.

5.5.2 To understand and appreciate the role and business of the assessee and the interplay it has with its parent company, Nike Inc., USA, in respect of its operations, an examination of the Transfer Pricing Study/Report submitted by the assessee is both informative and useful. In the Transfer Pricing report, under the heading "Brief on the Business", it is mentioned that –

"1.2.3 Nike India, a wholly owned subsidiary of NIKE Holdings Inc., is responsible for distribution of footwear, sports apparel and equipment. In addition, NIKE India Provides administrative support in relation to the marketing and brand promotion initiatives of NIKE Group in India.

1.2.4 The development of arm's length price in this analysis recognizes that NIKE India acts as a wholesale distributor and is primarily engaged in the business of providing value added services, acting as an intermediary between entrepreneurs and customers. This analysis reflects the provisions of the OECD Guidelines concluding that, at arm's length, companies engaged in providing such value added services are entitled to receive compensation appropriate to the services performed and the capital invested in their businesses, but are not entitled to share in any returns attributable to the marketing or commercial intangibles that belong to the entrepreneur.

1.2.5 NIKE group owns virtually all the valuable intellectual property rights (know how, copy rights, etc.) and other commercial or marketing intangibles (brand names, trade marks, etc.) and is involved in complex operations of developing proprietary technologies NIKE group also bears all the significant

business and entrepreneurial risks of product acceptability and performance in the market: On the other hand, NIKE India does not own any interest in these intangibles and is a mere service provider. Eased on an analysis of the functions performed and risks assumed, we conclude that NIKE group has more complex operations and bears greater share of risks."

5.5.3What emerges from a perusal of the above paragraphs of the TransferPricing Study report submitted by the assessee is that;

i) NIKE Group, the parent company, does certain marketing brand promotion initiatives, with some administrative support from the assessee;

ii) The assessee is merely a wholesale distributor and is only an intermediary between Nike Group and the ultimate customer. It is only a service provider, is compensated for its services and has absolutely no stake in the marketing and commercial intangibles, which belong only to the parent company.

iii)- The business risk of product acceptability and performance in the market is borne by Nike Group, the parent company and the assessee does not own any interest in the same.

5.5.4 Admittedly, as per the submissions of the assessee, the cost of samples is incurred to increase and improve the product awareness, the responsibility for which vests with the parent company, Nike Inc., USA. In this factual matrix, there is no reason why a mere service provider, merely acting as an intermediary between the entrepreneur and the customer, should bear the expenses related to increasing the product awareness and product acceptability in the market. The submissions made by the assessee before us and before the authorities below have been contradictory to what is stated in the assessee's Transfer Pricing Study and this is not acceptable. Further, as pointed out by the TPO, the assessee has separately booked substantial expenses amounting to approx. Rs.2.42 Crores towards advertising, marketing and sales promotion which is approx.. 8% of sales turnover and these have been allowed as expenses incurred towards promotion of product sales. The onus for proving that the expense! incurred by the parent, Nike Inc, USA, are towards the sales of the products and not for the purpose of creating brand awareness is on the assessee, which onus is not discharged by the assessee. Also considering that the assessee itself has admitted that the parent, Nike Inc. USA has brand marketing and promotion initiatives in India, it is but natural to conclude that the expenses incurred by Nike Inc., USA are towards creation of brand awareness, for which the parent has the responsibility. In this view of the matter, the expenses on cost of samples, etc., have to be attributed to the parent, Nike Inc., USA and therefore it is not correct to conclude that these expenses have to be borne by the assessee.

5.5.5 As regards the expenses related to employees, of the parent company who have been deputed to the assessee, the FAR analysis in the Transfer Pricing Study/Report related to the employees states as under:

Risk Category and Description	*Exposure to NIKE India*	*Exposure to NIKE Group*
Manpower Risk: *Any enterprise, which is largely dependent for its success, upon quality personnel with superior technical knowledge is faced with this risk. Competitive market forces expose such an enterprise to the risk of losing its trained personnel*	*NIKE India has to hire and retain good personnel. However, recruitment of key employees at higher levels are guided by Bike Group*	*NIKE Group bears a greater degree of this risk as it needs to retain key employees and trained technical people.*

