

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2' NEW DELHI**

**BEFORE SHRI J.S. REDDY, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.3525/Del/2009
AY: 2004-05**

**ITA No. 2770/Del/2011
AY: 2005-06**

**Pernod Ricard India Pvt. Ltd., vs Dy. CIT,
Vice President Corporate Floor 5, Circle 8(1), New Delhi.
Tower A, Global Business Park,
Mehrauli Gurgaon Road,
Gurgaon.**

**ITA No. 2530/Del/2011
AY: 2005-06**

**ACIT, vs Pernod Ricard India Pvt. Ltd.,
Circle 14(1), New Delhi, New Delhi**

**ITA No.3811/Del/2009
AY: 2004-05**

**Dy.Commissioner of Income Tax, vs M/s Seagram India Pvt. Ltd.,
New Delhi. (Now Pernod Ricard India
Pvt. Ltd.), 104, Ashoka Estate,
Barakhamba Road,
Connaught Place, New Delhi.
(Appellant) (Respondent)**

**Appellant by : Mr. Deepak Chopra, Adv.
Respondent by : Shri T.M. Shivakumar, CIT DR**

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

1.0 The appeal in I.T.A. No. 3525/Del/09 has been preferred by the assessee against the order of ld. CIT-XX, New Delhi dated

29.06.2009 for assessment year 2004-05 on the following grounds:-

“1. That the order of the Ld. Commissioner of Income Tax (Appeals) [CIT (A)], to extent prejudicial to the assessee, is bad in law in deserves to be set aside.

2. That the Ld. CIT(A) erred on facts and law in sustaining the addition of Rs. 5,376,946 on account of the arm's length price determined by the Transfer Pricing Officer in respect of Marketing Support Services provided by the Appellant to Seagram Martell Duty Free Ltd. Hong Kong.

2.1 That the Ld. CIT (A) erred on facts and in law in confirming the allocation of additional expenditure in respect of the Marketing Support Services provided by the Appellant for its associated enterprises.

2.2 That the Ld. CIT(A) grossly erred in including the reimbursed expenses in the cost base for computing the profit margin from the Marketing Support Services provided by the Appellant for its associated enterprises.

2.3 That the Ld. CIT (A) grossly erred in rejecting the comparable data used by the Appellant to benchmark its profits margin from the Marketing Support Services provided by the Appellant to its associated enterprises.

2.4 That the Ld. CIT(A) erred in law in not allowing for a variation / reduction of 5 percent from arithmetic mean to arrive at the arm's length price as per provisions of the proviso to section 92C(2).

2.5 That the Ld. CIT(A) erred in not following the jurisdictional Tribunals judgment in the case of Sony India Pvt. Ltd. Vs. DCIT (114 ITD 448) (Del.) and that of the Bangalore tribunal in the case of Philips Software Vs. ACIT (119 TTJ 721) for allowing the 5% variation

adjustment.

3. That the Ld. CIT (A) grossly erred in law in confirming the disallowance of Rs. 3,025,050 being provision for transit breakages.

3.1 That the Ld. CIT(A) grossly erred on facts and in law grossly erred on facts and in law in coming to the conclusion that there is no certainty that if breakages have occurred in the past they would occur in the future also.

3.2 That the Ld. CIT (A) grossly erred in law in sustaining the disallowance of provision for transit breakages as the same was made on scientific basis and was based upon the history of breakages in such territories in the past.

3.3 That the ld.CIT(A) erred in concluding that the liability on account of transit breakages was on account of a probability and as such was an unascertained liability.

4. That the Ld.CIT (A) erred in not allowing a deduction of Rs. 1,921,790/- being provision for commission on sales.

5. That the Ld. CIT (A) erred in not adjudicating on the grounds of appeal raised in respect of the adjustments made to the book profit of the appellant under section 115JB of the Act.

That the above grounds of appeal are without prejudice to each other.

That the Appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal.”

1.1 The appeal in I.T.A. No. 3811/Del/2009 has been preferred by the revenue against the order of the CIT(A)-XX, New Delhi dated 29.6.2009 on the following grounds:-

(1) On the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in allowing a relief of Rs.23,63,670/- (out of total disallowance of Rs.77,40,616/-) made by the AO on account of difference in Arms Length Price as determined by the TPO and as taken by the assessee.

(2) On the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in deleting the addition of Rs.13.24 crores made on account of brand building expenses as determined by the TPO.

(3) On the facts and circumstances of the case as well as in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.3,89,55,0707- being 10% of brand expenses treated as expenditure of capital nature by the Assessing Officer.

(4) The appellant craves to be allowed to add any fresh grounds of appeal and/or delete or amend any of the grounds of appeal.”

1.2 The appeal in I.T.A. No. 2770/D/2011 has been preferred by the assessee against the order of ld. CIT(A)-XX, New Delhi dated 28.2.2011 pertaining to assessment year 2005-06 on the following grounds:-

“1. That the Ld. CIT (A) grossly erred in confirming the disallowance of Rs. 1,686,688 on account of provision for transit breakages.

1.1 That the Ld. CIT(A) grossly erred in law in not appreciating that the provision for transit breakages was a liability in presenti, which was to be discharged at a future date.

1.2 That the Ld.CIT(A) grossly erred in concluding that the provision for transit breakages was an unascertained liability, hence not allowable under the provisions of the Act.

1.3 That the Ld.CIT (A) grossly erred in concluding that the provisions for transit breakages were not created on a scientific basis and hence was an unascertained liability.

1.4 That the Ld. CIT (A) completely failed to appreciate that as per the accounting standards prescribed under section 145 of the Act, the Appellant was required to account for all known liabilities.

2. That the Ld. CIT (A) grossly erred in sustaining an adjustment of Rs. 4,040,809 under section 92CA(3) on account of marketing support services provided to an associated enterprise.

2.1 That the Ld. CIT(A) erred on facts in allocating additional expenditure in respect of the sales and marketing activity carried out by the Appellant for its associated enterprises.

2.2 That the Ld. CIT(A) grossly erred in including the reimbursed expenses in the cost base for computing the profit margin from the sales and marketing activity conducted by the Appellant for its associated enterprises.

2.3 That the Ld. CIT(A) grossly erred in rejecting the comparable data used by the Appellant to bench mark its profits margin from the sales and marketing activity provided by the Appellant to its associated enterprises.”

1.3 I.T.A. No. 2530/Del/11 has been preferred by the revenue against the order of CIT (A)-XX dated 28.2.2011 on the following grounds:-

1. That on the facts and circumstances of the case and in law the Ld. CIT (A) has erred in law and on the facts of the case in allowing a relief of Rs.4,04,193/- out of total disallowance of Rs. 44,45,002/- made by the Assessing Officer on account of difference in Arm's Length Price determined by the TPO and taken by the assessee.

