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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.As. No. 1334/CHANDI/2010, 1203/ CHANDI /2011, 2511/DEL/2013, 1044/DEL/2014 & 4516/DEL/2016
ASSESSMENT YEARS: 2006-07 to 2010-11

M/s PepsiCo India Holdings Pvt Ltd, (erstwhile M/s Pepsi Foods Pvt. Ltd.), Level 3-6, Pioneer Square, Sector-62, Near Golf Course EXtension Road, Gurugram, Haryana - 122101	vs.	Additional Commissioner of Income TaX, Range 1, Chandigarh
TAN/PAN: AAACP 1272G		
(Appellant)		(Respondent)

I.T.As. No. 4517/DEL/2016, 4518/DEL/2016, 6537/DEL/2016, 6582/DEL/2017
ASSESSMENT YEARS: 2011-12 to 2013-14

M/s PepsiCo India Holdings Pvt Ltd, Level 3-6, Pioneer Square, Sector-62, Near Golf Course EXtension Road, Gurugram, Haryana - 122101	vs.	Assistant Commissioner of Income-taX, Central Circle – 7, New Delhi
TAN/PAN: AAACP 1272G		
(Appellant)		(Respondent)

Appellant(s) by:	Mr. Deepak Chopra, Adv. Ms. Rashi Khanna, Adv. Mr. Anmol Anand, Adv.		
Respondent by:	Mr. H.K. Chaudhary, CIT-DR		
Date of hearing:	20	08	2018
Date of pronouncement:	19	11	2018

O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid appeals have been filed by the Assessee Company and Pepsi Foods Pvt. Ltd. (PFL), now merged with the PepsiCo India Holdings Pvt. Ltd. (PIH), (hereinafter collectively referred to as the assessee) against separate impugned orders for the Assessment Years 2006-07 to 2013-14. Since the issues involved in all the appeals are by and large common arising out of identical set of facts, therefore, they were heard together and are being disposed of by way of this consolidated order. For sake of read reference, the main issues raised in all the years by the assessee are reproduced hereunder: -

A. I.T.As. No. 1203/CHANDI/2011 & 2511/DEL/2013: (AY 2007-08), In this appeal the assessee company (PFL) has raised the following issues in its grounds of appeal:

(i) Grounds No. 1 to 3 are general in nature.

(ii) In Grounds No. 4 to 4.10, the assessee has challenged the AMP adjustment computed by the TPO using BLT. The facts pertaining to this issue are identical to facts in ITA 1334/CHANDI/2010 for AY 2006-07 (discussed above).

(iii) In Grounds No. 5 to 5.5, the assessee has challenged the addition made by the AO on account of Price Support given to Bottlers amount to INR 6,00,52,116/-. This issue, the assessee has submitted, is squarely covered in favour of the assessee by the decision of the coordinate bench dated 05.10.2016 passed in ITA 1334/CHANDI/2010 as affirmed by the Hon'ble High

Court of Delhi vide order dated 13.11.2017 passed in ITA No. 474/2017.

(iv) In Ground No. 6, the assessee has challenged the addition on account of un-utilized MODVAT credit. The assessee has not pressed this ground and therefore the same is not adjudicated.

(v) Grounds No. 7 to 7.1 pertain to initiation of penalty proceedings under section 271(1)(c) of the Act and is consequential in nature.

B. In I.T.A. No. 2511/DEL/2013 pertaining to AY 2008-09, the assessee company has raised the following issues in its grounds of appeal:

(i) Grounds No. 1 to 5 are general in nature.

(ii) In Grounds No. 5 to 5.30, the assessee has challenged the AMP adjustment computed by the TPO using BLT. The facts pertaining to this issue are identical to facts in ITA 1334/CHANDI/2010 for AY 2006-07.

(iii) In Grounds No. 6 to 6.4, the assessee has challenged the addition made by the AO on account of Price Support given to Bottlers amount to INR 14,23,72,674/-. This issue, the assessee has submitted, is squarely covered in favour of the assessee by the decision of the coordinate bench dated 05.10.2016 passed in ITA 1334/CHANDI/2010 as affirmed by the Hon'ble High Court of Delhi vide order dated 13.11.2017 passed in ITA No. 474/2017.

(iv) In Ground No. 7, the assessee has challenged the addition on account of un-utilized CENVAT credit under

section 145A of the Act. The assessee has not pressed this ground and therefore the same is not adjudicated.

(v) In Ground No. 8, the assessee has challenged the adjustment made to book profit amounting to INR 70,30,540 (provisions for bad and doubtful debts) under section 115JB of the Act. The assessee has not pressed this ground as the same is academic in nature and therefore the same is not adjudicated.

(vi) Grounds No. 9 to 9.1 pertain to initiation of penalty proceedings under section 271(1)(c) of the Act and is consequential in nature.

C. I.T.A. No. 1044/DEL/2014 pertaining to AY 2009-10, the assessee company has raised the following issues in its grounds of appeal:

(i) Grounds No. 1 to 3 are general in nature.

(ii) In Grounds No. 4 to 6.22, the assessee has challenged the AMP adjustment computed by the TPO using BLT.

(iii) In Grounds No. 7 to 7.3, the assessee has challenged the disallowance of INR 3,85,15,497/- being sponsorship fees paid by the assessee to ICC.

(iv) In Grounds No. 8 to 8.5, the assessee has challenged the addition made by the AO on account of Price Support given to Bottlers amount to INR 10,49,82,000/-. This issue, the assessee has submitted, is squarely covered in favour of the assessee by the decision of the coordinate bench dated 05.10.2016 passed in ITA 1334/CHANDI/2010 as affirmed by the Hon'ble High Court of Delhi vide order dated 13.11.2017 passed in ITA No. 474/2017.

D. I.T.A. No. 4516/DEL/2016 pertaining to AY 2010-11, the assessee company has raised the following issues in its grounds of appeal:

(i) Grounds No. 1 to 2 are general in nature.

(ii) In Grounds No. 3 to 26, the assessee has challenged the AMP adjustment computed by the TPO vide order dated 30.06.2015 and incorporated in the final assessment order dated 28.07.2016 passed by the AO.

(iii) In Ground No. 27, the assessee has challenged the wrongful levy of interest under section 234A of the Act computed by the AO.

(iv) In Grounds No. 28 and 29, the assessee has challenged the levy of interest under section 234B and 234D of the Act computed by the AO and are consequential in nature.

(v) Ground No. 30 pertains to initiation of penalty proceedings under section 271(1)(c) of the Act and is consequential in nature.

E. I.T.A. No. 4517/DEL/2016 pertaining to AY 2010-11, the assessee company (PepsiCo India Holdings Pvt. Ltd.) has raised the following issues in its grounds of appeal:

(i) Grounds No. 1 to 2 are general in nature.

(ii) In Grounds No. 3 to 26, the assessee has challenged the AMP adjustment computed by the TPO vide order dated 30.06.2015 and incorporated in the final assessment order dated 28.07.2016 passed by the AO.

(iii) In Grounds No. 27 to 31, the assessee has challenged the disallowance of INR 1,18,82,315/- computed by the AO as per the provisions of section 14A of the Act.

(iv) Ground No. 32 pertains to initiation of penalty proceedings under section 271(1)(c) of the Act and is consequential in nature.

F. I.T.A. No. 4518/DEL/2016 pertaining to AY 2011-12, the assessee company has raised the following issues in its grounds of appeal:

(i) Grounds No. 1 to 2 are general in nature.

(ii) In Grounds No. 3 to 26, the assessee has challenged the AMP adjustment computed by the TPO vide order dated 30.06.2015 and incorporated in the final assessment order dated 28.07.2016 passed by the AO.

(iii) In Grounds No. 27 to 31, the assessee has challenged the disallowance of INR 69,84,350/- computed by the AO as per the provisions of section 14A of the Act.

(iv) In Grounds No. 32 to 33, the assessee has challenged the wrongful levy of interest under section 234A/ 234B of the Act.

(v) In Ground No. 34, the assessee has challenged the surcharged levied at a higher rate of 10% instead of 7.5%. However, the assessee has submitted that the AO vide rectification order dated 19.01.2017, has rectified the said error and hence the said issue has not been pressed. Therefore, the same is not adjudicated.

(vi) In Ground No. 35, the assessee has challenged the credit of tax deduction at source (TDS), advance tax and self-

assessment tax amounting to INR 84,90,70,726/- not given by the AO.

(vii) Ground No. 36 pertains to initiation of penalty proceedings under section 271(1)(c) of the Act and is consequential in nature.

G. I.T.A. No. 6537/DEL/2016 pertaining to AY 2012-13, the assessee company has raised the following issues in its grounds of appeal:

(i) Grounds No. 1 to 3 are general in nature.

(ii) In Grounds No. 4 to 6, the assessee has challenged the final assessment order dated 22.11.2016 passed by the AO on the ground of limitation. However, the same has not been pressed by the assessee and therefore the same is not adjudicated.

(iii) In Grounds No. 7 to 32, the assessee has challenged the AMP adjustment computed by the TPO vide order dated 29.01.2016 and incorporated in the final assessment order dated 22.11.2016 passed by the AO.

(iv) In Grounds No. 33 to 36, the assessee has challenged the disallowance of INR 24,36,362/- computed by the AO as per the provisions of section 14A of the Act.

(v) In Grounds No. 37 to 39, the assessee has challenged the addition of INR 2,95,10,993/- on account of Industrial Promotion Assistance (IPA) Subsidy received by the assessee under the West Bengal Incentive Scheme, 2004.

(vi) In Ground No. 40, the assessee has challenged the levy of interest under section 234B of the Act and as such is consequential in nature.

(vii) Ground No. 41 pertains to initiation of penalty proceedings under section 271(1)(c) of the Act and is consequential in nature.

(viii) Ground No. 42 is an additional ground raised by the assessee and is directed against the withdrawal of the benefit of brought forward losses and unabsorbed depreciation vide rectification order dated 08.12.2017 passed by the AO, earlier granted to the assessee vide final assessment order dated 22.11.2016.

H. I.T.A. No. 6582/DEL/2017 pertaining to AY 2013-14, the assessee company has raised the following issues in its grounds of appeal:

(i) Grounds No. 1 to 2 are general in nature.

(ii) In Grounds No. 3 to 28, the assessee has challenged the AMP adjustment computed by the TPO vide order dated 26.10.2016 and incorporated in the final assessment order dated 27.09.2017 passed by the AO.

(iii) In Grounds No. 29 to 34, the assessee challenged the transfer pricing adjustment amounting to INR 49,71,908/- on account of provision of information technology (IT) support services segment computed by the TPO. However, the assessee has submitted that the same has been rendered academic since the entire amount of adjustment has been deleted in the final assessment order after the grant of working capital adjustment as directed by the Dispute Resolution Panel vide order dated 21.08.2017. Therefore, the same is not adjudicated.

(iv) In Grounds No. 35 to 41, the assessee challenged the transfer pricing adjustment amounting to INR 10,42,067/- on account of receivables computed by the TPO and incorporated in the final assessment order by the AO.

(v) In Grounds No. 42 to 44, the assessee has challenged the addition of INR 3,93,52,756/- on account of IPA Subsidy received by the assessee under the West Bengal Incentive Scheme, 2004.

(vi) In Ground No. 45, the assessee has challenged the erroneous computation of brought forward losses and unabsorbed depreciation by the in the final assessment order.

(vii) In Ground No. 46, the assessee has challenged the levy of interest under section 234B of the Act and as such is consequential in nature.

(viii) Ground No. 47 pertains to initiation of penalty proceedings under section 271(1)(c) of the Act and is consequential in nature.

2. One of the key issue permeating in all the years relates to Transfer Pricing adjustment of 'advertisement, marketing and promotion expenses' (hereinafter referred to as 'AMP expenses'), which though has been made on different reasons and by applying different methods, like BLT, PSM or Other Method by the TPO/Assessing Officer in various years to justify the AMP adjustments. Before proceeding to decide the issues as challenged in various appeals before us, it would be very relevant to capture the brief background and facts of the case.