As .is stated in the Transfer Pricing Study, the recruitment of key employees at higher levels in the assessee company are guided by the parent group, negating the claim of the assessee made before us that these employees are totally under the control of the assessee. Further, from the secondment agreement submitted by the assessee before us, it is seen that the personnel deputed from the parent company are working as General Manager, India Sales Director, Manufacturing leader, Category Business Director and the like. There is no plausible reason put forth to justify why a mere service provider, who is only an intermediary between the entrepreneur viz. Nike Inc., USA and the customer should incur costs related to manufacturing leader, category business director, etc. Also it is inconceivable why a third party unrelated entity would employ people from the entrepreneur to man such key senior positions in its organization. Further, we also find that the assessee has not furnished any evidence to substantiate its claim that these persons, indeed only work in the distribution activities which is the sole work undertaken by the assessee. The onus for providing evidence to substantiate its claim rests with the assessee which, in the facts and circumstances as discussed above, the assessee has not discharged.

*5.5.6 In respect of the expenses amounting to Rs.1,74,93,025 claimed in *Miscellaneous Expenses", the assessee has put forth only a general explanation that these represent couriering expenses, etc. No further details as to the nature of expenses, the purpose for which they were expended etc. has been forthcoming from the assessee. The assessee has also not furnished any evidence to establish that these expenses were indeed incurred for and on behalf of the assessee. In the absence of these details, the claims put forth by the assessee remain unsubstantiated.*

5.5.7 Another contention of the assessee is that since the same set of expenses has been held to be at arm's length in the assessee's own case for Assessment Year 2008-09, therefore, they should be treated as arm's length in the year under consideration. We are unable to accept the contention that the transfer pricing adjustment made in the two years under consideration has to be negated only on the ground that such an adjustment was not made in the subsequent year. It is a well settled position in law that the assessment of every year stands on its own legs and the 'principle of res judicata' does not apply to income tax assessment proceedings. The ALP for each year is determined based on the set of facts applicable to each of the individual years and no common proposition can be propounded for all the years. As mentioned earlier, for the two years under consideration before us, the assessee has not furnished any evidence to substantiate its claim that these persons work onlyfor the distribution activity undertaken by the assessee. The onus for bringing such evidenceon record to substantiate the claim rests with the assessee and we-find that such onus hasneither been discharged before us nor before the authorities below. If these expenses were held to be at arm's length in the subsequent year, then the assessee must have furnished evidence before the TPO to show that these persons had contributed for the distribution activities of the assessee for that year. The facts could be different for each year be different for the same assessee depending on various factors and stage of the assessee's business and require to be viewed differently. From the copies of secondment agreement submitted to us, we find that the employees seconded are different for different years performing different functions, as seen from their designations. In this view of the matter the contention that the adjustment made in the two years under consideration require to be deleted merely be similar adjustment was not made in the subsequent year is not acceptable. We find that the facts applicable to the two years under consideration do not support the case of the assessee. In fact, as explained earlier, the statements, averments, admissions made in the Transfer Pricing Study submitted by the assessee does not support the stand urged by the assessee before us.

5.5.8 In view of the facts and circumstances of the case, as discussed above, on the issue of payment of cross charges of expats costs and contractor charges claimed as reimbursements to the parent company, Nike Inc., USA, we are of the considered opinion that the TPO has been right in holding that:

i) the nature of these expenses are such that they cannot be attributed to have been solely and exclusively for the distribution business of the assessee;

ii) the claim of the assessee that it had derived tangible benefit from the expenditure has not been substantiated with evidence.

iii) there is no evidence or likelihood of any independent entity dealing in similar circumstances bearing such expenditure.

We, therefore, uphold the finding in the orders of the authorities below in making the T.P. adjustment of Rs.4,79,96,697 for assessment year 2005-06 and dismiss the grounds raised by the assessee."

Accordingly, following the decision rendered by the co-ordinate bench referred above, we decide this issue against the assessee and confirm the Transfer Pricing adjustment made by the TPO."

5.4 Consistent with the view taken by the coordinate bench on this issue in the other years, we decide his issue against the assessee and confirm the transfer pricing adjustment made by TPO/AO.

6. The next issue relates to transfer pricing adjustment in respect of royalty payment amount to Rs.12.02 crores.

6.1 The ld. A.R. fairly admitted that an identical issue has been decided against the assessee by the coordinate bench in other years.