2. That on the facts and circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.8,93,95,976/- made by the Assessing Officer on account of brand building expenses as determined by the TPO.

3. That on the facts and circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.4,67,34,266/- being 10% of brand expenses treated as expenditure of capital nature by the Assessing Officer.

4. The appellant craves to be allowed to add, delete or amend any other grounds of appeal.”

1.4 Since the said appeals involve common issues, the same are being disposed off together by this common order.

2. The brief facts of the case are that the assessee company was incorporated on September 3, 1993 as a subsidiary of Peri Mauritius. In the initial years of its existence the assessee acted

as a holding company for the group's interests in India. Two companies viz. Seagram Manufacturing Pvt. Ltd. and Seagram Distilleries Pvt. Ltd. were subsequently incorporated in India, being the operational companies. With effect from April 1, 2003 Seagram Manufacturing Pvt. Ltd. vide order dated 03-09-2003 of Hon'ble Delhi High Court merged with the assessee company. The Assessee is engaged in the business of blending, bottling, and trading of Indian Made Foreign Liquor (IMFL). The liquor is bottled and sold within India through Government agencies and private distributors and also exported out of India.

3.0 The first issue raised in this batch of appeals pertains to disallowance on account of transit breakages. Before the Assessing Officer ("AO"), it had been submitted that the Assessee maintains a running account and every year the provision created in the earlier year is reversed in the subsequent year and the actual expenses on the breakages and the shortages are debited to the concerned account which is taken to the profit and loss account. The Assessing Officer, for AY 2004-05, vide order dated 28.12.2006, and for AY 2005-06, vide order dated 08.12.2008, disallowed the provision made on account of transit breakages being in the nature of unascertained liability. The Ld.

CIT (A) for AY 2004-05, vide order dated 26.09.2009, and for AY 2005-06, vide order dated 28.02.2011, upheld the view of the AO. He, however, allowed the amount of actual breakages incurred as an expense. The assessee is aggrieved by this finding of the Ld. CIT (A).

3.1 During the course of proceedings before us, the Ld. AR, in all fairness, submitted that the disallowance has been upheld by the Hon'ble High Court of Delhi vide their order dated 23.10.2015 in ITA No.237/2015 in assessee's own case for AY 2001-02. It was further submitted that the Hon'ble High Court, while, ruling in favour of Revenue gave the following key findings:-

- a. The provision for transit breakages created during the year was to be disallowed.
- b. Any reversals in the provision and the actual amount were to be allowed as a deduction.

3.2 Hence, the Ld. AR submitted that in light of decision of Hon'ble Delhi High Court reversal of provision and the actual transit breakages should be allowed as a deduction in the present case. It was also submitted that a provision of Rs. 7,82,854/- was created during the AY 2003-04 which was reversed during the AY 2004-05. Therefore, it was prayed that

only the net provision of Rs. 22,42,196/- could have been disallowed, being provision of Rs. 30,25,050/- created during AY 2004-05 less provision of Rs. 7,82,854/- which was created during AY 2003-04 and reversed in AY 2004-05. Similarly, it was submitted that for AY 2005-06 the AO/Ld. CIT (A) have disallowed only the net amount of provision viz., Provision created during AY 2005-06 of Rs 16,86,688/-, which was incorrect. For AY 2005-06, it was submitted that the provision created on account of transit breakages to the tune of Rs. 23,17,279/- should be reduced by the provision created for AY 2004-05 i.e. Rs. 30,25,050/- leading to no disallowance.

3.3 It was further submitted by the Ld. AR that the aforesaid order passed by the Hon'ble High Court of Delhi has been confirmed by the Hon'ble Supreme Court vide order dated 11.07.2016 passed in SLP No. 12104/2016, 12115/2016, 12116/2016 and 12132/2016.

3.4 The Ld. CIT DR placed reliance on the findings of the authorities below and also on the fact of the SLP before the Hon'ble Apex Court being decided in the favour of the Revenue.

3.5 We have heard the rival contentions and perused the relevant record. In view of the fact that this issue has been

decided against the assessee by the Hon'ble High Court and against which SLP filed by the assessee was also dismissed, we decide the issue against the assessee and as such these grounds of appeal are dismissed.

4.0 The second issue raised in this batch of appeals pertains to the transfer pricing adjustment on account of marketing support services provided by the assessee to its Associated Enterprises. The brief facts involved herein are that Seagram Martell and Pernod Ricardo Gulf ("Associated Enterprises" or "AEs") entered into a Representation Agreement dated 15.06.2002 with the assessee pursuant to which the assessee provided Marketing Support Services to such AEs during the subject AY, to promote duty free sales to be undertaken by such AEs in the SAARC region. The AEs paid a fixed fee per month as compensation for the rendering of such services and also reimbursed Rs. 5,66,11,006/- for AY 2004-05 and Rs. 6,70,87,680/- for AY 2005-06 as the actual marketing cost incurred by the assessee. The Ld. Transfer Pricing Officer ("TPO") vide order dated 18.12.2006 for AY 2004-05 and vide order dated 16.10.2008 for AY 2005-06 followed the approach as taken by his predecessors for earlier years, while re-allocating expenses to the marketing

support services and including the reimbursement received by the assessee in the cost base, to compute an adjustment of Rs. 77,40,616/- and Rs. 44,45,002/- for AY 2004-05 and AY 2005-06 respectively.

4.1 The Ld. CIT (A) vide order dated 29.06.2009 for AY 2004-05 and vide order dated 28.02.2011 for AY 2005-06, followed the approach of his predecessor taken in earlier years, to hold that reimbursement received by the assessee was to be added both on the income as well as expenses side to determine the Net Cost Plus Margin of the assessee for the Marketing Support Services segment. The Appellant is aggrieved by this finding of the CIT (A) However, the Ld. CIT (A), with respect to the re-allocation of expenses, granted partial relief to the assessee, by accepting the cost allocation on the head count basis in respect of some items of expenditure, thereby reducing the quantum of adjustment suggested by the Ld. TPO to Rs. 53,76,946/- for AY 2004-05 and Rs. 40,40,809/- for AY 2005-06. The Department is aggrieved by this finding of the Ld. CIT (A).

4.2 It was submitted by the Ld. AR that this Tribunal vide order dated 12.04.2016 for AY 2002-03 and 2003-04, upheld the findings of Ld. CIT(A) similar to the findings of Ld. CIT(A) for AY

2004-05 and AY 2005-06, thereby confirming the partial relief granted to the assessee in respect of cost allocation. It was further submitted that, however, the Tribunal confirmed Ld. CIT (A)'s finding that the reimbursement of expenses were to be added to the cost base. The Ld. AR also submitted that the assessee has preferred an appeal before the Hon'ble Delhi High Court against the aforementioned Tribunal's order which is pending adjudication.