Brief facts and background:

3. Pepsi Foods Pvt. Ltd. (PFL) was incorporated in India on 24.02.1989 as a Private Limited Company jointly promoted by PepsiCo Inc. USA, Punjab Agro Industries Corporation and Voltas Limited. Thereafter, in 1993, PepsiCo Inc. bought over the shareholding of Voltas in PFL. In that manner, PepsiCo Inc. held 99.98% of PFL. With effect from April 01, 2010, PFL was merged with PepsiCo India Holdings Pvt. Ltd., the assessee company, which in turn was also set up in India as subsidiary of PepsiCo Inc. The assessee has been *inter alia* involved in the manufacturing of soft drink/juice based concentrates and other agro products and has been supplying concentrates for aerated and non- aerated soft drinks to its deemed associated enterprises (AEs) in Bangladesh, Nepal, Bhutan and Sri Lanka, in addition to its local sales in India to its franchisee bottlers. By way of Trademark and Licence Agreement dated 09.11.1989, the assessee had procured a license from PepsiCo Inc. U.S.A. for the technology to manufacture the concentrates and to use and exploit the brands owned by PepsiCo Inc. U.S.A. As per the terms of the said agreement, the license to use the trademark was non-transferable and royalty free. Furthermore, it has been agreed in the said agreement that the assessee was granted an exclusive right to use the trademark in respect of syrups and concentrates and a non-exclusive right vis-à-vis beverages. It was explained during the course of the hearing by Sri Deepak Chopra, learned counsel for the assessee that the manufacture of concentrate was exclusively carried out by the assessee, whereas with respect to beverages certain independent bottlers were involved for the bottling function and hence the license to use the trademark in respect of beverages was non-exclusive with

the assessee. The assessee in terms of the aforesaid agreement has been importing keys and essences for the production of concentrate from AEs. The said import transaction has been duly reported by the assessee in Form 3CEB Report, which has been stated before us that no adverse inference was drawn by the TPO in the earlier years. As per clause 11 of the aforesaid agreement, assessee was required to employ its best efforts to promote the goodwill associated with the Trademarks and the sale of goods. As per clause 12 of the aforesaid agreement, PepsiCo Inc. was responsible for the protection of its Trademarks in India and assessee was obligated to fully co-operate with PepsiCo Inc. on that. As per clause 8 of the aforesaid agreement, assessee was to use the Trademarks of PepsiCo Inc. in connection with sale of goods in India and in the manner as may be directed or approved by PepsiCo Inc. or its representative. Furthermore, as per the said clause, the assessee was to use the Trademarks of PepsiCo Inc. on the labels, containers, packaging, pamphlets and advertisements in connection with sale of goods in India as may have been approved or directed by PepsiCo Inc. In the aforesaid agreement, the assessee was granted non transferrable, royalty free license for the use of trademark in its territory and the assessee was exclusive user of the trademarks in India in respect of syrup and concentrate and was granted non-exclusive rights for beverages and the reason assigned was that the manufacturing of the concentrate is done exclusively by the assessee, whereas the bottling activity was done by the group entities as well as by the independent bottlers spread across the country. It has been stated as a matter of record that the assessee did not pay any trademark royalty to its parent AE which has been certified by the AE before the TPO also. All the necessary functions of strategizing, advertisement and market activities, its implementation and

controlling across the country were performed by the assessee for market penetration in India.

4. In all the years impugned before us, the TPO has made AMP adjustments, by treating the AMP expenses as international transaction and then after applying various methods, like, BLT in the A.Y.s 2006-07 to 2009-10; PSM in the A.Y.s 2010-11 to 2012-13; and the 'Other Method' in A.Y 2013-14 and on different reasons. The amount of adjustments made and the method applied for making the adjustments in the various years are as under:

AMOUNT IN RS.

A.Y.	ADJUSTMENT AS COMPUTED BY TPO	METHOD APPLIED BY TPO	ADJUSTMENT AS COMPUTED BY DRP	METHOD APPLIED BY DRP
2006-07	174,39,58,880/-	BLT	174,39,58,880/-	BLT
2007-08	215,09,88,807/-	BLT	215,09,88,807/-	BLT
2008-09	255,12,79,469/-	BLT	255,12,79,469/-	BLT
2009-10	316,66,11,827/-	BLT	316,66,11,827/-	BLT
2010-11	290,20,73,215/-	PSM	290,20,73,215/-	PSM
2010-11	134,46,25,674/-	PSM	134,46,25,674/-	PSM
2011-12	561,32,18,691/-	PSM	561,32,18,691/-	PSM
2012-13	601,59,21,918/-	PSM	601,59,21,918/-	PSM

2013-14	578,21,11,120/-	PSM	334,06,17,000/-	BLT/ OTHER METHOD

Thus, in these appeals, the issue of Transfer Pricing Adjustment on account of AMP can be segregated into three separate categories on the basis of methodology applied by the TPO for computing the AMP adjustment: -

a) Appeals for A.Y. 2006-07 to 2009-10 wherein the Ld. TPO has computed the adjustment by applying Bright line ("BLT");

b) Appeals for A.Y. 2010-11 to 2012-13, wherein the Ld. TPO has computed the adjustment by applying Profit Split Method ("PSM"); and

c) Appeals for A.Y. 2013-14, wherein the Ld. TPO had computed the adjustment by applying PSM, however, the Hon'ble DRP rejected PSM and instead applied BLT under the garb of "Other Method".

5. We will first take up the appeal for the Assessment Year 2006-07 and our observations and finding given herein will apply *mutatis mutandis* in all the years, except for the applicability of different methods applied by the TPO for making the adjustments. This appeal has been remanded back by the Hon'ble High Court vide judgment and order dated 08.02.2017 in ITA No.100 of 2017 to this Tribunal for deciding the Transfer Pricing issue relating to AMP expenses in the light of prevailing jurisprudence.

6. As stated above, the assessee company was engaged in the business of manufacturing of soft drink/ juice based concentrates, processing of potato and grain food products and other agro based food products. The TPO observed that the assessee company had carried out analysis for the import of commodities using the Transactional Net Margin Method (TNMM); export of concentrates using the TNMM method; export of rosemary using the Comparable Uncontrolled Price (CUP) method; and availing of services using TNMM method. TPO instead of analysing any of the said international transactions, proceeded to analyze the determination of arm's length price of reimbursement of advertisement expenditure. During this year, the assessee company had also disclosed an international transaction of reimbursement of expenditure of Rs. 33,60,15,501/- to M/s Pepsi Cola International Ireland, its AE. The said reimbursement was on account of advertisement expenditure incurred by the AE which was claimed to be reimbursed by the assessee on cost. Thereafter, the TPO proceeded to examine the total advertisement expenditure incurred by the assessee company during the year. For that the TPO referred to the financials of the assessee company and observed that the assessee company had incurred selling and distribution expenses of Rs. 46,38,000/- and advertising & marketing expenses of Rs. 202,34,16,000/- on sales turnover of Rs. 303,19,65,000/-. Having observed so, the TPO concluded that the assessee company had created marketing intangible by incurring expenditure of Rs. 202,80,54,000/- on advertisement, marketing and promotion of the AE brand and products, without receiving any compensation for the same. He was of the view that the assessee company had incurred huge AMP expenditure to promote a trademark owned by its AE and develop marketing intangibles for the product of the AE. He further

observed that the AEs of the assessee company had received benefit in form of enhanced brand value in India. Further, referring to provisions of section 92B (1) that arrangement between two AEs for allocation or apportionment of or any contribution to any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises was an international transaction. He held that here in this case the assessee company had incurred the cost in connection with a benefit and services provided to the AE under a mutual agreement which was, although, not in writing, but such arrangements could be proved from the conduct of the assessee company and accordingly, the AMP expenditure of INR 202,80,54,000/- was an international transaction under section 92B(1) read with 92F(v).

7. Thereafter, the TPO held that the AMP expenditure incurred by the assessee company was 66.89% of the total revenue of the assessee company for the year under consideration and the same was in the nature of intra-group-service provided to the AE, which requires compensation on an arm's length basis. In order to arrive at the arm's length price of such transaction, the TPO applied the bright line test (BLT). After applying BLT, he arrived at an adjustment of Rs. 174,39,58,880/- in the hands of the assessee company.

8. The Assessing Officer (AO) incorporated the said transfer pricing adjustment in his draft assessment order. On objections raised by the assessee company against the said draft assessment order, the DRP confirmed the transfer pricing adjustment of Rs.

174,39,58,880/- as computed by the TPO. The same thereafter, culminated into a final assessment order dated 28.10.2010.

9. In the first round the Tribunal vide order dated 05.10.2016 remanded the issue of Transfer Pricing adjustment pertaining to AMP expenses back to the file of the TPO holding that the TPO did not had the benefit of judicial view which are now available for consideration wherein in some of the cases the transaction of AMP has been held to be international transaction and others not. Accordingly, the matter was restored back to the file of the TPO to decide, whether there exist any international transaction of AMP expenses and if there is no such international transaction is proved then there would be no TP adjustment. This decision of the Tribunal was challenged before the Hon'ble High Court (ITA 100/2017), wherein the matter has been remanded back to this Tribunal vide judgement dated 08.02.2017 in the following manner:

The question of law which was under consideration before their Lordships was as under:

> *"Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal (ITAT) fell into error in remitting the matter for examination by the Transfer Pricing Officer (TPO) for AY 2006-07 in respect of the AMP expenses?"*

The relevant observations and findings by their Lordships were as under: -

> *"The assessee had filed its Transfer Pricing Report; the Assessing Officer (AO) referred it to the TPO, who made adjustments based upon the prevailing understanding as to the applicability of the Bright Line Test, holding that the AMP expenses were subject to*

adjustment. The Dispute Resolution Panel (DRP) affirmed this view.

In the meanwhile, the Special Bench had in LG Electronics v. ACIT (2013) 22 ITR 1 (SB) enunciated and affirmed the Bright Line Test rule. That view was subsequently overruled by this Court in Sony Ericsson Mobile Communications India Pvt. Ltd. v. CIT (2015) 374 ITR 118. The ITAT in this case has remitted the entire matter for reconsideration to the TPO.

This Court has heard learned counsel for the parties. In Le Passage to India Tour & Travels (P) Ltd. v. DCIT [ITA 368/2016 & connected matter, decided on 12.01.2017], this Court stated as follows:

> *"4. This Court is of the view that whilst L.G. Electronics India Pvt. Ltd. (supra) indicated that AMPs were or did constitute the basis for an inquiry into the international transaction and indicated a "bright line" test for it, Sony Ericsson Mobile Communications India Pvt. Ltd.(supra) overruled that decision. This per se does not mean that every endeavour will be to conclude that all transactions reporting AMPs are to be treated as international transactions, the facts of each case would have to be examined for some deliberations. Whilst the TPO and the DRP undoubtedly held that the international transactions existed - that understanding apparently was passed upon the pre-existing regime, propounded in L.G. Electronics India Pvt. Ltd. (supra) with greater clarity on account of this Court's decision in Sony Ericsson Mobile Communications India Pvt. Ltd.(supra). The I.T.A.T. in our opinion, should have first decided whether in the circumstances of this case, the nature of the AMP reported, could lead to the conclusion that there was an*

international transaction. When doing so, it should have remitted the matter back for examination to the A.O. in this case. Accordingly, following the decision of Sony Ericsson Mobile Communications India Pvt. Ltd.(supra) and a subsequent decision in Daikin Air-conditioning India Pvt. Limited v. Assistant Commissioner of Income Tax in ITA 269/2016, decided on 27.07.2016, this Court hereby remits the matter for a comprehensive decision by the I.T.A.T. In other words, the I.T.A.T. will decide whether the reporting of the AMP in regard to the outbound business constitutes an international transaction for which ALP determination was necessary and if so, the effect thereof. The parties are directed to appear before the I.T.A.T. on 01.02.2017. The appeal is partly allowed in the above terms."

In view of the above order, and given that only controversy involved in the present case is with respect to AMP expenses, we are of the opinion that the ITAT itself should consider the matter as to the applicability or otherwise of the rule enunciated in Sony Ericsson (supra) and render its decision on merits after applying the correct test as to whether the expenses in the present case should be subjected to adjustments. The parties shall be present before the ITAT for this purpose on 24.04.2017."

10. Now in wake of aforesaid directions the matter of AMP adjustment is to be adjudicated by this Tribunal.

Contention raised by the Ld. Counsel of the Assessee on the AMP issue in all the years:

11. Before us, learned counsel for the assessee, Mr. Deepak Chopra, first of all referred to Transfer Pricing study report and catena of other documents in support of his argument that

incurring of AMP expenses by the assessee company did not fall within the ambit and definition of "international transaction" within the meaning of Section 92B. The assessee company manufacturer of soft drink/ juice based concentrates and other agro products and was exposed to normal risks associated with carrying on such business. He submitted that the assessee company did not own any significant intangibles and neither does it undertake research and development on its account that could lead to the development of non-routine intangibles. The assessee company had obtained a license from its US parent AE, viz. M/s PepsiCo Inc., USA for the technology to manufacture the concentrates and to use and exploit the brands owned by PepsiCo Inc., in the regions allocated to the assessee company. Under the aforesaid agreement, the assessee company had been granted a non-transferable, royalty free license for the use of the trademarks in its territory. The assessee company has been the exclusive user of the trademarks in India in respect of syrups and concentrates but has been granted non-exclusive rights for beverages. It was explained that the reason for the same was that the manufacture of concentrate was done exclusively by the assessee company whereas the bottling activity was done by group entities as well as independent bottlers spread across the country. A letter dated 11.06.2015 issued by PepsiCo Inc. addressed to JCIT, Transfer Pricing Officer – 3(3), New Delhi, was also placed on record acknowledging therein that the assessee company had not paid any trademark royalty to it over the years. He further submitted that all the necessary functions of strategizing, advertising and marketing activities, their implementation and controlling across India were to be performed by the assessee for market penetration in India, whereas PepsiCo Inc. was to play the limited role of keeping a quality check on the standards conceptualized by the assessee in

line with its global advertising policy. In support he also placed on record a letter dated 11.06.2015 issued by PepsiCo Inc. and addressed to the TPO, acknowledging therein the economic ownership of the assessee in India with respect to the brands, legally owned by it; and no dividend was paid by the assessee company to PepsiCo Inc. during the Assessment Years 2006-07 to 2013-14.