6.2 The assessee has paid royalty of Rs.2.02 crores. The TPO noticed that the ITAT has confirmed the transfer pricing adjustment made in respect of royalty payment in A.Y. 2005-06 & 2006-07. Following the same, TPO determined the ALP of royalty payment as Nil and accordingly, made transfer pricing adjustment of Rs.2.02 crores.

6.3 We notice that an identical issue has been examined by the coordinate bench in A.Y. 2014-15 and this issue has been decided against the assessee by following the decision rendered by the coordinate bench in A.Y. 2005-06. The observations made in this regard by the Tribunal in AY 2014-15 are extracted below:-

"*16. The next issue relates to the T.P adjustment made in respect of third party royalty. This issue is being contested by the assessee in AY 2010-11, 2012-13 and 2014-15.*

16.1 The TPO noticed that the assessee was paying royalty on goods endorsed by celebrity sports persons around the world on the basis its sales turnover in India. The TPO noticed that the assessee has not furnished any agreement in respect of this arrangement. The assessee could not also furnish workings as to how it is allocated to it. Further, the assessee was seen paying royalty @ 1% on the sales, in addition to the payment of third party royalty, in accordance with the agreement entered by it with M/s NEON, an Associated Enterprises, which manages endorsement contracts with world class athletes. Accordingly, the TPO took the view that the payment of third party royalty would amount to duplication of payment. The TPO also noticed that the assessee has not obtained approval from RBI for making this payment. Accordingly, he took the view that the third party royalty is not an expenditure related to the assessee. Accordingly the TPO determined the ALP of this expenditure at NIL.

16.2 The Ld A.R submitted that there is no duplication of royalty payment as presumed by the TPO. He submitted that the assessee is paying royalty of 1% for using the brand name NIKE in its products. In addition to that, the Associated Enterprise "NEON" enters into contracts with celebrities for promotion of the product, which would in turn would increase the sales. The third party royalty simply represents cross charging of royalties paid by AE back to the distributors.

16.3 We heard Ld D.R on this issue and perused the record. As observed by the co-ordinate bench in the case of the assessee in AY 2005-06, the onus to prove that the expenses incurred by the AE was towards sale of products and not for purpose of creating brand awareness lies upon the assessee. We notice that this onus has not been discharged by the assessee. The basic details like the agreement if any for reimbursing this expenses, RBI approval, business necessity/expediency in making the payment, the basis of calculation etc., have not been furnished. Hence, the TPO has taken the view that this expenditure is not related to the business of the assessee and accordingly he has determined the ALP at NIL. Before us also, no further details were furnished. In view of the above, we are of the view that there is no infirmity in the order so passed by the TPO/AO."

6.4 Following the decision rendered by the coordinate bench in A.Y 2005-06, we decide this issue against the assessee and confirm the TP adjustment made by the TPO/AO.

7. The next issue relates to transfer pricing adjustment made in respect of Advertisement, Marketing and Promotion expenses (AMP expenses). The assessee had incurred expenditure of Rs.83.13 crores towards AMP expenses. The A.O. made an adjustment of Rs.85.58 crores in respect of this expenditure. The Ld. A.R. submitted that an identical adjustment was made by the TPO in other years also and this issue was examined by the coordinate bench in assessment year 2014-15. He submitted that the assessee was having an agreement with it's A.E. with regard to the expenses incurred during Cricket Tournaments conducted by BCCI. The agreement was relevant to the assessment years 2010-11 & 2011-12. The Tribunal passed a common order dated 14.10.2020 for assessment years 2012-13 & 2014-15. For deciding this issue, the AMP expenses were divided into two categories, viz.,

(a) AMP expenses other than BCCI expenses and

(b) AMP expenses relating to BCCI.

The Ld. A.R. submitted that the second category "AMP expenses relating to BCCI" actually referred to the years in which the assessee had an agreement with its AE for reimbursing part of expenses incurred on BCCI tournaments. The TP adjustment with regard to the first category of expenses was deleted by the tribunal and the TP adjustment in respect of AMP expenses relating to BCCI, which arose in 2010-11 & 2011-12 was restored to the file of the A.O. The Ld. A.R. submitted that in assessment years 2010-11 & 2011-12, the assessee had an agreement with its A.E. for reimbursement of 50% of the expenses incurred on the tournaments held by BCCI. In view of the existence of the