4.3 The Ld. CIT DR supported the order of the AO/Ld. TPO.

4.4 We have heard the rival contentions and while respectfully following the co-ordinate benches decision in the assessee's own case we direct that the reimbursements have to be included in the cost base and the operating margins have to be computed accordingly. As regards the grounds of appeal raised by the revenue against the partial relief granted by the Ld. CIT (A) towards allocation of costs, no sustainable ground has been presented before us by the revenue and as such the order of the Ld. CIT (A) is confirmed. Hence, these grounds of appeal of the assessee and the revenue are disposed off in terms of these directions.

5.0 The next issue raised in this batch of appeals pertains to transfer pricing adjustment on account of Advertisement, Marketing and Promotional (“AMP”) expenses incurred by the assessee for promotion of its brands in India. During the course of proceedings, the Ld. AR made detailed submissions which are as follows:

“For AY 2004-05:

1. The Appellant’s key business activities in India consist of processing, bottling and selling of scotch and Indian Made Foreign Liquor (“IMFL”). In the manufacturing segment the Appellant imports Concentrate Alcoholic Beverage (“CAB”) from Chivas Brother, UK. The imported CAB is subjected to various processes, the end product whereof known as Bottled in India Scotch (“BIIS”) is bottled and made available for sale in India. BIIS consist of brands like Passport, Hundred Pipers and Something Special 12 year old. The imported CAB is also blended with Grain Neutral Spirit (“GNS”) and then subjected to various processes, the end product whereof known as IMFL is bottled and made available for sale in India as well. IMFL consist of brands like Blenders Pride, Oaken Glow, Royal Stag, Imperial Blue, Seagram Extra Dry Gin and Fling Vodka. Due to increase in demand for the aforementioned brands and scarcity of infrastructure for bottling, the Appellant entered into bottling arrangements with third party bottlers to match the demand.

2. The Appellant in order to promote the sales of the aforementioned brands, which are owned by Appellant’s AEs in foreign jurisdiction, incurred AMP

expenses in India. Following are the details of CAB imported, total sales and AMP expenses incurred by the Appellant during the subject AY.

<u>S. No</u>	<u>Particulars</u>	<u>Value (in INR)</u>
1)	Turnover: Sales 203,77,90,310 Revenue from bottling arrangements 1,01,68,86,804	305,46,77,114
2)	CAB imported (page 182 of Paperbook Vol – I)	7,60,36,811
3)	% of Cab imported vis-à-vis Turnover	2.49%
4)	Brand expenses (AMP) incurred	38,95,50,709
5)	% of Brand expenses vis-à-vis Turnover	12.76%

3. The TPO vide order dated 18.12.2006 held that by incurring such AMP expenses, the Appellant created marketing intangible for the AEs who owned the aforementioned brands and thus such expenses needed to be shared between the Appellant and the AEs. The TPO also held that the AEs are getting benefits from India on account of increased import of raw materials by the Appellant and the bottlers. Thereafter, the TPO added the cost of CAB imported by the Appellant and the revenue from bottling arrangements to use as the base line figure in calculating the benefit that AEs were deriving because of such brand expenses incurred by the Appellant. Hence the TPO, on an irrational basis, computed the cost contribution of AEs to the amount of INR 13.24 crore. While coming to such conclusion, the TPO did not allege the existence of any arrangement wherein the Appellant was to incur AMP expenses for and on behalf of the AEs.

4. The CIT(A) vide order dated 29.06.2009 noted that the Appellant had a royalty-free license with the AEs for the utilization of the aforementioned brands in India

and that such brands were specific only to the Indian Market and were not significantly sold outside of India. The CIT (A) also noted that the comparables available also incurred about 12% ('bright line') of brand expenses vis-à-vis turnover while earning a mean operating profit on sales of only about 2% as compared with the Appellant company which had spent 12.49% on brand expenses and earned super normal operating profit on sales of 27.37%, which was brought to tax in India. Therefore, the CIT (A) held that benefit, if any, arising to the AE was purely incidental and thus deleted the adjustment proposed by the TPO on account of AMP expenses. The Revenue Department is aggrieved by this finding of the CIT (A) and hence is in Appeal before Your Honours.

5. In this regard, it is most humbly submitted that the CIT (A) is well reasoned and in tune with the recent developments in law on the issue of AMP expenses. Hon'ble jurisdictional Delhi High Court, in the case of Maruti Suzuki India Ltd. vs. CIT 381 ITR 117, Whirlpool of India Ltd. vs. DCIT 381 ITR 154 and Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. ACIT 381 ITR 227 has clearly laid down the jurisprudence on the issue of AMP expenses undertaken by a manufacturer and hence are squarely applicable to Appellant's case as well.

6. Such decisions have been followed by the Hon'ble Delhi Tribunal in the case of Goodyear India Ltd. vs. DCIT [2016] 70 taxmann.com 67, which also involved an assessee who was a manufacturer. The Tribunal held that there existed no international transaction between the AE and assessee for brand building in the absence of an express agreement to that effect between the two and the contention of the revenue that an

abnormal increase in the advertisement expenses in comparison to preceding year would not render any help to the Revenue, keeping in view the proportionate rise in turnover of the assessee. This ratio also squarely applies to the Appellant's case as well.

7. The Hon'ble Mumbai Tribunal also in the case of Diageo India Private Limited vs. DCIT ITA No. 7545/Mum/2012 which involved an assessee engaged in the business of manufacturing and marketing of various international alcoholic brands, after relying upon the aforementioned Delhi High Court decisions, held that incurring of AMP expenses for the brands owned by AEs, in the absence of an express agreement to that effect, cannot be labelled as international transaction. The facts of this case are identical to the facts of the Appellant being a manufacturer of various alcoholic brands.

For AY 2005-06:

1. The Appellant's key business activities in India consist of processing, bottling and selling of scotch and Indian Made Foreign Liquor ("IMFL"). In the manufacturing segment the Appellant imports Concentrate Alcoholic Beverage ("CAB") from Chivas Brother, UK. The imported CAB is subjected to various processes, the end product whereof known as Bottled in India Scotch ("BIIS") is bottled and made available for sale in India. BIIS consist of brands like Passport, Hundred Pipers and Something Special 12 year old. The imported CAB is also blended with Grain Neutral Spirit ("GNS") and then subjected to various processes, the end product whereof known as IMFL is bottled and made available for sale in India as well. IMFL consist of

brands like Blenders Pride, Oaken Glow, Royal Stag, Imperial Blue, Seagram Extra Dry Gin and Fling Vodka. Due to increase in demand for the aforementioned brands and scarcity of infrastructure for bottling, the Appellant entered into bottling arrangements with third party bottlers to match the demand.

2. The Appellant in order to promote the sales of the aforementioned brands, which are owned by Appellant's AEs in foreign jurisdiction, incurred AMP expenses in India. Following are the details of CAB imported, total sales and AMP expenses incurred by the Appellant during the subject AY.