12. Mr. Chopra further placed on record a chart comparing the value of import with the turnover of the assessee company over the years, to demonstrate that the import of the keys and essences from the AEs was miniscule as compared to the sales/ turnover of the assessee company. By placing the aforesaid letters and charts, he tried to demonstrate that no benefit whatsoever was being derived by the US parent entity i.e. PepsiCo Inc. from India and in fact he submitted that PepsiCo Inc. was paying taxes in its home jurisdiction on the imputed royalty that it ought to have received from the assessee company for the grant of trademark license. This fact is also borne out of the letter dated 11.06.2015 issued by PepsiCo Inc. addressed to JCIT, Transfer Pricing Officer – 3(3), New Delhi, which has been placed on record. He submitted that the TPO has inferred that there existed an international transaction on the incurring of AMP expenses mainly for the reason that there was an international transaction of expenses reimbursed by the assessee to its AE, which were incurred by the AE on behalf of the assessee company in connection with the sponsorship of ICC events; and on the ground of excessiveness of the AMP expenditure. Ld. Counsel tried to clarify that the reimbursement of expenses by the assessee company to its AE was for purely commercial reasons and was not at the behest of the AE. The assessee company is in the industry

where it faces stiff competition and the products sold by the assessee company do not fall in the category of daily need products and therefore, the assessee company is required to market its products aggressively, in order to boost / promote its sales.

13. The learned counsel further submitted that, India being a cricket loving nation, Assessee Company strategically promotes its products by advertising at cricketing events. Keeping the aforesaid in view, one of Pepsi's AE, namely, PCIC, Ireland, on behalf of all group entities located in cricketing nations, entered into a Global Partnership Agreement dated 28.10.2004 with Global Cricket Corporation PTE Limited (GCC) for obtaining sponsorship rights of various ICC cricketing events worldwide. The said agreement was placed on record and pointed out that PCIC, Ireland, had entered into the aforesaid agreement with GCC only with the consent of the group companies from whom reimbursement was sought. Thereafter, PCIC had entered into an agreement dated 9.09.2005 with the assessee company, wherein the assessee company admitted *"that it recognizes the substantial popularity of the sport in India and has consistently promoted its range of products using the Cricket platform either through promotion of the events itself be they domestic or international or through endorsements of cricketing personalities*". In view of these facts, the assessee company for promoting its own business, decided to reimburse a portion of the total sponsorship fees paid to GCC. The payment under the said agreement dated 9.09.2005 was made by the assessee company on the basis of joint decision taken by all Pepsi entities located in cricketing jurisdictions as these entities were promoting its products using the cricket platform and therefore, the allegation of the TPO that reimbursement of expenses was enforced upon the assessee

company by PCIC was completely misplaced. He submitted that 60% of the total cricketing viewership is in the Indian sub-continent, i.e., India, Sri Lanka, Bangladesh and Pakistan and therefore, such a huge viewership was only to benefit the assessee in its business promotion and sales. Since the assessee company has been supplying concentrate, not only to the bottlers in India but also to the ones located in Sri Lanka, Bangladesh and Bhutan and therefore, in order to promote its sales in neighboring countries, it has been undertaking AMP activities in those jurisdictions also. In view of the aforesaid, proportionate reimbursement, i.e., on cost to cost basis was made by the assessee company to its AE. The said amount was disbursed only after obtaining requisite approvals from the Ministry of Sports & Youth Affairs. The approval letters issued by the Ministry of Sports & Youth Affairs to corroborate the said averment was also placed on record. The assessee solely and independently took decision regarding the AMP activities undertaken by it in the Indian sub-continent and no directives were received by it, in this regard, from its AE. To justify this averment, the learned counsel placed on record a Global Partnership Agreement dated 20.08.2008 entered into between the Assessee Company and ICC Development International Limited. All these contentions placed by the Ld. Counsel were to counter the view of the TPO and DRP that AMP activities of the assessee company were controlled by its AE.

14. Thereafter, Mr. Chopra submitted that the action of the TPO in treating incurrence of AMP expenses as a separate international transaction requiring separate benchmarking under section 92B of the Act, was not in accordance with the settled legal position in law and therefore, deserved to be quashed. It was submitted by him that

the AMP expenditure incurred did not result in a separate international transaction as per Section 92B read with Section 92F (v) of the Act, which together define an 'international transaction'. He stressed on the point that these do not apply in the absence of any arrangement/ understanding/action in concert between the two AEs. In the present case he submitted that, AMP expenses incurred by the assessee company would rather fall under the category of domestic transaction as it was undertaken with the third parties which are not covered under the definition of international transaction within the purview of Section 92 of the Act. Any kind of analysis of such domestic transactions undertaken with the third parties was also beyond the purview of Section 92CA of the Act. Further, these transactions purely represented the expenses incurred by the assessee company for the purpose of its own business and had no bearing whatsoever on any international transactions that the assessee company had with its AEs. Thereafter, he drew our attention towards Section 92 of the Act that provides for computation of 'income' arising from an 'international transaction' having regard to the arm's length price and "International transaction" has been defined in section 92B of the Act, as transaction between two or more 'associated enterprises', either of whom is a non-resident; and also to clause (v) of section 92F of the Act He submitted that Section 92F only provided "definitions" of certain terms relevant to computation of arm's length price and had to be read in conjunction with Section 92B of the Act. The said section could not be considered/ read in isolation to cover any and every transaction that a company enters into with any unrelated party that too domestically. He submitted that from the conjoint reading of the provisions of clause (v) of section 92F and sub-section (1) of section 92B of the Act, it could be inferred that

Transfer Pricing regulations would be applicable to any 'transaction', being an arrangement, understanding or action in concert, *inter alia*, in the nature of purchase, sale or lease of tangible or intangible property or any other transaction having bearing on profits, income, losses or assets of such enterprises.

15. In view thereof, it was submitted that in order to be characterized as an 'international transaction', it would have to be demonstrated that the transaction arose in pursuant to an arrangement, understanding or action in concert. A 'transaction', *per se* involves a bilateral arrangement or contract between the parties. Unilateral action by one of the parties, without any binding obligation, in absence of a mutual understanding or contract, could not be termed as a 'transaction'. A unilateral action, therefore, could not be characterized as an 'international transaction' invoking the provisions of Section 92 of the Act.

16. Thereafter, the learned counsel submitted that the assessee company had incurred expenditure on AMP to cater to the needs of the customers in the local market. Such AMP expenditure was neither incurred at the instance/ behest of overseas AEs, nor was there any mutual agreement or understanding or arrangement as to allocation or contribution by the AE towards reimbursement of any part of AMP expenditure incurred by the assessee company for the purpose of its business. In absence of any understanding, arrangement, etc., it was submitted that no 'transaction' or 'international transaction' could be said to be involved with respect to such AMP expenditure incurred by the domestic enterprise, which may be covered within the provisions of Transfer Pricing regulations. Further it was reiterated that payment for

advertisement, marketing and sales promotion was made by the assessee company (which is a tax resident of India) to other Indian third parties. The reimbursement made by the assessee to its AE in lieu of sponsorship fees paid to ICC was wholly and exclusively for assessee company's business and was not at the behest of the AE. He submitted that the twin requirements of section 92B did not exist in the present case, i.e., the transaction involved was between Indian parties and no foreign party was involved and the transaction of AMP expenses did not take place between two AEs.

17. Mr. Chopra further invited our attention towards the decisions of the Hon'ble High Court of Delhi in this regard and submitted that the Hon'ble High Court had held that the onus was upon the Revenue to demonstrate that there existed an arrangement between the assessee and its AE under which assessee was obliged to incur excess of amount of AMP expenses to promote the brands owned by AE. The TPO had heavily relied upon clause 8 in the Trademark License agreement, which empowered PepsiCo. Inc to approve and review the advertisement proposed to be telecasted in India but he failed to appreciate that it was only the advertisement content and not the quantum of the AMP expenditure, which was sent to the AE for alignment. He submitted that the alignment from parent was only to ensure that the applicable "Brand guardrails" are being followed by AE's across the world and it is not at all directed to control the marketing functions in various Geographies. He submitted that it must be appreciated that marketing for impulse products like beverages had to be managed locally as per the ethos; culture and aspirations of the local population and it could not be remotely managed. He stressed on the point that the assessee company had a full-blown marketing team in India who with the

help of local marketing agencies and consultants managed the marketing function across the country.

18. Mr. Chopra further placed heavy reliance on the decision of the Hon'ble High Court of Delhi in **Maruti Suzuki India Pvt. Ltd. v. CIT [2016] 381 ITR 117 (Delhi)**, to buttress the averment that the onus was cast upon the Revenue to prove the existence of international transaction vis-à-vis incurrence of AMP expenses, which was not discharged by the TPO in the present case. He also placed reliance on few other decisions of the Hon'ble High Court of Delhi that have upheld the same proposition: **Whirlpool of India Ltd vs. DCIT [2016] 381 ITR 154; Bausch & Lomb Eyecare (India) Pvt Ltd vs. ACIT [2016] 381 ITR 227; Honda Siel Power Products Ltd vs. DCIT [2016] 283 CTR 322**. Thereafter, the he brought our attention towards a decision of coordinate bench of this Tribunal passed in the case of **Goodyear India Ltd vs. DCIT [ITA No. 5650/Del/2011]**. He submitted that the Revenue in this case as well had relied upon the clause in the Trademark and License Agreement, under which the assessee was required to submit its advertisements for review and approval to its AE, to allege that this goes to show that AE was actively controlling and supervising the AMP expense of the assessee and hence, there existed an international transaction. He strongly pressed the point that the mere review of the advertising material by the AE did not indicate existence of any international transaction in terms of the aforesaid decision. There is no obligation on the assessee company to incur AMP expenses to promote the brand of the AE and no such obligation has been brought out by the TPO on the facts of the present case and therefore there arose no question of existence of

any transaction let alone an international transaction on the facts of the present case.

19. The learned counsel for the assessee, thereafter, referred to clause 13 of the agreement dated 09.11.1989 to contend that the risk and rewards of incurring the AMP expenditure lied with the assessee company only as the foreign AE was completely insulated from such risks and rewards arising from the manufacturing activity carried on by the assessee company in India. He submitted that the assessee company has been operating as a licensed manufacturer of concentrates in India, which have been used in the manufacturing of soft drinks. For this purpose, the assessee company had obtained the license from its US parent AE for the technology to manufacture concentrates and to exploit the brands owned by the US parent AE. It was submitted that the assessee company has been maintaining advertising and marketing team of its own which has been strategizing for the marketing and promotion of its products. As a part of the license agreement for the use of trademarks own by the US AE, the assessee company is entitled to promote its products in India using the trademark. The assessee company has been performing the function of procurement of raw material, manufacturing of concentrates, development of advertising and marketing strategy, determination of the advertisement and marketing budget, deciding the concept and content of advertising, deciding the choice of media where advertising needs to be released, dealing with advertisement and marketing agencies, pricing of concentrates and sale of concentrates to retailers and distributors. Hence, it was submitted that the assessee company is solely entitled to enjoy the return associated with the commercial exploitation of the brand. And therefore, it was

logical that the expenses on account of AMP should have been borne by the assessee company and not by its parent AE. He further submitted that the argument of the TPO in respect to existence of a direct benefit being passed to the Parent AE was erroneous since the assessee company had not paid any royalty to its US parent AE for the usage of brands and technology and had paid a minuscule amount for the import of keys and essences.

20. As regards, the allegation of the TPO that the assessee did not have exclusive right to manufacture the beverage in India and hence it could not be said that AMP expenses incurred by it was solely for its benefit, Mr. Chopra submitted that the assessee had the exclusive right to manufacture concentrates in India and only bottling of the beverage was allocated to third parties. This was because, bottling of beverages was a separate function and for strategic reasons this had to be given to third party bottlers for part of the country keeping in mind operating efficiency of operations.

21. As regards, the allegation of TPO that certain brands such as Kurkure (1999), Aliva and Nimbooz were conceptualized and developed in India but the trademark in respect of these brands was owned the foreign AE, it was submitted by him that the sales of these brands were largely limited to India and since, it were not widely sold outside India, no benefit could have been said to have accrued to the AE on account of promotion of these brands. Further, it was submitted that in cases where such brands were sold outside India, it used different flavours and spices suitable for local consumption on which the advertising and marketing was carried by the local entity present in those jurisdictions. It was because of the fact that, the AE had not charged the assessee any

royalty for use of its trademarks in India; hence it was unfair on part of the TPO to allege that the assessee should have been compensated for brands conceptualized and developed by it. The allegation of the TPO that the assessee company merely duplicated the advertisements of PepsiCo Inc., USA is also not correct since there were various advertisements which had been independently conceptualized by the assessee company in India. Thereafter, he pressed on the point that it was an admitted position that the US parent AE was the legal owner of the brand/trademarks/ intellectual property which had been licensed to the assessee for the use in Indian market. However, the assessee happened to be the economic owner of the brand in India and therefore, was entitled to all the economic benefits arising out of the intangible property. It was submitted that the assessee bore all the risks associated with the AMP spending, as it was the assessee who was earning the ultimate benefit from those expenses in the form of increase in sales. Since no residual profits were flowing out of India to the AE, there was no way income of the AE was increasing from where it could fund the reimbursement of advertising and marketing expense to the assessee in India. Furthermore, he submitted that there was no tangible evidence to show that PepsiCo Inc. had actually been benefited on account of the AMP expenditure incurred by the assessee; rather it suffered an adjustment on account of royalty not charged from India. In view thereof, it was submitted that in case any benefit of enhancement, maintenance, development of marketing intangibles was accruing to the AE in US then it was "purely incidental". It was submitted thereafter that in view of the recent High Court decisions cited, it was a settled position of law, that incidental benefit to the AE on account of AMP activities carried

on by the assessee would not warrant any transfer pricing adjustment in the hands of the assessee company.