agreement, the issue was restored to the file of AO/TPO. The Ld A.R. submitted that the assessee does not have any agreement with its A.E. for reimbursement of BCCI cost from assessment years 2012-13 onwards. Accordingly, the Ld. A.R. submitted that the expenses incurred by the assessee during the year under consideration on BCCI tournaments would fall under the first category only.In the cases, where no agreement exists with the AE, the coordinate bench has decided the issue in A.Y. 2010-11, 2011-12, 2012-13 & 2014-15 in favour of the assessee. He submitted that, in this regard, the Tribunal has followed the decision rendered by it in assessment year 2009-10, wherein the Tribunal had followed the decision rendered by Hon'ble Delhi High Court in the case of Maruti Suzuki Ltd. (282 ITR 1). Accordingly, the Ld. A.R. submitted that the facts prevailing in the current year are akin to the facts that prevailed in assessment year 2009-10. Accordingly, he submitted that the entire TP adjustment should be deleted.

7.1 We heard Ld. D.R. on this issue and perused the record. We notice that the AMP expenses incurred by the assessee in the years, other than the year in which there was partial reimbursement of expenses by A.E. of the assessee, has been held to be fully allowable by the coordinate bench. Those years are A.Y. 2009-10, 2010-11, 2011-12, 2012-13 & 2014-15. Accordingly, the TP adjustment made in those years has been deleted by the Tribunal. Only in the years relevant to assessment year 2010-11 & 2011-12, there was an agreement between the assessee and its A.E for reimbursement of 50% of the BCCI expenses. The TP adjustment made in those years has been restored to the file of AO/TPO. Since the facts available in the present year is akin to A.Y. 2009-10 and since it is stated that there is no agreement between the assessee and its A.E. for reimbursement of expenses, we are of the view that the decision

rendered by Hon'ble Delhi High Court in the case of Maruti Suzuki Ltd. (supra) is applicable to the facts of the present case. Accordingly, following the decision rendered by the coordinate bench in other years, we hold that the TP adjustment made in respect of AMP expenses is not justified. Accordingly, we direct the A.O. to delete the same.

8. The next issue relates to the disallowance of claim of purchase of samples. An identical issue has been decided against the assessee in assessment year 2012-13 & 2014-15. For the sake of convenience, we extract below the decision rendered by the coordinate bench on this issue:-

"*20. The remaining issues are corporate issues and the additions have been made by the assessing officer. The first corporate issue urged by the assessee relates to the "disallowance of purchase of samples and incidental expenses". This issue is being urged in AY 2012-13 and 2014-15.*

20.1 This expenditure was disallowed by way of Transfer pricing adjustment in the earlier years. In the assessment year 2012-13 and 2014-15, the assessing officer has disallowed the expenditure incurred on purchase of samples and incidental expenses holding that this expenditure is to be borne by the manufacturer only and not by the assessee, as the assessee is only distributor of products.

20.2 The AE of the assessee, viz., Nike Inc., has introduced new products and accordingly sent samples to the assessee for giving the same to the third party distributors, who are required to display the same in their premises. The objective is apparently promotion of the new products. The AE has charged the assessee towards cost of samples given to it. The AO took the view that the assessee is only a distributor of the NIKE products and hence the expenditure on samples should be borne by the manufacturer only. Accordingly the AO took the view that the manufacturer should not pass on the burden to the assessee. Accordingly, the AO took the view that the expenditure on purchase of samples and incidental expenses are not related to the business activities of the assessee. Accordingly he disallowed the same. The Ld DRP also confirmed the same.

20.3 The Ld A.R submitted that the assessing officer cannot sit in the arm chair of the assessee and decide the mode of conducting business.

He submitted that the assessee has incurred expenditure on samples on commercial considerations and hence the same should be allowed. The Ld A.R placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of CIT vs. Dhanrajgirji Raja Narasingirji (1973)(94 ITR 544), wherein the Hon'ble Apex Court has observed as under:-
"It is not open to the department to prescribe what expenditure an assessee should incur and in what circumstances he should incur that expenditure. Every businessman knows his interest best. So far as the apportionment is concerned we are not told why we should not consider the same as a reasonable estimate."