<u>S. No</u>	<u>Particulars</u>	<u>Value (in INR)</u>
1)	<i>Turnover:</i>	
	<i>Sales</i>	<i>210,30,61,000</i>
	<i>Revenue from bottling arrangements</i>	<i>116,46,80,000</i>
		<i>326,77,41,000</i>
2)	<i>CAB imported</i>	<i>8,29,11,124</i>
3)	<i>% of Cab imported vis-à-vis Turnover</i>	<i>2.54%</i>
4)	<i>Brand expenses (AMP) incurred</i>	<i>46,79,78,320</i>
5)	<i>% of Brand expenses vis-à-vis Turnover</i>	<i>14.32%</i>

3. The TPO vide order dated 16.10.2008 held that by incurring such AMP expenses, the Appellant created marketing intangible for the AEs who owned the aforementioned brands and thus such expenses needed to be shared between the Appellant and the AEs. The TPO also held that the AEs are getting benefits from India on account of increased import of raw materials by the Appellant and the bottlers. Thereafter, the TPO added the cost of CAB imported by the Appellant and the bottlers to the sales of the Appellant to use as the base line figure in calculating the benefit that AEs were deriving because of such brand expenses incurred by

the Appellant. Hence the TPO, on an irrational basis, computed the cost contribution of AEs to the amount of INR 8,93,95,976. While coming to such conclusion, the TPO did not allege the existence of any arrangement wherein the Appellant was to incur AMP expenses for and on behalf of the AEs.

4. The CIT(A) vide order dated 28.02.2011 noted that the Appellant had a royalty-free license with the AEs for the utilization of the aforementioned brands in India and that such brands were specific only to the Indian Market and were not significantly sold outside of India. The CIT (A) also noted that the comparables available also incurred about 11% ('bright line') of brand expenses vis-à-vis turnover while earning a mean operating profit on sales of only about 5.18% as compared with the Appellant company which had spent about 14% on brand expenses and earned super normal operating profit on sales of 18.26%, which was brought to tax in India. Therefore, the CIT (A) held that benefit, if any, arising to the AE was purely incidental and thus deleted the adjustment proposed by the TPO on account of AMP expenses. The Revenue Department is aggrieved by this finding of the CIT (A) and hence is in Appeal before Your Honours.

5. In this regard, it is most humbly submitted that the CIT (A) is well reasoned and in tune with the recent developments in law on the issue of AMP expenses. Hon'ble jurisdictional Delhi High Court, in the case of Maruti Suzuki India Ltd. vs. CIT 381 ITR 117, Whirlpool of India Ltd. vs. DCIT 381 ITR 154 and Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. ACIT 381 ITR 227 has clearly laid down the jurisprudence on the issue of AMP

expenses undertaken by a manufacturer and hence are squarely applicable to Appellant's case as well.

6. Such decisions have been followed by the Hon'ble Delhi Tribunal in the case of Goodyear India Ltd. vs. DCIT [2016] 70 taxmann.com 67, which also involved an assessee who was a manufacturer. The Tribunal held that there existed no international transaction between the AE and assessee for brand building in the absence of an express agreement to that effect between the two and the contention of the revenue that an abnormal increase in the advertisement expenses in comparison to preceding year would not render any help to the Revenue, keeping in view the proportionate rise in turnover of the assessee. This ratio also squarely applies to the Appellant's case as well.

7. The Hon'ble Mumbai Tribunal also in the case of Diageo India Private Limited vs. DCIT ITA No. 7545/Mum/2012 which involved an assessee engaged in the business of manufacturing and marketing of various international alcoholic brands, after relying upon the aforementioned Delhi High Court decisions, held that incurring of AMP expenses for the brands owned by AEs, in the absence of an express agreement to that effect, cannot be labelled as international transaction. The facts of this case are identical to the facts of the Appellant being a manufacturer of various alcoholic brands."

5.1 The Ld. CIT (DR) on the issue of transfer pricing adjustment on account of AMP expenses submitted as follows:

“A.Y.2004-05 (Appeal No. ITA No 3811/Del/2009)”

1. During the year under consideration the appellant had incurred Brand Expenditure of Rs. 38,95,50,709/- (para 13 of TPO on internal page 21 for A.Y.2004-05). The AO has held that the Assessee was not the legal owner of the brands and therefore it had to be compensated by its AE for the marketing intangible being created due to brand expenditure incurred by the Assessee. He has calculated the benefit derived by the AE at Rs. 13.24 crores (para 13.5 on internal page 25 of TPO) by multiplying the Brand Expenditure with result of the following ratio:

Sum of bottling income plus raw material import

(Turnover of Taxpayer + Sum of bottling income plus raw material import)

2. Ld CIT (A) has dis-agreed with the Ld.AO. He has completely relied upon the submissions of the Assessee made before him during the appeal proceedings. The averments made by the Assessee have not been cross verified by the Ld CIT(A). The submissions of the Assessee have been elaborately reproduced by Ld CIT (A) and at the end he has held that the brand expenditure incurred by the Assessee has been on brands that are essentially specific to the Indian market and are not significantly known / sold outside India and that foreign AE is not deriving any benefit out of it. This finding of Ld CIT (A) is without any independent basis. There are no facts and figures / data available on record to support such finding of the Ld CIT(A). Infact the finding is defective in as much as it is completely contrary to the facts of the case as is discussed below:

3. Kind reference is invited to page.4 and Page 5 of the order of Ld CIT(A) where in at para 5.5 and 5.6 it is stated that the Assessee manufactures and sells the

Scotch brands (Bottled in India Scotch -BIIS) namely, 'Passport', 'Hundred Pipers' and 'Something Special 12 year old'. These brands are very much international brands and Ld CIT (A) has completely missed (or avoided) to refer to these brands in his findings. He has only taken the names of the IMFL brands listed at Para 5.7 of his order and stated that the Brand expenditure has been incurred only on them without any basis. This is far from truth. IN FACT it is also true that there was no material available on record to conclude that so and so brands are not having market outside India. There was no data or material available on record for the Ld CIT(A) to decide that the other brands listed at Para 5.7 are only sold in India. Thus the findings of the Ld.CIT(A) are perverse as he has come to a conclusion without any material basis.

4. Further, the bottlers are buying the raw material from Assessee's parent Company (AE) as per the bilateral Agreement between bottlers and the Assessee. The bottlers are contractually bound (kindly refer to first point under Para 3.31 of assessee's letter to the TPO dated 27th Nov 2006 given at page 417 of Assessee's paper book) to buy the raw material from assessee's AE only. This arrangement does give rise to international transaction as per S.92B(2) of the Act. The bottling remuneration received by Assessee has a component of remuneration from the AE who is getting benefit of selling its raw material and also getting benefit of marketing intangibles created by Advertisement spend by Assessee.