22. The learned counsel for the assessee, thereafter drew our attention to the scope of section 92B (2) as explained by the Central Board of Direct Taxes in their **Circular no. 14 of 2001**. The relevant portion of the said circular states as follows:

> "55.8 Sub-section (2) of section 92B extends the scope of the definition of international transaction by providing that a transaction entered into with an unrelated person shall be deemed to be a transaction with an associated enterprise, if there eXists a prior agreement in relation to the transaction between such other person and the associated enterprise or the terms of the relevant transaction are determined by the associated enterprise. An illustration of such a transaction could be where the Assessee, being an enterprise resident in India eXports goods to an unrelated person abroad, and there is a separate arrangement or agreement between the unrelated person and an associated enterprise which influences the price at which the goods are exported. In such a case the transaction with the unrelated enterprise will also be subject to transfer pricing regulations."

Based on the above, the learned counsel submitted that the TPO in his order had not recorded / identified any such separate arrangement or agreement and hence the domestic transactions entered by the assessee with the uncontrolled third parties in the local market, fell outside the scope of section 92B(2) of the Act. He further stressed on the point that no evidence had been brought on record to establish the manner in which the AEs of the assessee had

influenced the price paid by the assessee to independent third parties (AMP vendors) in India, so as to bring the transaction within the fold of sub-section (2) of Section 92B of the Act. It was submitted that the TPO proceeded to aver that the assessee was contributing to global profits and therefore, AMP expenses assumed the characteristics of an international transaction based on misconstrued facts and complete disregard of the assessee's business model. Hence, there was invalid assumption of jurisdiction on the part of the TPO.

23. The learned counsel also pointed towards the explanation to Section 92B. The explanation to Section 92B as inserted by the Finance Act 2012. From the said provisions he submitted that it was clear that under the expanded definition of the term 'international transaction' the purchase, sale, transfer, lease or use of intangible property had been classified as an international transaction. Intangible property had been defined to include marketing related intangible assets such as trade-marks, trade names, brand names and logos etc. Thus, it was submitted that where two AEs engaged in a transaction, which involved the purchase, sale, transfer, lease or use of intangible property, the same shall be classified as an international transaction.

24. Thereafter, the learned counsel for the assessee drew our attention towards the decision the Hon'ble Delhi High Court in **Maruti Suzuki India Pvt. Ltd (supra)**, wherein it was held that AMP transaction did not fall within the ambit of *Explanation I* to Section 92B and that the onus of proving the existence of an international transaction was on the Department. At this point, the he submitted that the reliance placed by the TPO on the decision of

the Hon'ble High Court in Sony Ericsson Mobile Communication India Pvt. Ltd. (supra) was completely misplaced. The TPO had relied upon the said decision of the Hon'ble High Court to contend that mere incurrence of AMP expenditure in respect of brands not owned by the assessee had to be treated as an international transaction under the provisions of the Act. By way of rebuttal, our attention was drawn towards the relevant passage given in para 41 to 44 of the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Pvt. Ltd (supra).

25. He submitted that Sony Ericsson Mobile Communication India Pvt. Ltd. (supra) was specifically a case of distributor and there was no dispute as far as existence of international transaction was concerned. However, in the present case, it was submitted that the very issue of existence of international transaction pertaining to incurring of AMP expenses was in dispute and hence reliance on Sony Ericsson on this count was completely misplaced by the TPO.

26. The learned counsel for the assessee also submitted that the reliance of the TPO on the decision of Toshiba India Pvt Ltd (supra) was also misplaced since the same stood overruled by the decisions of the Hon'ble Delhi High Court in Maruti Suzuki India Pvt. Ltd (supra), Whirlpool of India Ltd (supra), Bausch & Lomb Eyecare (India) Pvt Ltd (supra), Honda Siel Power Products Ltd (supra) and the decisions of the coordinate benches of this Tribunal in M/s Essilor India Pvt Ltd vs. DCIT: IT(TP)A No. 29/Bang/2014, M/s Heinz India Private Limited vs. ACIT: ITA No. 7732/Mum/2010, L'oreal India Private Limited vs. DCIT : ITA No. 7714/Mum/2012 and Goodyear India Ltd (supra) and Honda Siel Power Products Ltd vs. DCIT: ITA No. 551/Del/2014.

27. Mr. Chopra, thereafter directed our attention towards the benchmarking yardstick used by the TPO over the years to compute the transfer pricing adjustment pertaining to AMP expenses. He submitted that for the AYs 2006-07 to 2009-10, the TPO used Bright Line Test, not only to benchmark the alleged international transaction but also for concluding that there existed an international transaction in the first place. He stressed heavily that the transfer pricing adjustment pertaining to AMP expenses computed using BLT has specifically been time and again deleted/ remanded back by the Hon'ble High Court of Delhi in various decisions starting with Sony Ericsson Mobile Communications Pvt. Ltd. (supra). He again drew our attention towards the relevant passage in para 121 & 122 from the decision of the Hon'ble Delhi High Court in Sony Ericsson Mobile Communications Pvt. Ltd. (supra) Thereafter, he re-directed our attention towards the para 68 to 76 from the decision of the Hon'ble Delhi High Court in Maruti Suzuki India Pvt. Ltd (supra). Relying on the judgement he submitted that in the absence of any machinery provision as well as a substantive provision to bring AMP spending within the purview of Chapter X, there could not be any transfer pricing adjustment exercise. He further submitted that it was a settled position of law in the jurisdiction in which the assessee operates that incurring of AMP expenses was not an international transaction. Even otherwise, the very existence of international transaction vis-à-vis AMP expenses had to be established by the Department *de hors* BLT. Therefore, on both the counts, the TPO fell in error.

28. Thereafter, he drew our attention towards the TPO order for the AYs 2010-11 to 2012-13, wherein, the TPO reached to a

conclusion that there existed an international transaction vis-à-vis AMP expenses due to the excessiveness of the said expenditure. He pointed out that the said exercise itself was against the mandate of the Hon'ble Delhi High Court and also pointed our attention towards the fact that the TPO declined to follow the decision of the Hon'ble Delhi High Court in **Maruti Suzuki India Pvt. Ltd (supra)** by quoting that the Department had preferred a special leave petition (SLP) before the Hon'ble Supreme Court of India against the said judgment of the Hon'ble Delhi High Court.

29. He further, pointed out that the method applied by the TPO to benchmark the alleged international transaction pertaining to AMP expenses in AY 2010-11 to 2012-13, wherein TPO had applied the PSM method incorrectly as per Rule 10B(1)(d) of the Income Tax Rules, 1962 (Rules). He drew our attention to Rule 10B(1)(d) PSM was to be applied vis-à-vis an international transaction involving unique intangibles and contented that here neither the combined profit can be worked out nor there is any involvement of transfer of any in tangibles. In fact no profit has derived by the AE in India and when no FAR is being carried out by the AE in India and hence no ALP is required to be determined under PSM.there is

30. Mr. Chopra also referred to the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010 (TP Guidelines), which has also been relied upon by the TPO. He submitted that under the said guidance and as per the Rules, the TPO was required to determine the combined profit arising from the impugned "international transaction" of incurring AMP expenses. Thereafter, the TPO was required to split the combined profit in the proportion of the relative contribution of the assessee and the AE.

However, the TPO did not apply PSM correctly and did not analyse the contribution made by both the entities, i.e., the assessee company and the US Parent AE, on the relative value of the FAR of each of the entities. He also pointed out various other inconsistencies in the TPO's application of PSM for benchmarking the alleged international transaction of AMP expenses.

31. It was pointed out by him that the TPO in its order for the AYs 2010-11 to 2012-13, had applied the PSM method by taking the financials of the US Parent AE into account. He has determined a rate of 35% allocable towards marketing activities by relying upon the decision of the coordinate bench of this Tribunal in **Rolls Royce PLC vs. DDIT [TIOL-408-ITAT-DEL]** and had applied the same to the global net profit of the US Parent AE to arise at the global profit of the US Parent AE from marketing activities. Thereafter, the TPO had compared the AMP spent by the US Parent AE with that of the assessee company and multiplied that ratio with the global net profit of the US Parent AE arising from the marketing activities to compute the subject transfer pricing adjustment on account of AMP expenses. He submitted that PSM is applicable mainly in international transactions involving transfer of unique intangibles or in multiple international transactions which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction. It was further submitted that the in the case of the assessee company, there was no transfer of any unique intangibles but for the license to use trademark which was also royalty free. According to the Rules for applicability of PSM, the combined net profit of the AEs arising from the 'international transaction' has to be determined and therefore, if incurrence of AMP expenses was to be considered as the

'international transaction', then the combined profit was to be determined from the value of such international transaction. Thus, the approach of the TPO to split global net profit was completely out of place.

31. The learned counsel further submitted that even otherwise also, the profit earned on account of the AMP expenses incurred by the assessee or the economic exploitation of the trademarks/ brands in India was already captured in the profit and loss account of the assessee company itself and the same had duly been offered to tax in the income tax return and thus, there was no logic to compute a transfer pricing adjustment on this score at all. The assessee company had placed similar arguments before the DRP for all the years, however, for AY 2013-14 only, the DRP found reason with such argument and had directed the application of "other method" as prescribed under the Rules as against the application of PSM for the subject transfer pricing adjustment.

33. Mr. Chopra, then brought our attention towards the application of the "Other Method" as employed by the DRP for AY 2013-14 and submitted that the same was a disguised BLT method instead. He submitted that the DRP for AY 2013-14, had directed the application of "other method" as per the Rules and had computed the adjustment by comparing the AMP/sales ratio of the US Parent AE with that of the assessee company. Thereafter, the DRP considered the excessive AMP spent by the assessee company to be transfer pricing adjustment on account of AMP expenses for AY 2013-14. The only difference between the approach adopted by the DRP with that of the Department was that Department compares the AMP/sales of the tested party with that of third

parties and in the instant case, the AMP/Sales of the assessee company has been compared with that of its parent AE. He submitted that even in AY 2013-14, the "other method" has been incorrectly applied. He also drew our attention to Rule 10AB and pointed out that erroneous interpretation of this Rule has been made by the DRP by comparing the AMP / Sales ratio of the assessee with the Global AMP/ sales of Pepsi Group on a worldwide basis. He submitted that Rule 10AB provided that "Other Method" takes into account the price which had been charged or paid for the same or similar uncontrolled transaction with or between non-associated enterprises under similar circumstances. Comparison of the AMP over sales ratio of the assessee with the AMP ratio of Pepsi Co Group on a worldwide basis was nothing but a distorted version of the BLT.

34. Without prejudice, Ld. Counsel submitted that even if there was an international transaction pertaining to incurrence of AMP expenses, then also the application of BLT for benchmarking would render no transfer pricing adjustment in view of settled law by the Jurisdictional High Court in several cases, as a result would be liable to be set aside. He placed heavy reliance on the decision of the Hon'ble High Court of Delhi in **Valvoline Cummins Private Ltd. vs. DCIT [ITA No. 158/2017, judgment dated 31.07.2017]**, wherein the Hon'ble High Court has held that once BLT had been declared by the Hon'ble High Court of Delhi in Sony Ericsson India Pvt. Ltd. v. CIT (supra) to be no longer a valid basis for determining the existence of or the arm's length price (ALP) of an "international transaction" involving AMP expenses, the order of the TPO could not be sustained in law.

35. Again without prejudice to his earlier averments, he submitted that even if incurrence of AMP expenditure was to be considered as an 'international transaction' and BLT was to be considered as the most appropriate method, then the same may be compared to the sales of the final product that will include the sales made by the bottlers. He submitted a chart to demonstrate that if the sales of the final product are considered and not just the sales of the concentrate made by the assessee to the bottlers, the said ratio would fall within the range as computed by the TPO for the comparables using BLT. As an illustration, it was submitted that during AY 2006-07, if the sales made by the bottlers i.e. 1764,13,14,226/- is considered for BLT to apply as compared to the total AMP expenses incurred by the assessee as well as bottlers, i.e., Rs. 259,57,71,988/- (including AMP expenses worth Rs. 202,34,16,000 as incurred by the assessee alone), then the AMP/ sales ratio falls down to 14.71%. It was submitted that the said ratio was within the range as computed by the TPO for comparables using BLT.