20.4 We heard Ld D.R and perused the record. We have noticed earlier that this expenditure was a matter of transfer pricing adjustment in AY 2010-11 and 2011-12, wherein we have confirmed the transfer pricing adjustment by following the decision rendered by the co-ordinate bench in the assessee's own case in AY 2005-06 & 2006-07. In those years, the Tribunal has decided the issue against the assessee with the following observations:-

> *"The onus for proving that the expense! incurred by the parent, Nike Inc, USA, are towards the sales of the products and not for the purpose of creating brand awareness is on the assessee, which onus is not discharged by the assessee. Also considering that the assessee itself has admitted that the parent, Nike Inc. USA has brand marketing and promotion initiatives in India, it is but natural to conclude that the expenses incurred by Nike Inc., USA are towards creation of brand awareness, for which the parent has the responsibility. In this view of the matter, the expenses on cost of samples, etc., have to be attributed to the parent, Nike Inc., USA and therefore it is not correct to conclude that these expenses have to be borne by the assessee."*

In our view, the view expressed by the co-ordinate bench can be taken as guidance for deciding the issue in the years under consideration also. There is no dispute that the parent company Nike Inc., has introduced new products and the samples are supplied to third party distributors in order to create awareness of new products amongst the public. The assessee herein is merely an intermediary between M/s Nike Inc and the public. Hence, it is the responsibility of the assessee, first of all, to show that the expenditure on samples &incidental expenditure was incurred for the purposes of business of the assessee. Under sec.37(1), expenditure should have been laid out or expended wholly and exclusively for the purposes of business of the assessee. In the context of AMP expenses, the co-ordinate bench has taken the view that the sample expenses are related to brand promotion and marketing initiatives of the parent company of the assessee, meaning thereby, it cannot be said that this expenditure has been expended wholly and exclusively for the business of the assessee. The Ld A.R contended that the assessing officer cannot question the necessity of incurring the expenditure. However, in our

view, when the transaction is between related parties, the Act places more burden on the shoulders of the assessee to prove that the expenditure is related to the business of the assessee. Further, in trade circles also, it is known fact that the expenditure on samples are borne by the manufacturers only. Hence this claim of expenditure is against the trade practice and the assessee appears to have borne the expenses only on the reasoning that the same was charged upon it by its parent company. Hence, we are of the view that the AO was justified in holding that the burden to incur this expenditure is that of parent company and is not related to the business activities of the assessee. Accordingly, we confirm the disallowance made by the AO."

8.1 Consistent with the view taken in the above said years, we decide this issue against the assessee and accordingly, confirm the disallowance made by the A.O. on this issue.

9. The last issue urged by the assessee relates to disallowance made u/s 40 (a)(i/ia) of the Act. The Ld. A.R. submitted that certain expenses were disallowed in the earlier years u/s 40(a)(i/ia) of the Act for non-deduction of tax at source. He submitted that, as per provisions of section 40(a)(i/ia) of the Act, expenditure which was disallowed in the earlier year is allowable as deduction in the year in which TDS was remitted to the credit of the Government. The ld. A.R. submitted that the assessee could not fully furnish the relevant details before the AO/DRP in respect of expenses which were disallowed in earlier years in respect of which TDS was remitted during the year. Hence the claim of the assessee was not allowed. The Ld. A.R. submitted that the assessee has now collated all the details and accordingly prayed for an opportunity to present the same before the A.O.

9.1 We heard the Ld. D.R. on this issue and perused the record. Having regard to the submissions made by the Ld. A.R., we are of the view that, in the interest of natural justice, the assessee may be provided with an opportunity in this regard. Accordingly, we

restore this issue to the file of AO for examining the same afresh in accordance with law.

10. In the result, the appeal filed by the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the open court on 30th June, 2021

Sd/-	**Sd/-**
(George George K.)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 30th June, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation .....

2. Date on which the typed draft is placed before the dictating Member .....

3. Date on which the approved draft comes to Sr.P.S .....

4. Date on which the fair order is placed before the dictating Member .....

5. Date on which the fair order comes back to the Sr. P.S. .....

6. Date of uploading the order on website.....

7. If not uploaded, furnish the reason for doing so .....

8. Date on which the file goes to the Bench Clerk .....

9. Date on which order goes for Xerox & endorsement.....

10. Date on which the file goes to the Head Clerk .....

11. The date on which the file goes to the Assistant Registrar for signature on the order .....

12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order .....

13. Date of Despatch of Order. .....

14. Dictation note enclosed.....