5. The entire basis for Ld CIT(A)'s decision is that the entire AMP expenditure is on promoting local brands – completely forgetting that there is no material basis to arrive at such conclusion and also that it is factually incorrect as explained at Par- 3 & 4 above.

6. *Ld CIT(A) has also based his judgment on the Bright Line Test adopted by the Assessee before Ld.CIT(A) to establish the absence of international transaction in AMP. The mode and validity of selection of comparables etc selected by the Appellant have not been subjected to the bare minimum scrutiny that is warranted in any assessment / appeal proceedings. Further the Ld CIT(A) has held the profits as super normal merely on the submissions of the Assessee without any further scrutiny by the appropriate authority and solely on the averments of the Assessee.*

7. *The TPO/AO have completed the assessment on the reasoning that AE has not compensated the Assessee for the AMP spend that contributes to accrual of marketing intangibles to the AE – the legal owner of the brands. However, in the cases of Sony Ericsson Mobile Communications Pvt. Ltd. vs. CIT reported at 374 ITR 118 and Maruti Suzuki India Ltd. vs. CIT in ITA no. 110/214 and 710/2015 order dated 11 December, 2015 the Hon'ble High Court of Delhi has held that TPO /AO cannot PRESUME the existence of arrangement / understanding between AE and the taxpayer on AMP, but that he has to prove it without the help of BLT. Post these decisions, the Hon'ble High Court and also various benches of Hon'ble ITAT have been setting aside the AMP issue to the file of the AO /TPO for fresh adjudication in the light of the guidelines and ratio set out in those decisions of the Hon'ble High Court. In the following cases the AMP issue has been set aside to the file of the AO /TPO post the above cited Sony Ericsson and Maruthi decisions. IT is therefore prayed that the Hon'ble Bench may consider setting aside the issue of benchmarking the AMP expenditure to the file of the AO /TPO for fresh consideration.*

A. *Toshiba India Pvt. Ltd., New Delhi vs Assessee on 8 April, 2016 -*

*ITA No. 944/Del/2016 Assessment Year : 2011-12
Dtd: 08 .04.2015*

The relevant para are as under:

6. *During the course of hearing the ld. Counsel for the assessee at the very outset submitted that the issue under consideration deserves to be set aside to the TPO/AO as the issue now has been settled by the Hon'ble Jurisdictional High Court in the case of Sony Ericsson Mobile Communications Pvt. Ltd. vs. CIT reported at 374 ITR 118 and in the case of Maruti Suzuki India Ltd. vs. CIT in ITA no. 110/214 and 710/2015 order dated 11 December, 2015. It was further submitted that the aforesaid orders were not available to the T.P.O. / D.R.P. at the time of passing of their respective orders. It was also submitted the TPO/AO/DRP (In ITA No. 944/Del/2016) have not brought any evidence on record to demonstrate the existence of any mutual agreement or arrangement between the assessee and the A.E. It was stated that the DRP declined to apply the decisions of M/s Maruti Suzuki India Ltd. vs. C.I.T. (Supra) on the ground that it was given in the context of a manufacturer and not a distributor, however, subsequent to the said decision the Hon'ble Jurisdictional H.C. in the case of Whirlpool of India vs. DCOT in I.T.A. 228/2015 & C.M.No. 5751/2015 order dated 22.12.2015 and in the case of Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. A.C.I.T. in I.T.A. No. 643 & 675/14 order dated 23.12.2015 examined this aspect and applied the same principle to distribution business as well. It was further*

submitted that DRP and the TPO failed to give any cogent reason for de-bundling the AMP function of the assessee as a separate transaction which is in violation of the principles laid down in the case of Sony Ericsson Mobile Communications India Pvt. Ltd reported at (2015) 55 Taxman.com.240(Del.) (Supra).

7. in his rival submissions, the ld. DR although supported the order of the AO could not controvert the aforesaid contention of the Ld. Counsel for the assessee.

8. We have considered the submissions of both the parties and perused the material available on the record. In the present case it is an admitted fact that the T.P.O. proposed the adjustment by applying the "Bright Line Test", on account of excessive AMP incurred by the assessee on behalf of the A.E. But subsequently the D.R.P. held that the application of "Bright Line Test" has been overruled in the case of M/s. Sony Ericsson Mobile Communication India Pvt. Ltd. (Supra). However, the D.R.P. declined to apply the decision of Maruti Suzuki India Ltd. (Supra) on the ground that it was rendered in the context of a manufacturer and not a distributor. Recently, the Hon'ble Delhi High Court, subsequent to the said (In ITA No. 944/Del/2016) decision of Maruti Suzuki India Ltd. (Supra), examined this aspect and applied the same principle to the distribution business also in the cases of Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. A.C.I.T. (Supra) and C.I.T. & Ors vs. Whirlpool of India Ltd. (supra) vide order dated 23.12.2015 and 22.12.2015 respectively. These decisions of the Hon'ble Jurisdictional Court which are applicable to the facts of the present case were

not considered by the T.P.O. and the D.R.P. since these were not available to them. We, therefore, by considering the totality of the facts and the ratio laid down by the Hon'ble Delhi High Court in the aforesaid judicial pronouncements, deem it appreciate to set aside the issue relating to the adjustment on account of AMP to the file of the TPO/AO to be decided afresh in accordance with the law after providing due and reasonable opportunity of being heard to the assessee.

B. India Medtronic P.Ltd, Mumbai vs Assessee on 31 December, 2015 -

I.T.A. No.2168/M/2014 (Assessment Year: 2009-2010)

C.O. No.213/M/2014 (Arising out of ITA No.2121/M/2014) (AY 2009- 2010)

The relevant para are as under:

8. We have heard both the parties and perused the orders of the Revenue Authorities ie DRP / TPO / AO and perused the voluminous paper books filed before us. The undisputed facts of the case include the benchmarking analysis of the core international transactions were found to be at Arm's Length. TPO did not suggest any addition on account of the import of the finished goods. There is no disturbance is called for to the method of accounting ie TNM Method adopted by the assessee. It is a legally decided issue now by virtue of the judgment of the Hon'ble Delhi High Court in the case of Sony Ericsson (supra), the Special Bench decision in the case of L.G. Electronics (supra) stands reversed on many issues such as adopting the „bright line method“

in matters of benchmarking the AMP transactions. The relevant paras of the Hon"ble Delhi High Court (supra) were already extracted / cited in the preceding paragraphs of this order. Factually, the said judgment of the Delhi High Court being dated 16.3.2015, was not available during the proceedings before the Assessing Officer dated 29.1.2014. Therefore, we find that it is fair to give an opportunity to the TPO / AO to apply the ratio of the said judgment and others, if any, and remand this issue to the file of the AO considering the plethora of orders of the Tribunal referred above ie the case of Toshiba India (P) Ltd vs. DCIT (supra); (ii) Casio India Co. (P) Ltd vs. DCIT (supra); (iii) Valvoline Cimmins (P) Ltd vs. DCIT (supra) and (iv) Reebok India Company vs. DCIT (supra).