36. He submitted that the dispute with respect to the applicability of method for benchmarking was secondary and the real or the primary dispute was with respect to the existence of any 'international transaction' *qua* AMP expenditure incurred by the assessee in its commercial wisdom and expertise. As per assessee's business model, assessee has been engaged in the manufacture of concentrate, which is an intermediate product and is sold only to licensed bottlers who complete the product which is sold in the market to the consumer. He submitted that the concentrate as such was not a marketable commodity. To distinguish its case from the decision of the Hon'ble Delhi High Court in Sony Ericson Mobile

Communications (India) Pvt. Ltd. (supra), he pointed out that the Sony decision involved distributors and the said distinction has also been recognized in the subsequent decision of the Hon'ble Delhi High Court in Maruti Suzuki India Pvt. Ltd. (supra), which was a case of manufacturer. Thus, the assessee's case was squarely covered by the Maruti decision. For this reason, Special Bench of this Tribunal in **LG Electronics India (P.) Ltd. vs. Asstt. CIT 140 ITD 41 (Delhi) (SB)** held that all selling and manufacturing expenses were to be excluded for the purposes of determining any the transfer pricing adjustment on account of AMP expenses. Such a finding has been upheld by the Hon'ble Delhi High Court Hon'ble Delhi High Court in Sony Ericson Mobile Communications (India) Pvt. Ltd. (supra).

37. He further contended that the entire AMP expenditure incurred by the assessee formed part of the assessable value under the excise laws and on which the assessee had paid excise duty. To demonstrate the same, he placed reliance on the decision of the Hon'ble Supreme Court in assessee's own case reported as **Collector of Central Excise, Chandigarh vs. Pepsi Foods Ltd. 1997 (91) ELT 544 (SC)** and submitted that such an amount also included the reimbursements made to the AE for ICC cricketing sponsorship. Hence, it the entire AMP expenditure formed part of the cost of manufacture for the assessee and given the mandate of the Special Bench that all selling and manufacturing expenses could not be included for the purposes of determining any excessive AMP expenditure, the entire adjustment deserves to be set aside. He also placed reliance on the decision of the Hon'ble Bombay High Court in the case of **Coca Cola India Pvt. Ltd. Vs. The Commissioner of Central Excise (Central Excise Appeal no. 118**

of 2007) to demonstrate the entire business model and structure of business operations of a company which operates in the same industry as the assessee. The assessee company was an intervener before the Hon'ble Bombay High Court in this case and the issue before the Hon'ble Court was, whether the assessee were entitled to avail of input service tax credit in respect of the advertising and marketing expenditure. The Hon'ble Court had also examined whether the advertising done by the assessee was integrally connected with the final product with the manufacture of concentrate since concentrate was not openly sold in the market. The Hon'ble Court, after examining the facts of the case, accepted that the advertising done by the assessee was integrally connected with the sale of the final product and consequential related and integral to the manufacture and sale of concentrate. The business exigency/necessity of the assessee in terms of incurring such expenditure was also approved by the Court and it was held that the assessee would be entitled to avail of the input service credit in respect of service tax paid by the assessee on advertising and marketing services availed off.

38. In light of the above, it was submitted that it is established beyond doubt that the AMP expenditure formed part of the cost of manufacture for the assessee and could not be considered for any adjustment by the TPO whether on the grounds of excessiveness or otherwise.

39. Thereafter, the learned counsel brought our attention towards the Final Report of Action 8-10 of the Base Erosion and Profit Shifting Project (BEPS) of the OECD titled as "Aligning Transfer Pricing Outcomes with Value Creation". He submitted that even

under this latest development in international tax, there has been no adjustment suggested on account of AMP expenditure incurred by a full-fledged manufacturer. He took us through the examples provided in the report to contend that none of the examples therein pertained to a manufacturer, thereby indicating a consistent logic that AMP expenditure incurred by a manufacturer could not be subjected to transfer pricing adjustment.

40. He thus, contended that in assessee's case the legal owner of the trademarks licensed to the assessee has performed no relevant functions, used no relevant assets, and assumed no relevant risks, but for solely acting as the title holder and therefore, it is actually not entitled to any return for holding such title. When the legal owner being the US Parent AE is not entitled to any return, then there was no reason why it compensates its subsidiary in India, i.e., the assessee company for marketing activities while operating in India as a full-fledged manufacturer and reaping all profits from its operations in India. To support his averments, learned counsel also demonstrated that the risk with respect to its manufacturing operations in India was undertaken totally by the assessee and not by the US Parent AE. He referred to various clauses in the Agreement dated 09.11.1989 that indicated that the assessee was to undertake all risks with the manufacturing activity in India and submitted that in 2006, there was an investigation launched by the Food Inspector of Mobile Vigilance against the assessee company since a very small amount of pesticide residue – carbofuran was found in the sample of the beverage manufactured by the assessee that was collected by the Food Inspector. It was the assessee who took the hit as far as market share in respect of beverage industry in India was concerned and no amount was reimbursed by the US

Parent AE for the loss of goodwill that the assessee suffered. He further submitted that such issue was fought by the assessee in its own name up till the Hon'ble Apex Court, where the assessee company won, however there was no intervention by the US Parent AE who was the legal owner of the brand and no part of the cost associated with the said litigation was reimbursed to the assessee by the US Parent AE either. He submitted that the order passed by the Hon'ble Supreme Court in that matter is reported as **PepsiCo India Holdings Pvt. Ltd. vs. Food Inspector & ANR (Crl. Appeal No. 836 of 2010, judgment dated 18.11.2010)**. The said litigation demonstrated that the assessee company was the economic owner of the concerned brands in India and therefore was required to undertake AMP activities in India for the sale of its manufactured products in India.

41. Lastly, the learned counsel submitted that assessee's case was covered by various decisions including the following decisions:

(i) Maruti Suzuki India Ltd. vs. CIT (supra);
(ii) Whirlpool of India Ltd. vs. DCIT (supra);
(iii) Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. ACIT (supra);
(iv) Honda Siel Power Products Ltd. vs. DICT (supra);
(v) Valvoline Cummins Pvt. Ltd. vs. DCIT (supra);
(vi) Goodyear India Ltd. vs. DICT (supra);
(vii) Honda Siel Power Product Ltd. vs. DICT: ITA No. 551/ Del/ 2014 (Delhi ITAT);
(viii) M/s Essilor India Pvt. Ltd. vs. DCIT: IT(TP)A No. 29/Rang/2014 (Bangalore ITAT);
(ix) M/s Heinz India Private Ltd. vs. ACIT (supra);

(x) L'oreal India Private Limited vs. DICT: ITA/7714/Mum/2012 (Mumbai Tribunal);

(xi) Thomas Cook (India) Ltd. vs. DCIT: [2016] 70 taXmann.com 322 (Mumbai Trib.);

(xii) Diageo India Private Limited vs. DCIT: I.T.A./7545/Mum/2012 (Mumbai Trib.);

(xiii) Mondelez India Foods (P) Ltd. Vs. ACIT: [2016] 70 taXmann.com 112 (Mumbai-Trib.);

(xiv) DCIT vs. Mattel Toys (India) Pvt Ltd: ITA No. 4415/Mum/2014 (Mumbai Tribunal);

(xv) WideX India Pvt. Ltd. vs. ACIT: 117/Chandi/2016 (Chandigarh Tribunal);

(xvi) Nippon Paint India Pvt. Ltd vs. ACIT: ITA No.779/Mds/2016 (Chennai Tribunal);

(xvii) Nikon India Pvt. Ltd. vs. DCIT: ITA No. 4574/Del/2017 (Delhi ITAT).

Contention raised by the Ld. CIT-DR:

42. The learned CIT DR in support of TPO's order submitted that, it is an undisputed position that the 'Pepsi' brand for soft drinks and other brands, on which the assessee incurred AMP expenditure, belonged to the US Parent AE. It was submitted that the assessee did not own and develop its own brand and that the AMP spent was purely towards brand building and not sales promotion expenses. Through the AMP spend of the assessee, new brands were developed such as 'Nimbooz' and 'Kurkure', which were although conceptualized in India, but belonged to the US Parent AE. He relied upon the TPO's order for AY 2010-11 to 2013-14 and submitted that the themes/ slogans used in advertisements in India by the

assessee were identical to those used abroad by the US Parent AE. He submitted that such an exercise revealed that the assessee was seeking approval for the content of the advertisement to be in lines with global policies of the Pepsi group to strengthen and create intellectual property brands owned by the US Parent AE. He placed further reliance on TPO's order to submit that the on the basis of the brand developed in India, Pepsi group launched Pepsi Karkedeh in Egypt. Similarly, it was submitted that the assessee had developed other products through AMP spend namely slice mangoes drink, mantana mango etc. Since the said brands were also registered in the name of the US Parent AE, the same proved that the assessee was helping its AE in creation of marketing intangibles.

43. The learned DR further submitted that the very fact that Pepsi Cola (Ireland) had entered into agreement with Global Cricket Corporation Ltd. for advertising the Pepsi brand in cricketing events showed that the advertisement policy of the assessee was guided, approved and planned by its AEs. He pointed out that assessee bore 72.5% of the total payment made by the said AE under the aforesaid agreement on the claim of viewership even for matches played outside India. Thereafter, he placed reliance on the profit and loss account for AY 2006-07 to submit that the total raw material consumption cost was INR 35 crores, whereas the advertisement cost was INR 202 crores. He highlighted that the said figures indicated that the advertisement expense constituted more than two – third of the entire cost for the assessee. Therefore, the real question was whether the assessee's main business was manufacture of concentrates of whether it was development of brand through AMP expenditure. He submitted that in light of the fact that AMP expense was huge in comparison to other direct and

indirect expenses, it was clear that the assessee company was developing market and creating marketing intangible and hence the AMP function dominated the manufacturing function. He further submitted that the assessee's alleged manufacturing business itself was processing of essence with sugar etc. to make drink concentrates; therefore, these activities can at the best be called processing and not manufacturing where normally huge mechanical processes are required. The entire sale was based on advertisement of brand owned by the AE. Hence, the assessee was providing services to the AE by way of strengthening the brands and creation of brands for the AE.

44. The learned DR further submitted that the benefit for the assessee by way of increase in sale was incidental and the main purpose of the AMP was the creation of market intangible namely brand owned by the AE. The assessee mainly existed and carried out the activity for the creation and strengthening of brands owned by the AE. Accordingly, it was submitted that the assessee was providing a service to the AE for creation of marketing intangible by incurring AMP expenses, which was an 'international transaction' and required benchmarking. He submitted that the reliance placed by the assessee on the decision of the Hon'ble High Court of Delhi in Maruti Suzuki India Pvt. Ltd. (supra) was not tenable, since Maruti Suzuki was a manufacturer and that there was hardly any manufacturing activity undertaken by the assessee. Furthermore, in the said decision, the brand that was promoted was 'Maruti Suzuki' which was co-owned by Maruti & Suzuki. He submitted that said brand was not exclusively owned by the AE, namely Suzuki Ltd. He further submitted that that Hon'ble High Court had appreciated therein that Maruti brand had already built a huge reputation and

therefore, the AMP expenditure had substantially benefited MSIL. However, in the present case, the brand 'Pepsi' was owned by the AE. He pointed out that for AY 2006-07 more than 60% of the entire expenditure was towards AMP spend, hence, the main business activity of the assessee was creation of marketing intangibles. Therefore, the facts of the present case were distinguishable from the decision of Hon'ble High Court of Delhi in Maruti Suzuki India Pvt. Ltd. (supra). Similarly, other decisions of the Hon'ble High Court were also distinguishable.

45. The learned DR submitted that the reliance placed by the learned counsel of the assessee on the decision of the Hon'ble Bombay High Court in the case of Coca Cola India Pvt. Ltd. (supra) was misplaced, because, whether or not the input credit for AMP expenses was to be allowed, the same had no bearing on whether the assessee in the present case was providing a service to its AE through AMP spend. Similarly, the decision of the Hon'ble Supreme Court in PepsiCo India Holdings Pvt. Ltd. (supra) on which reliance was placed by the learned counsel for the assessee to demonstrate that the assessee undertook all the risks associated with its operations, was misplaced since the same also had no bearing on whether the assessee in the present case was providing a service to its AE through AMP spend. Further, he contended that the quantum of sales made by the bottlers of the final product was not verifiable and same may not be considered for benchmarking purposes.

46. The learned DR, thereafter submitted that, since the assessee was providing services to the AE by way of AMP spend, there was an action in concert between the assessee and its AE which constituted an 'international transaction' for the purposes section 92F(v). On

PSM, he strongly relied upon the order of the TPO and contended that the same may be upheld.

47. In his rejoinder, the learned counsel for the assessee submitted that the averments made by the learned DR were never raised earlier by the authorities below and hence the same were not permissible at this stage. Further, he placed reliance on the financials of the assessee company from AY 2006-07 to 2013-14 to contend that the expenditure incurred by the assessee on AMP activities fell from 67% when compared to sales in AY 2006-07 to less than 10% when compared to sales in AY 2013-14. He submitted that the quantum of expenditure in the earlier years was high given the issue raised by the food inspector in Kerala in 2006 which had affected the goodwill of the company substantially and hence there was a commercial rationale for the assessee company to incur such huge expenditure to sustain in the highly competitive Indian market. Therefore, he submitted that the argument of the learned DR that the assessee company was primary engaged in development of brand of the AE was completely misplaced and deserved to be ignored. The learned counsel for the assessee also relied upon the said figures to contend that despite the fall of AMP/ sales ratio of the assessee company from 67% in AY 2006-07 to below 10% in AY 2013-14, the Revenue had been computing transfer pricing adjustment based on the excessiveness of the expenditure incurred, which demonstrated lack of application of mind and hence deserved to be set aside.

DECISION

48. We have heard the rival submissions, perused the relevant findings given in the impugned orders as well as material referred to before us in respect of transfer pricing issue pertaining to AMP adjustment made by the TPO. We have already discussed in detail, the brief facts and background of the cases in the light of the material on record and as captured in the arguments placed by the parties. As stated in the earlier part of the order, adjustment has been made on account of AMP expenses by the TPO in different years on different reasons by applying different methods. For instance, in the appeals for the Assessment Years 2006-07 to 2009-10, the TPO has computed the adjustment by applying 'Bright Line Test'; in the appeals for the Assessment Years 2011-12 to 2012-13 adjustment has been completed by applying 'Profit Split Method' and for the Assessment Year 2013-14 from the stage of the DRP, 'Other Method' has been applied. In all the years, the TPO has held that incurring of excess AMP expenses amounts to 'international transactions' as defined in Section 92B of the Act. He has compared the advertisement and marketing expenses with the sales turnover and thereafter concluded that the assessee company has created marketing intangibles for promotion of PepsiCo Inc (AE) without receiving any compensation for the same. The entire expenditure is to promote trade mark owned by its AE and developing the marketing intangibles for the product of the AE, and therefore, AE has benefitted from such AMP expenses and hence it has to be reckoned as 'international transaction'. In the Assessment Year, 2006-07, the Hon'ble High Court has remanded the issue back to this Tribunal to decide the issue of AMP adjustment afresh on merits. Their Lordships referring to the judgment of its own court, in 'Le Passage to India Power and Travels Pvt. Ltd.' (supra), wherein it

has been observed that Bright Line Test has been overruled by the judgment of Sony Ericsson Mobile Communication India Pvt. Ltd and endeavour should not be made to conclude that all transaction relating AMPs are to be treated as international transaction and the fact of each case needs to be examined after deliberation.

49. Thus, in light of the aforesaid direction, first of all we have to see, whether at all by incurring of higher AMP expenses, a conclusion can be reached that it is an international transaction which warrants determination of Arm's Length Price. Ergo, if it is held that there is no international transaction, then ostensibly there is no requirement of any kind of AMP adjustment. Accordingly, we would like to first dwell upon whether the incurring of expenditure on account of AMP amounts to international transaction or not. In a succinct manner we would like to analyze function and the profile of the assessee company. The assessee is a subsidiary of US entity, PepsiCo Inc, which is mainly involved in the manufacturing of Soft-drink/juice based concentrate and other agro products; and supply concentrated for aerated and non-aerated soft-drinks in India as well as to its AEs in Bangladesh, Nepal, Bhutan and Sri Lanka. It has obtained a license from its US parent AE for the technology to manufacture the concentrate and to use and exploit the brands owned by the said AE in the regions designated to the assessee company. The relevant clauses of Trademark, Licensing Agreement dated 09.11.1989 has already been referred above whereby the assessee was granted a non-transferrable, royalty free license for the use of trademarks in its territory. The assessee is exclusive user of the trademarks in India in respect of syrups and concentrate but was granted non-exclusive right for the beverages manufactured by it. The manufacture of concentrate is done exclusively by the assessee, whereas the bottling activity is done by the group entities

as well as independent bottlers spread across the country for the smooth operation and reach to every corners of India and neighbouring countries. As discussed above, it is an undisputed fact that assessee is not paying any trademark royalty to its parent AE. Thus, assessee has characterize itself as a full-fledged manufacturer exposed to all kind of risks associated with carrying out such business. It does not own any significant intangibles and neither does it undertake the research and development on its account. The assessee has been importing only keys and essences for the production of the concentrate from its AE and said import transaction has been duly reported in the Form 3CEB and also filed transfer pricing documentation on which no adverse inference has been drawn by the department. Before us, learned counsel for the assessee has pointed out from the records that the value of import from the AE in ratio to total sales turnover is only 0.18%. The chart was filed before us giving details of turnover, total expenditure, net profit, amounts spent on AMP, ratio of AMP incurred upon turnover and the value of import. Such a chart for the sake of ready reference is reproduced hereunder: -

A.Y.	Turnover (net) (in INR) (A)	Total Expenditure (in INR) (B)	Net Profit (before tax) (in INR) (c)	Profit--ability (%) D=C/B) X 100	AMP Spent (in INR) (E)	AMP/ Turnover (%) F=(E/A) X 100	Value of Import (in INR) (G)	Value of Import/ Turnover (%) H=(G/A) X 100
2006-07	303,19,65,000	312,07,86,000	11,00,72,000	3.53%	202,80,54,000	66.74%	53,80,272	0.18%
2007-08	353,35,63,000	354,73,89,000	28,88,96,000	8.14%	222,20,62,000	62.78%	77,08,654	0.22%
2008-09	447,44,79,000	375,50,58,00	101,50,22,000	27.03%	237,88,52,000	53.16%	56,57,871	0.13%
2009-10	591,76,85,000	498,54,32,000	124,29,00,000	24.93%	306,50,13,000	51.79%	77,13,883	0.13%

50. The FAR analysis of the various functions performed, assets and risks involved of the Parent AE, assessee company and the third parties can be summarized in the following manner: -

Particulars	**AEs**	**PFL**	**PIH/ Third Parties**
Functions performed			
Legal ownership of trademark	**Yes**	Nil	Nil
Registration/ protection of trademark	**Yes**	Nil	Nil
Supply of keys and essences for manufacturing of concentrates	**Yes**	Nil	Nil
Manufacturing of concentrate	Nil	**Yes**	Nil
Bottling of final beverage	Nil	Nil	**Yes**
Advertisement and marketing of products in India	Nil	**Yes**	(FOBO - limited)
Determination of advertisement and marketing budget	Nil	**Yes**	**Yes**
Deciding concept and content of advertising	Nil	**Yes**	**Yes**
Deciding the choice of media	Nil	**Yes**	**Yes**
Dealing with advertisement and marketing agencies	Nil	**Yes**	**Yes**
Selling and distribution in India of bottled beverage	Nil	Nil	**Yes**
Pricing of final product	Nil	**Yes**	Nil

All the necessary functions of strategizing, advertising and marketing activities, its implementation and controlling across the country is conducted by the assessee company alone for market penetration in India. Thus, in a way assessee is the economic owner

of the brand though not a legal owner. As a full-fledged manufacturer, the assessee company has been assuming all the risks for promoting its sales and thereby the entire profitability is subject to tax in India and no residual profits are enjoyed by the AE and neither any kind of royalty is also paid. Looking to the nature of business in which assessee is involved, it has incurred huge advertising, marketing and promotional expenses which is evident from the fact that during the Assessment Year 2006-07 alone, the ratio of AMP upon sales was 66.89%. Now such a huge incurrence of AMP expenses has led to AMP adjustment by the Revenue holding that incurring of such a huge AMP has also benefited the AE in the nature of promotion of its brand and trademark.

51. The TPO during the course of the proceedings for the Assessment Year 2006-07 had noted that assessee had disclosed an international transaction of reimbursement of expenditure of Rs.33,60,15,501/- to M/s. Pepsi Cola Ireland (AE) which was incurred by the said AE and claimed to be reimbursed by the assessee on cost. Based on this transaction, the TPO proceeded to examine the total advertisement expenditure incurred by the assessee during the year. Looking to the magnitude of AMP expenses, he concluded that assessee has created marketing intangibles only for the promotion of brand and products of the AE. Since AEs recovering some part of the AMP expenditure incurred by it from the assessee this goes to show that AE is controlling the AMP activity of the assessee and also indicate that there was some arrangement between the assessee and its AE regarding incurring of AMP expenditure. As per the provision of Section 92B(1) such an arrangement between two AEs for allocation or apportionment or any contribution to any cost or expenditure incurred or to be

incurred in connection with the benefit is an international transaction and if the assessee company had incurred the cost in connection with benefit and services provided to the AE under a mutual agreement though not in writing but if it can be proved from the conduct then it amounts to an international transaction u/s.92B(1) r.w.s. 92F(v). Accordingly, he held that such an AMP expenditure was in the nature of intra-group services provided to the AE which required compensation on an Arm's Length basis and in order to arrive such ALP, he applied Bright Line Test and after applying such method, he made an adjustment of Rs.174,39,58,880/-.

52. First of all, in so far as the reimbursement of cost of expenditure incurred by Ireland (AE), it has been brought on record that the said AE has entered into a global partnership agreement dated 28.10.2004 with Global Cricket Corporation PTE Ltd. for the sponsorship right of Cricketing event world-wide. Since, assessee-company is mainly based in India where game of cricket is immensely popular, therefore, it was agreed amongst the group companies that the expenditure incurred for sponsoring the ICC cricketing events, all the group companies which had benefitted from the cricketing events in the form of advertisement will reimburse the cost. The said cost was purely for promoting assessee's own business and nowhere it has been brought on record that such a reimbursement of the cost was subject to any markup or any functions have been provided from where any income has been derived by the AE. The assessee on the basis of joint decision taken by Pepsi entities located in various cricketing jurisdiction had decided to reimburse the cost incurred by Ireland (AE) for sponsorship and advertisement as it will help the promotion of the

business of such entities including that of the assessee company. Accordingly, the assessee has paid its proportionate share of reimbursement on cost to cost basis after requisite approvals from the Governmental authorities. Based on this transaction alone, TPO has deduced that: -

- *firstly*, since AE is recovering the AMP expenditure incurred by it from the assessee which goes to prove that AE is controlling the AMP activities of the assessee;
- *secondly*, it also indicates that there is some kind of arrangement between the assessee and its AE regarding the incurrence on AMP expenditure, and;
- *lastly*, incurring of huge expenditure of AMP indicates that such kind of expenditure must have been incurred at the behest of AE for promoting the brand owned by its AE.

From the perusal of agreement dated 09.09.2005 entered by the Ireland AE with the assessee, nowhere it is borne out that such expenditure incurred by the AE was for either for its own business promotion or there was any direction by the AE to the assessee that it had to incur the expenditure or assessee had no option but to reimbursed the cost. If such a reimbursement of cost was purely for business promotion of the assessee company, then it cannot be held that such a transaction though amounts to international transaction under the Act, requires determination of ALP. In any case, if at all, ALP was to be determined then it should have been strictly circumscribed to the reimbursement of the cost aggregating to Rs.33,60,15,501/-. Further, the transaction of reimbursement of expenditure of Rs.33,60,15,501/- cannot be expanded to the entire expenditure of AMP of Rs.202.34 crores. The reason being, the

amount of Rs.202.34 crores have been incurred by the assessee on its own volition and business requirement to be in competition with other big players in the field of aerated and non-aerated beverages and food products. It is acclaimed fact that industry in which assessee company is operating has to face stiff competition not only from the Indian companies but also from many multinational companies; and to remain in the competition as a lead brand it has to aggressively promote its product under the brand to remain in the competition and to augment its sale. All the necessary functions of strategizing, advertising and marketing activities, its implementation for market penetration in India is solely carried out by the assessee and there is no material on record to infer that there is any arrangement or agreement with the AE at any point of time that assessee is required to spent on AMP or it has been done at the behest of the AE. The reason adopted by the Revenue to conclude that the incurrence of AMP expenditure by the assessee for promoting the brands which is owned by its AE constituting a separate international transaction for the purpose of Section 92B which requires separate bench marking, does not has any legs to stand, because the Revenue has failed to show the existence of any agreement, understanding or arrangement between the assessee company and AE regarding the quantum of AMP spent or it was spent on behest of AE. The TPO has not recorded or identified any such separate arrangement or agreement that AMP expenses incurred by the assessee company are in pursuance of any agreement or arrangement. It is also not the case of the Department that the expenses which has been incurred by the assessee company during the course of its business have any bearing whatsoever on any other international transaction with the AE,

other than reimbursement of expenditure of Rs.33.60 crores as discussed above.

53. Section 92B defines the international transaction in the following manner: -

> *"(1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to anyone or more of such enterprises.*

From the plain reading of the aforesaid Section, it is quite clear that:

(i) the transaction has to be between two or more associated enterprises either or both of whom are non-resident;

(ii) the transaction is in the nature of purchase, sale or lease of tangible or intangible property or provision of services or lending or borrowing money;

(iii) or any other transaction having bearing on the profits, income, loss or assets of such enterprises;

(iv) all such nature of transaction described in the section will also include mutual agreement and the arrangement

between the parties for allocation or apportionment or any contribution to any cost or expenses incurred or to be incurred in connection with benefit, services and facility provided to any of such parties.