C. *Johnson & Johnson Ltd. -*

ITA No. 829/M/2014 A.Y.09-10 dated 07.01.2016

Hon'ble Mumbai Tribunal, after consideration decision of Hon'ble High Court in the case of Sony Ericsson and Maruti Suzuki, have restored the matter back to the file of TPO for determination of ALP on AMP issue.

Para 6 is reproduced below:

"6. We have heard both the parties on this issue of benchmarking the AMP expenses qua the brand development and find the AO / TPO relied heavily on the Special Bench decision of ITAT, Delhi in the case of L.G. Electronics India Pvt Ltd (supra) in making the adjustments and in applying the „BLT“ in benchmarking the AMP expenditure. It is an undisputed fact that the Hon"ble Delhi High Court has rendered a judgment in the case of Sony Ericsson Mobile Communications India Pvt Ltd

(supra), reversing the said Special Bench decision in the case of L.G. Electronics (supra). As on today, the „BLT“ is not to be applied in such benchmarking exercise of the AMP expenditure. AP / TPO is statutorily bound to apply the existing methods mentioned in the IT Act, 1961 / IT Rules, 1962. We, accordingly, remand the issue, that revolves around the TP adjustment of Rs. 133.02 (rounded off), to the file of the AO / TPO to benchmark these transactions, if necessary in the light of the guidelines specified in the precedents enunciated by the Delhi High Court (supra). Further, TPO is directed to apply all the principles laid down by the Hon'ble Delhi High Court in the case of Maruti Suzuki India Limited vs. CIT in ITA No. 110/ 2014 and ITA 710/2015, dated 11 th December, 2015 in the remand proceedings in the matters of the requirement of benchmarking the AMP transactions."

D. Molson Coors Cobra India P.Ltd decided on 10 February, 2016 -

I.T.A. No.7119/M/2012

Assessment Year: 2007-2008

The relevant para are as under:

7. We have heard both the parties and perused the orders of the Revenue Authorities as well as the relevant material placed before us. We have considered the submissions of the Ld Counsel that under the factual matrix of this case, the issue of benchmarking the AMP transactions was remanded in the case of M/s. Johnson & Johnson Limited (supra) and judgment of the Hon"ble Delhi High Court in the case of Perfetti Van Melle India

Pvt Ltd vs. DCIT in ITANo.407/Del/2015 (AY 2010-2011), dated 2.6.2015. The undersigned is a party to the said decision of the Tribunal in the case of M/s. Johnson & Johnson Limited (supra). For the sake of completeness of this order, relevant paras from the said Tribunal's order dated 7.1.2016 is extracted and placed as under:-

"6. We have heard both the parties on this issue of benchmarking the AMP expenses qua the brand development and find the AO / TPO relied heavily on the Special Bench decision of ITAT, Delhi in the case of L.G. Electronics India Pvt Ltd (supra) in making the adjustments and in applying the „BLT“ in benchmarking the AMP expenditure. It is an undisputed fact that the Hon“ble Delhi High Court has rendered a judgment in the case of Sony Ericsson Mobile Communications India Pvt Ltd (supra), reversing the said Special Bench decision in the case of L.G. Electronics (supra). As on today, the „BLT“ is not to be applied in such benchmarking exercise of the AMP expenditure. AP / TPO is statutorily bound to apply the existing methods mentioned in the IT Act, 1961 / IT Rules, 1962. We, accordingly, remand the issue, that revolves around the TP adjustment of Rs. 133.02 (rounded of), to the file of the AO / TPO to benchmark these transactions, if necessary in the light of the guidelines specified in the precedents enunciated by the Delhi High Court (supra). Further, TPO is directed to apply all the principles laid down by the Hon'ble Delhi High Court in the case of Maruti Suzuki India Limited vs. CIT in ITA No.

110/ 2014 and ITA 710/2015, dated 11th December, 2015 in the remand proceedings in the matters of the requirement of benchmarking the AMP transactions."

8. *We also find that the judgments of the Hon''ble Delhi High Court in the case of Sony Ericsson Mobile Communications Pvt Ltd (supra) and Maruti Suzuki India Limited (supra) are also considered while remanding the above case (M/s. Jhonson and Jhonson) to the file of the AO for necessary adjudication. With similar directions, we remand Ground no.2 with its sub-grounds of the present appeal to the file of the AO for benchmarking the relevant international transactions. Accordingly, Ground no.2 with its sub-grounds raised by the assessee are allowed for statistical purposes.*

I am also enclosing the list of cases where the matter has been set aside to the AO /TPO for redoing as Annexure-A to this submission.

A.Y.2005-06 (ITA No 2530/Del/2011):

It is submitted that the facts and circumstances of the case as found in orders of AO /TPO are same as in the case of the Assessee for A.Y.2004-05. The Ld. CIT(A) has also given the same reasons as given in the order of Ld.CIT(A) for A.Y.2004-05 while deleting the addition. Hence for the same reasons as submitted above for A.Y.2004-05, the Hon'ble Bench may consider setting aside the issue of benchmarking the AMP expenditure to the file of the AO /TPO for fresh consideration."

5.2 The Ld. CIT (DR) also submitted a list of cases as aforementioned where the issue relating to AMP was restored to the file of the Ld. TPO/AO but the same is not being reproduced here for the sake of brevity.

5.3 The Ld. AR, in response to the aforementioned CIT (DR)'s submissions, submitted as follows:

“.....The crux of the matter is that, in totality of the circumstances, the Revenue has not been able to establish that there was any “international transaction” or any arrangement between the Assessee and the Associated Enterprise (“AE”) of the Assessee for incurring of AMP expenditure.

What the CIT(DR) has completely missed is that there was a separate arrangement between the Assessee and its AE for the purposes of providing Marketing Support Services in respect of the international brands, which were sold directly by the AE to Institutions with the Assessee playing no role in the sale of such brands in India and all such expenditure relating the advertisement and marketing conducted by the Assessee for the AE stood completely reimbursed. The Transfer Pricing Officer (“TPO”) while determining the ALP in respect of that marketing arrangement has included the entire marketing expenditure done for the AE and reimbursed by the AE as part of the cost base, which action has been confirmed by the Tribunal in the AY 2002-03 and 2003-04 (ITA Nos. 4783/Del/2007 and 4784/Del/2007 enclosed at pages 714-755 of the Paperbook Vol III). At this juncture, it is also submitted

that this marketing arrangement with the AE, catered to the foreign brands which were to be sold in India to Institutions and Duty Free Shops. The CIT (DR) while referring to the brands has completely mixed up the whole proposition and has drawn erroneous conclusions.