Relevant *Explanation* to Section 92B as inserted by the Finance Act, 2012 reads as under: -

"i. the expression "international transaction" shall include—

.....

(b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;

Clause (ii) of the said explanation reads as follows-

ii. the expression "intangible property" shall include—

(a) marketing related intangible assets, such as, trademarks, trade names, brand names, logos;....."

Thus, under the expanded definition of the term 'international transaction' intangible property has been defined to include marketing related intangible assets such as trademark, trade name, brand name and logos, etc. This inter alia means that where two AEs engaged in the transaction which involved, purchase, sale, transfer, lease or use of intangibles rights then the same shall be classified as international transaction. From the above, definition,

apart from transaction relating to purchase, sale or lease of tangible or intangible property, services lending or borrowing money, etc. functions having bearing on the profits, income, losses or assets is reckoned as international transaction. Besides this, if such a transaction is based on any mutual agreement or arrangement between the AEs for allocation or any contribution to any cost or expenditure incurred or to be incurred for the benefit, service or facility, then also such an agreement or arrangement is treated as international transaction. Clause (v) of Section 92F reads as under:

> *"92F (v). "transaction' includes an arrangement, understanding or action in concert, -*
>
> *(A) Whether or not such arrangement, understanding or action is formal or in writing; or*
>
> *(B) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings."*

This definition of transaction has to be read in conjunction with the definition given in section 92B, which means that the transaction has to be first in the nature given in Section 92B (1); and then when such transaction includes any kind of arrangement, understanding or action in concert amongst the parties, whether in writing or formal, then too it is treated as international transaction. Here the conjoint reading of both the sections lead to an inference that in order to characterized as international transaction, it has to be demonstrated that transaction arose in pursuant to an arrangement, understanding or action in concert. Such an arrangement has to be between the two parties and not any unilateral action by one of the parties without any binding obligation on the other or without any mutual understanding or contract. If one of the party by its own volition is entering any

expenditure for its own business purpose, then without there being any corresponding binding obligation on the other or any such kind of an arrangement actually existing in wring or oral or otherwise, it cannot be characterized as international transaction within the scope and definition of Section 92B (1).

54. Here, in this case, it has been vehemently argued from the side of the assessee that assessee-company had incurred expenditure on AMP to cater to the needs of the customers in the local market and such an expenditure was neither incurred at the instance or behest of overseas AE nor there was any mutual understanding or arrangement or allocation or contribution by the AE towards reimbursement of any part of AMP expenditure incurred by it for the purpose of its business. If no such understanding or arrangement exists, then no transaction or international transaction could be said to be involved between the AE and the assessee which can be reckoned to be covered within the provision of Transfer Pricing Regulation. The incurring of expenditure by the assessee is in fact purely a domestic transaction by a domestic enterprise with a third party in India for its own business purpose. Even the reimbursement, as discussed above, by the assessee to its AE was in lieu of sponsorship fee paid to ICC which again was wholly and exclusively for the assessee's own business and was not at the behest or mandate of AE. This contention of the learned counsel on the face of record is liable to be accepted and in absence of any material or any kind of arrangement discovered or brought on record by the Revenue, remains unrebutted. The onus is on the Revenue to show that the twin requirement of Section 92B exists, that is, *firstly*, the transaction involved was between the AE, one of which is resident and other a non-resident was involved; and

secondly, the transaction of AMP expenses has taken place between the two AEs (except for reimbursement of Rs.33.60 crore). Now it has been well settled by the Hon'ble Jurisdictional High Court in the case of **Maruti Suzuki India Pvt. Ltd. (supra)** that onus is upon the Revenue to demonstrate that there existed an arrangement between the assessee and its AE under which assessee was obliged to incur excess amount of AMP expenses to promote the brands owned by the AE. The relevant observation and the finding of the Hon'ble High Court in paragraph 60 reads as under:

> *"60……Even if the resort is had to the residuary part of clause (b) to contend that the AMP spend of MSIL is "any other transaction having a bearing" on its "profits, income or losses" for a 'transaction' there has to be two parties. Therefore, for the purposes of the 'means' part of clause (b) and the 'includes' part of clause (c,)* ***the revenue has to show that there exists an 'agreement' or 'arrangement' or 'understanding' between MSIL and SMC whereby MSIL is obliged to spend excessively on AMP in order to promote the brand SMC****……*
>
> *61……Even if the word 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it still incumbent on the revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means' part and the 'includes' part of Section 92B (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC."*

Same proposition has been upheld by the Hon'ble Jurisdictional High Court in the case of Whirlpool of India Ltd. vs. DCIT, Bausch & Lomb Eyecare India Pvt. Ltd. vs. ACIT (supra) and Honda Siel Power Products Ltd. vs. DCIT (supra).

55. The TPO in his order has relied upon clause (viii) of the 'Trade mark License Agreement' which empowered the PepsiCo Inc to approve and review the advertisement proposed to be telecasted in India. It has been clarified by Mr. Chopra before us that, it was only for the purpose of advertisement content and not for the quantum of the AMP expenditure. The mandate of the AE was to only ensure that same brand guardrails are being followed by the AEs all across the world, i.e., the logo of the Pepsi or any other brand or trademark owned by the AE should be presented in the same manner all across the world. The AE does not have any direct control of the marketing functions of any AE in various geography. This contention of the learned counsel is also borne out from the material on record and nothing has been brought by the TPO to rebut that the AEs had any direct control over the marketing functions or has any say in the quantum of expenditure to be spent. Marketing of such an impulse product like beverages had to be managed locally as per the ethos, customs and preferences/choices of the local population and neither the content nor the quantum can be remotely managed by a non-resident AE. It has been brought on record that the assessee company had a full-fledged marketing team in India who with the help of local marketing agency and consultant managed the marketing function across the country. Further, mere review of marketing material by the AE does not indicate that there is existence of any international transaction, because here in this

case there was no obligation on the assessee company to incur AMP expenditure to promote the brand of the AE and no such obligation too has been brought out by the TPO in the impugned order. It is also evident from clause (xiii) of the Agreement that the risk and reward of incurring the AMP expenditure lied entirely with the assessee company and the foreign AE was completely insulated from such risk and rewards arising from the manufacturing activity carried on by the assessee company in India. Assessee has been operating as a licensed manufacturer of concentrates in India which is used in manufacturing of soft drinks and it had obtained the license from its parent AE for the technology to manufacture concentrate and to exploit the brand owned by the US AE for the promotion of business of assessee company in the territories in India. The assessee has been independently performing the function of procurement of raw material, manufacturing of concentrates, development of advertising and marketing strategy, determination of the marketing budget, design concept and content of advertisement, choice of media, pricing of the concentrate and the sales of concentrates to retailers and distributors. All the rewards for such functions and the returns associated with the commercial exploitation of the brand is completely enjoyed by the assessee company. Hence, in such a situation, the assessee was free to decide its own AMP expense which has been borne by it and therefore, to hold or presume that parent AE should have reimbursed some or part of the expenditure would not be correct. Here, in this case, there is no existence of any direct benefit passed on to the parent AE, because as discussed above, no royalty has been paid to parent US AE for the usage of brand and technology and assessee had paid a very miniscule amount for the import of keys and essences.

56. One of the other allegations of the TPO has been that assessee do not have exclusive right to manufacture the beverage in India and hence it could not be said that AMP expenditure incurred was solely for its benefit. However, such an allegation does not hold ground, because assessee had exclusive right to manufacture concentrate in India and only bottling of the beverage was located to third parties which was a separate function and for strategic reason it has been given to third party bottlers also for the efficiency of the operation. Another allegation made in subsequent years by the TPO certain brands such as 'Kurkure', 'Nimbus', etc. though were conceptualized and developed in India but the trade mark in respect of these brands were owned by the foreign AE. It has been stated by the learned counsel that these brands were largely sold in India and no benefit could have been said to accrue to the AE in other territory on account of promotion of these brands in different territory and geographical location because such kind of different brands are peculiar to a native choice and are sold in their respective territory with different flavour and spices which is suitable for local consumption on which advertising and marketing was carried out by the local entity in those jurisdiction. Such an argument has a strong basis for the reason that, *firstly*, AE had not charged any royalty for use of trademark in India from the assessee, and therefore to allege that assessee should have been compensated for the brand conceptualized and developed by it, is too farfetched and; *secondly*, the brand developed in India which are to be exclusively sold in India will only help in promotion of sales in India and not in the jurisdiction of the other AEs. Since assessee happened to be the economic owner of the brand in India, therefore, it was entitled to all such economic benefits arising out of intangible

benefit. Because, assessee bore of the risk associated with the AMP spending and has ultimately benefited from such expenses which will result increase sales. It is also not the case of the TPO that the residual profits from exploitation of brand were flowing out of India to the AE in any way and in no manner the income of the AE was increasing from where it could fund the reimbursement of advertising and marketing expenses to the assessee in India.

57. The TPO has also referred to the decision of Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India Pvt. ltd. to contend that mere incurrence of AMP expenditure in respect of brand not owned by the assessee has to be treated as international transaction. Such an inference by the learned TPO is not tenable in view of the Hon'ble Delhi High Court in the judgment in the case of Maruti Suzuki India Pvt. Ltd. wherein the ratio of Sony Ericsson judgement has been explained in the following manner: -

> *"41. Having considered the above submissions, the Court proceeds to analyse the decision in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) to determine if it conclusively answers the issue concerning the existence of an international transaction as a result of incurring of AMP expenditures by an Assessee.*
>
> *42. As already noticed, the judgment in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) does not seek to cover all the cases which may have been argued before the Division Bench. In particular, as far as the present appeal ITA No. 110 of 2014 is concerned, although it was heard along with the batch of appeals, including those disposed of by the Sony Ericsson*

Mobile Communications India (P.) Ltd. (supra) judgment, at one stage of the proceedings on 30th October 2014 the appeal was delinked to be heard separately.

43. ***Secondly, the cases which were disposed of by the Sony Ericsson Mobile Communications India (P.) Ltd. (supra) judgment, i.e. of the three Assessees Canon, Reebok and Sony Ericsson were all of distributors of products manufactured by foreign AEs. The said Assessees were themselves not manufacturers. In any event, none of them appeared to have questioned the existence of an international transaction involving the concerned foreign AE. It was also not disputed that the said international transaction of incurring of AMP expenses could be made subject matter of transfer pricing adjustment in terms of Section 92 of the Act****.*

44. However, in the present appeals, the very existence of an international transaction is in issue. The specific case of MSIL is that the Revenue has failed to show the existence of any agreement, understanding or arrangement between MSIL and SMC regarding the AMP spend of MSIL. It is pointed out that the BLT has been applied to the AMP spend by MSIL to (a) deduce the existence of an international transaction involving SMC and (b) to make a quantitative 'adjustment' to the ALP to the extent that the expenditure exceeds the expenditure by comparable entities. It is submitted that with the decision in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) having disapproved of BLT as a legitimate means of determining the

ALP of an international transaction involving AMP expenses, the very basis of the Revenue's case is negated."

"68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wildgoose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an exercise. The Court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions". Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it emphasizes that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. ***The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negatived by the Court in Sony Ericsson Mobile Communications India (P.) Ltd. (supra). Therefore, the existence of an international transaction will have to be established de hors the BLT.***

69. There is nothing in the Act which indicates how, in the absence of the BLT, one can discern the existence of an international transaction as far as AMP expenditure is concerned*. The Court finds considerable merit in the contention*

of the Assessee that the only TP adjustment authorised and permitted by Chapter X is the substitution of the ALP for the transaction price or the contract price. It bears repetition that each of the methods specified in S.92C (1) is a price discovery method. S.92C (1) thus is explicit that the only manner of effecting a TP adjustment is to substitute the transaction price with the ALP so determined. The second proviso to Section 92C (2) provides a 'gateway' by stipulating that if the variation between the ALP and the transaction price does not exceed the specified percentage, no TP adjustment can at all be made. Both Section 92CA, which provides for making a reference to the TPO for computation of the ALP and the manner of the determination of the ALP by the TPO, and Section 92CB which provides for the "safe harbour" rules for determination of the ALP, can be applied only if the TP adjustment involves substitution of the transaction price with the ALP. Rules 10B, 10C and the new Rule 10AB only deal with the determination of the ALP. Thus, for the purposes of Chapter X of the Act, what is envisaged is not a quantitative adjustment but only a substitution of the transaction price with the ALP.

70. What is clear is that it is the 'price' of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should

follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment.