It is respectfully submitted that even otherwise the Revenue has grossly erred in not discharging the onus relating to existence of AMP as an “international transaction” de hors the application of Bright Line Test (“BLT”) method with respect to the alleged AMP expenditure issue, as mandated by the Jurisdictional High Court of in the case of Maruti Suzuki India Ltd. [2016] 381 ITR 117 (Delhi High Court).

On the issue of and the Revenue’s endeavour to have the matter remanded back, the Assessee seeks liberty to point out that the Delhi High Court in Sony Ericsson Mobile Communications India P. Ltd. (2015) 374 ITR 118, followed by Maruti Suzuki India Ltd. (supra) have clarified that the Tribunal, in the first instance, should decide the issue on merits rather than passing an order of remand to the AO/TPO. It was also held in Maruti Suzuki India Ltd. (supra) that the Tribunal was not right in directing a fresh benchmarking comparative analysis thereby setting aside the remand order of the ITAT while deciding the AMP issue in favour of the assessee.

Further, in terms of the written submission filed by the CIT (DR), the para wise reply is as under:

1. The contents of paragraph 1 of CIT (DR)’s note state facts and figure which are a matter of record.

2. *The contents of paragraph 2 of CIT(DR)'s note are untenable and uncalled for in the absence of any specific ground of appeal raised by the Revenue Department in their appeals. Moreover, the CIT(DR) has completely failed to discharge the onus of producing any material on record in support of his submissions that could suggest a manifest error on part of the CIT(A) so that the matter may be remitted back to the file of AO/TPO.*

3. *The contents of paragraph 3 of CIT(DR)'s note are vague and without corroborating evidence, hence denied. Reliance placed on Para 5.5 to 5.7 of the order of Ld. CIT(A) is misconceived and on selective reading of facts, which is not permissible. Even otherwise, it is respectfully submitted that when Revenue has not challenged the conclusion drawn by CIT(A) in respect to these facts [kindly refer Para 10.9 of the CIT(A) order], then it is not open for the CIT(DR) to raise such unilateral averments (Reliance is placed on settled legal principle that – “what cannot be done directly cannot be done indirectly”).*

Without prejudice, it is now a settled legal principle that CIT(DR)'s arguments are to be confined to support or defend the AO/TPO/CIT(A) order and that he cannot set up an altogether different case [ACIT v. Ms. Aishwarya K. Rai [2010] 2 ITR (Trib) 644 (Mumbai Tribunal), ITO v. Anant Y. Chavan (2009) 126 TTJ 984 (Pune Tribunal), Mahindra & Mahindra Ltd. ITA No. 2606/Mum/2000 (Mumbai Tribunal Special Bench) and DCIT v. M/s. Envision Investment & Finance Pvt. Ltd. ITA No. 2138/Mum/2010 (Mumbai Tribunal)].

4. *The contents of paragraph 4 of CIT(DR)'s reply are untenable, without any basis and are denied in toto. The CIT(DR)'s argument that the bottling arrangement between the Assessee and third party bottlers constituted an "international transaction" under section 92B of the Income Tax Act is completely devoid of merits as the necessary ingredients of section 92B are not met. Moreover, the CIT(DR) has failed to appreciate that the revenue received by the Assessee as per the bottling arrangements is wholly taxed in India and any enhanced bottling revenue as a result of AMP expenditure incurred by the Assessee would not lead to shifting of profits outside India.*

5. *The contents of paragraph 5 and 6 of CIT(DR)'s note are untenable and repetitive. The CIT(DR) has himself failed to substantiate his stand by not producing any evidence/material to support his submission that could render the finding of CIT(A) perverse, in order to remit the subject appeals back to the file of AO/TPO.*

6. *The contents of paragraph 7 of CIT(DR)'s note are untenable as the recent decision of Delhi High Court in Maruti Suzuki India Ltd. (supra) has clearly held that the onus of establishing the existence of international transaction vis-à-vis AMP issue is on the Revenue Department, failure of which requires setting aside of any addition on account of AMP issue rather than remanding the matter back to the AO/TPO. The High Court in Maruti Suzuki India Ltd. (supra) relied upon the findings in Sony Ericsson Mobile Communications India P. Ltd. (2015) 374 ITR 118, which are reproduced as follows:*

“193. ... The Tribunal, at the first instance, would try and dispose of the appeals, rather than passing an order of remand to the Assessing Officer/TPO. The endeavour should be to ascertain and satisfy whether the gross/net profit margin would duly account for AMP expenses. When figures and calculations as per the TNM or RP Method adopted and applied show that the net/gross margins are adequate and acceptable, the appeal of the assessed should be accepted...”

It is essential to point out here that the decision of Maruti Suzuki India Ltd. (supra) is squarely applicable to the current set of facts as the assessee in that case was also a manufacturer incurring AMP expenditure. Furthermore, it is respectfully submitted that the Delhi High Court recently in Sony Ericsson Mobile Communications India Pvt. Ltd. vs. DCIT ITA 638/2015, Casio India Company Private Limited Vs. DCIT ITA 309/2016 and Rayban Sun Optics India Pvt Ltd vs. CIT ITA 674 of 2016 has set aside the remand order of ITAT involving AMP issue and has directed the ITAT to adjudicate such AMP issue without remanding it further. Therefore, in accordance with the trend set out by the Hon'ble Jurisdictional High Court, it is most humbly prayed that the AMP issue be decided by the Hon'ble Bench rather than remanding it back to the AO/TPO.

7. In furtherance of CIT(DR)'s efforts to have the matter remanded back, he has relied upon the Tribunal's decisions in Toshiba India Pvt. Ltd. v. DCIT ITA No.

944/Del/2016, India Medtronic Pvt. Ltd. v. DCIT ITA No. 2168/Mum/2014, Johnson & Johnson Ltd v. ACIT ITA No. 829/Mum/2014 and Molson Coors Cobra India Pvt. Ltd. v. DCIT ITA No. 7119/Mum/2012. It is respectfully submitted that all these decisions are distinguishable and none of these decisions are applicable to the Assessee's case as they are based on different set of facts with different business model. The decision of jurisdictional High Court in Maruti Suzuki (supra) holds the legal front and ratio laid down therein has to be followed.

8. Furthermore, the CIT(DR) has also submitted an exhaustive list of cases involving AMP issue wherein the matter was remanded back to the file of AO/TPO for fresh determination. The Appellant most respectfully submits that none of the precedents relied upon by the CIT(DR) are applicable to the current set of facts. The list of cases as submitted by the CIT(DR) along with Appellant's comments are enclosed herewith as Annexure - A. Furthermore, the Appellant seeks liberty to submit a list of cases wherein the AMP issue was decided by various forums on merits. The list of cases relied upon by the Appellant, apart from what has already been submitted before the Bench, is enclosed herewith as Annexure - B.

5.4 The list of cases submitted by the Ld. AR as aforementioned in the submissions is not being reproduced in this order for the sake of brevity.

5.5 We have heard the rival submissions. In our considered opinion the crux of the matter is that we find force in the

contentions of the Ld. Counsel of the assessee that no adjustment was warranted on the facts of the present case since the brands for which the AMP expenditure was incurred were India specific. This categorical finding has been recorded by the Ld. CIT(A) in Para 10.9 of his order for AY 2004-05 and no evidence has been brought on record by the Ld. DR to repel this factual finding. Given the above, we find no force in the contentions of the DR that the issue be remanded back to the Ld. TPO for a fresh consideration. As rightly pointed out by the Ld. Counsel for the assessee, the jurisdictional High Court has time and again directed the Tribunal to apply the law as laid down by the High Court and adjudicate the matter. Given the fact that the AMP spend was India specific as the said brands were also India specific we find no force in the contentions of the revenue that any benefit could have arisen to the non-resident AE. If the product manufactured and sold by the assessee is India specific then it cannot be said that any benefit could have accrued to the AE on account the AMP spend in India in respect of such brands.

5.6 Further, the Ld. Counsel of the assessee has also submitted that the assessee is a full risk bearing manufacturer

in India and as such no adjustment is warranted on account of AMP expenditure since the benefit of such expenditure accrues to the assessee only. However, we are not opining on this issue at this stage since on the facts we have already held that where the products are India specific there cannot be any adjustment in respect of the AMP expenditure since no benefit arises to the AE on account of such expenditure. Accordingly, these grounds of the revenue are rejected and order of the Ld. CIT (A) is confirmed.

5.7 We further make it clear that our adjudication on the issue of AMP in these appeals is case specific and we are not enunciating a legal principle to be followed in other cases as a precedent. Our adjudication in favour of the assessee is guided by the undisputed fact that in the case of the assessee the AMP spend was India specific as the said brands were also India specific and there is no possibility that any benefit could have arisen to the non-resident AE. If the product manufactured and sold by the assessee is India specific then it cannot be said that any benefit could have accrued to the AE on account the AMP spend in India in respect of such brands.

6.0 The next issue involved in the present batch of appeals pertains to disallowance of deduction of Rs. 19,21,790/- being provision for commission on sales during AY 2004-05. During the course of proceedings, it was pointed out by the Ld. AR that there was no discussion on this issue in the AO's order and that only while computing the total income on page 12 of the AO's order, a disallowance of Rs. 19,21,790/- being provision for commission on sales was disallowed. The Ld. CIT (DR) did not object to this fact. Therefore, the Ld. AR prayed before us to have this issue remanded back to the file of the Assessing Officer. This was also not opposed by the Ld. DR.

6.1 In view of the above since there is no discussion by the AO on the issue at hand, we deem it fit and in the interest of justice to set aside the addition and remand the matter to the file of the AO for a fresh consideration in accordance with law and after giving adequate opportunity to the assessee.

7.0 The next issue involved in the present batch of appeals pertains to adjustment made to the book profits of the assessee under section 115JB to the tune of Rs. 6,68,82,609/-. During the course of proceedings, the Ld. AR submitted that as this

issue was purely academic in nature and did not impact the assessed income / tax liability of the assessee, the same was not being pressed. Accordingly, the same is dismissed *in limine*.

8.0 The last issue involved in the present batch of appeals raised by the revenue pertains to deletion of addition of Rs. 3,89,55,070/- in AY 2004-05 and Rs. 4,67,32,266/- being 10% of brand expenses made by the AO treating the same as being capital in nature.

8.1 The brief facts involved therein are that the assessee company had claimed brand expenses amounting to Rs. 38,95,50,709/- for AY 2004-05 and Rs. 46,73,42,660/- for AY 2005-06. These expenses comprised of expenditure on event management, business promotion, merchandising, printing of brochures/mailers, market research etc. to determine the consumer reaction to company's products. The AO vide order dated 28.12.2006 for AY 2004-05 and vide order dated 08.12.2008 for AY 2005-06 disallowed 10% of such expenditure as being capital in nature on the premise that the benefit of such expenditure is enduring in nature and available to the assessee over a period of time than being restricted to the relevant previous

year alone in which it was incurred, thereby leading to creation of a tangible asset being goodwill, reputation and credibility. However, the Ld. CIT (A) vide order dated 29.06.2009 for AY 2004-05 and vide order dated 28.02.2011 for AY 2005-06 deleted the said disallowance while relying upon his predecessor's order in earlier years and noting that expenditure on sales and marketing was required to refresh the memory of the consumer of the products manufactured by the assessee and hence there was no enduring benefit. The Revenue is aggrieved by this finding of the Ld. CIT (A).

8.2 During the course of proceedings, the Ld. AR. pointed out that the issue was squarely covered in favour of the assessee vide this Tribunal's order dated 14.03.2016 passed in Assessee's own case for the immediately preceding years, i.e., AY 2002-03 and 2003-04. It was further pointed out that the aforesaid issue had also been decided in favour of the assessee by Hon'ble High Court of Delhi vide order dated 6.04.2016 passed in ITA No. 224/2016 and 225/2016 in the case of assessee's sister concern, viz., M/s Seagram Distilleries Pvt Ltd.. The Ld. AR also cited Hindustan Aluminium Corporation Limited v. CIT: 159 ITR 673, CIT v.

Berger Paints (India) Ltd. (254 ITR 503), CIT v. Salora International (308 ITR 199) (Del.), CIT v. Casio India Ltd. (335 ITR 196) (Del) and CIT v. Adidas India Marketing Ltd. (195 Taxman 256) (Del.) to support his contentions.

8.3 The Ld. CIT (DR) supported the order of the Ld. TPO/AO.

8.4 We have heard the rival contentions and perused the orders of the jurisdictional High Court and that of the co-ordinate benches. We find force in the arguments of the Ld. Counsel that the issue is squarely covered in favour of the assessee as there is a clear finding that such expenditure does not result in any enduring benefit. Hence, these grounds of the revenue are dismissed and the order of the Ld. CIT (A) is confirmed.

9. In the final result, the appeals filed by the assessee are partly allowed and that of the revenue are dismissed.

Order pronounced in the open court on 2nd May, 2017.

Sd/-
(J.S. REDDY)
ACCOUNTANT MEMBER

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

DATED: 2nd May 2017
'GS'

I.T.A. 3811/D/09 & 3525/Del/09
I.T.A. 2770/D/11, 2530/D/11
Assessment year 2004-05, 05-06

Copy forwarded to:

- 1. Appellant**
- 2. Respondent**
- 3. CIT(A)**
- 4. CIT 5. DR**

ASSTT. REGISTRAR

ITAT NEW DELHI