71. ***Since a quantitative adjustment is not permissible for the purposes of a TP adjustment under Chapter X, equally it cannot be permitted in respect of AMP expenses either. As already noticed hereinbefore, what the Revenue has sought to do in the present case is to resort to a quantitative adjustment by first determining whether the AMP spend of the Assessee on application of the BLT, is excessive, thereby evidencing the existence of an international transaction involving the AE. The quantitative determination forms the very basis for the entire TP exercise in the present case****.***

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

73. It bears repetition that the subject matter of the attempted price adjustment is not the transaction involving the Indian entity and the agencies to whom it is making payments for the AMP expenses. The Revenue is not joining issue, the Court was told, that the Indian entity would be entitled to claim such expenses as revenue expense in terms of Section 37 of the Act. It is not for the Revenue to dictate to an entity how much it should spend on AMP. That would be a business decision of such entity keeping in view its exigencies and its perception of what is best needed to promote its products. The argument of the Revenue, however, is that while such AMP expense may be wholly and exclusively for the benefit of the Indian entity, it also ensures to building the brand of the foreign AE for which the foreign AE is obliged to compensate the Indian entity. The burden of the Revenue's song is this: an Indian entity, whose AMP expense is extraordinary (or 'nonroutine') ought to be compensated by the foreign AE to whose benefit also such expense enures. The 'nonroutine' AMP spend is taken to have 'subsumed' the portion constituting the 'compensation' owed to the Indian entity by the foreign AE. In such a scenario what will be required to be benchmarked is not the AMP expense itself but to what extent the Indian entity must be compensated. That is not within the realm of the provisions of Chapter X.

74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions

listed under the Explanation to Section 92B of the Act. The problem does not stop here. Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the ample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?

75. As an analogy, and for no other purpose, in the context of a domestic transaction involving two or more related parties, reference may be made to Section 40A(2)(a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the AO "is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods." In such event, "so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction." The AO in such an instance deploys the 'best judgment' assessment as a device to disallow what he considers to be an excessive expenditure. There is no corresponding 'machinery' provision in Chapter X which enables an AO to determine what should be the fair 'compensation' an Indian entity would be entitled to if it is found that there is an international transaction in that regard. In practical terms, absent a clear statutory guidance, this may encounter further difficulties. The strength of a brand, which could be product specific, may be impacted by numerous other imponderables not limited to the nature of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on. A simplistic approach using one of the modes similar to

the ones contemplated by Section 92C may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance.

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

Further in the judgment of Sony Ericsson Mobile Communication Pvt. Ltd. (supra), the High Court itself has distinguished the cases before it wherein there were cases which already themselves had accepted that there exists international transaction and there were other set of cases where the assessee has disputed the international transaction. This is clear from the following passage of the judgment: -

"120. Notwithstanding the above position, the argument of the Revenue goes beyond adequate and fair compensation and the ratio of the majority decision mandates that in each case where an Indian subsidiary of a foreign AE incurs AMP expenditure should be subjected to the 'bright line test' on the basis of

comparables mentioned in paragraph 17.4. Any excess expenditure beyond the bright line should be regarded as a separate international transaction of brand building. ***Such a broadbrush universal approach is unwarranted and would amount to judicial legislation. During the course of arguments, it was accepted by the Revenue that the TPOs/Assessing Officers have universally applied 'bright line test' to decipher and compute value of international transaction and thereafter applied 'Cost Plus Method' or 'Cost Method' to compute the arm's length price. The said approach is not mandated and stipulated in the Act or the Rules. The list of parameters for ascertaining the comparables for applying bright line test in paragraph 17.4 and, thereafter, the assertion in paragraph 17.6 that comparison can be only made by choosing comparable of domestic cases not using any foreign brand, is contrary to the Rules. It amounts to writing and prescribing a mandatory procedure or test which is not stipulated in the Act or the Rules. This is beyond what the statute in Chapter X postulates. Rules also do not so stipulate. The argument and reasoning in paragraph 17.6 in a way loses focus on the main issue and controversy; whether the arm's length price fixed between the two AEs is adequate and justified and would have been paid if the transaction was between two independent enterprises. The two independent enterprises must be two unrelated parties having no connection****. *It does not matter whether the comparables are domestic enterprises or not. However, and it is manifest that the*

comparable should have similar rights, if any, as the tested party in the brand name, trademark, etc.

121. During the course of hearing before us, counsel for the Revenue had submitted that paragraph 17.4 should be treated as illustrations and not as binding comparables. We would prefer to observe, that an Assessing Officer/ TPO can go and must examine the question whether the assessee is performing functions of a pure distributor or performing distribution and marketing functions, in the latter case, he must examine and ascertain whether the transfer price takes into consideration the marketing function, which would include AMP functions. This would ensure adequate transaction price and hence assure no loss of revenue. When the distribution and marketing functions are interconnected and reliable comparables are available, arm's length price could be computed as a package, if required and necessary by making adequate adjustments. When the Assessing Officer/TPO comes to the conclusion that it is not possible to compute arm's length price without segregating and dividing distribution and marketing or AMP functions, he can so proceed after giving justification and adequate reasons. At that stage, he would have apportioned the price received or the compensation paid by the foreign AE towards distribution and marketing or AMP functions. The TPO can then apply an appropriate method and compute the arm's length price of the two independently and even by applying separate methods. This will be in terms of the provisions of the Act and the Rules and also as per the general principles of international taxation accepted and applied universally. ***On the other hand, as recorded by us above, applying 'bright line test' on the***

basis of parameters prescribed in paragraphs 17.4 and 17.6 would be adding and writing words in the statute and the Rules and introducing a new concept which has not been recognised and accepted in any of the international commentaries or as per the general principles of international taxation accepted and applied universally. There is nothing in the Act or the Rules to hold that it is obligatory that the AMP expenses must and necessarily should be subjected to 'bright line test' and the nonroutine AMP expenses as a separate transaction to be computed in the manner as stipulated.”

58. Thus, form the plain reading of the aforesaid principles laid down by the Hon'ble Jurisdictional High Court, the key sequitur is that:

(i) International transaction cannot be identified or held to be existing simply because excess AMP expenditure has been incurred by the Indian entity.

(ii) International transactions cannot be found to exist after applying the BLT to decipher and compute value of international transaction.

(iii) There is no provision either in the Act or in the Rules to justify the application of BLT for computing the Arm’s Length Price and there is nothing in the Act which indicate how in the absence of BLT one can discern the existence of an international transaction as far as AMP expenditure is concerned.

(iv) Revenue cannot resort to a quantify the adjustment by determining the AMP expenses spent by the assessee after

applying BLT to hold it to be excessive and thereby evidencing the existence of the international transaction involving the AE.

59. Here in this case also, the TPO has tried to prove the international transaction, vis-à-vis, AMP after applying the BLT which now in view of settled law by the Hon'ble Jurisdictional High Court, such an approach has to be rejected. Hence at the very threshold the spending of AMP expenditure by the assessee cannot be held to be an international transaction between the assessee and its AE.

60. Another point which has been raised by the Revenue is that, huge spending of AMP expenses amounts to brand building and trade mark of the AE, and therefore, such a spending gives a benefit to the AE by enhancing its brand value which helps the AE in achieving sales in other territories or otherwise. This concept of brand building and whether such a brand building can be attributed to advertisement and sale promotions and thereby benefitting the AE, has been discussed in detail by the Hon'ble High Court in the case of **Sony Ericsson Mobile Communication vs. CIT (supra)** which for the sake of ready reference is reproduced hereunder: -

> "*Brand and brand building*
>
> *102. We begin our discussion with reference to elucidation on the concept of brand and brand building in the minority decision in the case of L. G. Electronics India Pvt Ltd. (supra). The term "brand", it holds, refers to name, term, design, symbol or any other feature that identifies one seller's goods or services as*

distinct from those of others. The word "brand" is derived from the word "brand" of Old Norse language and represented an identification mark on the products by burning a part. Brand has been described as a duster of functional and emotional 103 It is a matter of perception and reputation as it reflects customers' experience and faith. Brand value is not generated overnight but is created ever a period of time, when there is recognition that the logo or the name guarantees a consistent level of quality and expertise. Leslie de Chematony and McDonald have described "a successful brand is an identifiable product, service, person or place, augmented in such a way that the buyer or user perceives relevant, unique, sustainable added values which match their needs most closely". The words of the Supreme Court in Civil Appeal No. 1201 of 1966 decided on February 12, 1970, in Khushal Khenger Shah v. Khorshedbann Dabida Boatwala, to describe "goodwill", can be adopted to describe a brand as an intangible asset being the whole advantage of the reputation and connections formed with the customer together with circumstances which make the connection durable. The definition given by Lord MacNaghten in Commissioner of Inland Revenue v. Midler and Co. Margarine Ltd. [1901] AC 217 (223) can also be applied with marginal changes to understand the concept of brand. In the context of "goodwill" it was observed:

> *"It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired.*
>
> *I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by*

process of law. He may dispose of it if he will—of course, under the conditions attaching to property of that nature ... What is goodwill? It is a thing very easy to describe very difficult to define. It is the benefit and advantage of the good name, reputation, and: connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However, widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyse goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the all, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such. For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again ..."

104 "Brand" has reference to a name, trade mark or trade name. A brand like "goodwill", therefore, is a value of attraction to customers arising from name and a reputation for skill, integrity, efficient business management or efficient service. Brand creation and value, therefore, depends upon a great number of facts relevant for a particular business. It reflects the reputation which the proprietor of the brand has gathered over a passage or period of time in the form of widespread popularity and universal approval and acceptance in the eyes of the customer. To use words from CTT v. Chunilal Prabhudas and Co. [1970] 76 ITR 566 (Cal) ; AIR 1971 Cal 70, it would mean :

> *"It has been horticulturally and botanically viewed as 'a seed sprouting' or an 'acorn growing into the mighty oak of goodwill'. It has been geographically described by locality. It has been historically explained as growing and crystallising traditions in the business. It has been described in terms of a magnet as the 'attracting force'. In terms of comparative dynamics, goodwill has been described as the 'differential return of profit'. Philosophically it has been held to be intangible. Though immaterial, it is materially valued. Physically and psychologically, it is a 'habit and sociologically it is a 'custom'. Biologically, it has been described by Lord Macnaghten in Trego v. Hunt [1896] AC 7 as the 'sap and life' of the business."*

There is a line of demarcation between development and exploitation. Development of a trade mark or goodwill takes place over a passage of time and is a slow ongoing process. In cases of well recognised or known trade marks, the said trade mark is already recognised. Expenditures incurred for promoting product(s) with a trade mark is for exploitation of the

trade mark rather than development of its value. A trade mark is a market place device by which the consumers identify the goods arid services and their source. In the context of trade mark, the said mark symbolises the goodwill or the likelihood that the consumers will make future purchases of the same goods or services. Value of the brand also would depend upon and is attributable to intangibles other than trade mark. It refers to infra-structure, know-how, ability to compete with the established market leaders. Brand value, therefore, does not represent trade mark as a standalone asset and is difficult and complex to determine and segregate its value. Brand value depends upon the nature and quality of goods and services sold or dealt with'. Quality control being the most important element, which can mar or enhance the value.

Therefore, to assert and profess that brand building as equivalent or substantial attribute of advertisement and' sale promotion would be largely incorrect. It represents a coordinated synergetic impact created by assort- merit largely representing reputation and quality. There are a good number of examples where brands have been built without incurring substantial advertisement or promotion expenses and also cases where in spite of extensive and large scale advertisements, brand values have not been created. Therefore, it would be erroneous and fallacious to treat brand building as counterpart or to commensurate brand with advertisement expenses. Brand building or creation is a vexed and complexed issue, surely not just related to advertisement. Advertisements may be the quickest and effective way to tell a brand story to a large audience but just that is not enough to create or build a brand. Market value of a brand would depend upon how many

customers you have, which has reference to brand goodwill, compared to a baseline of an unknown brand. It is in this manner that the value of the brand or brand equity is calculated. Such calculations would be relevant when there is an attempt to sell or transfer the brand name. Reputed brands do not go in for advertisement with the intention to increase the brand value but to increase the sales and thereby earn larger and greater profits. It is not the case of the Revenue that the foreign associated enterprises are in the business of sale/transfer of brands.

Accounting Standard 26 exemplifies distinction between expenditure HJ7 incurred to develop or acquire an intangible asset and internally generated goodwill. An intangible asset should be recognised as an asset, if and only if, it is probable that future economic benefits attributable to the said asset will flow to the enterprise and the cost of the asset can be measured reliably. The estimate would represent the set off of economic conditions that will exist over the useful life of the intangible asset. At the initial stage, intangible asset should be measured at cost. The above proposition would not apply to internally generated goodwill or brand. Paragraph 35 specifically elucidates that internally generated goodwill should not be recognised as an asset. In some cases expenditure is incurred to generate future economic benefits but it may not insult in creation of an intangible asset in the form of goodwill or brand, which meets the recognition criteria under AS-26. Internally generated goodwill or brand is not treated as an asset in AS-26 because it is not an identifiable resource controlled by an enterprise, which can be reliably measured at cost. Its value

can change due to a range of factors. Such uncertain and unpredictable differences, which would occur in future, are indeterminate. In subsequent paragraphs, AS-26 records that expenditure on materials and services used or consumed, salary, wages and employment related costs, overheads, etc., contribute in generating internal intangible asset. Thus, it is possible to compute good- will or brand equity/value at a point of time but its future valuation would be perilous and an iffy exercise.

In paragraph 44 of AS-26, it is stated that intangible asset arising from development will be recognised only and only if amongst several factors, can demonstrate a technical feasibility of completing the intangible asset: that it will be available for use or sale and the intention is to complete the intangible asset for use or sale is shown or how the intangible asset generate probable future benefits, etc. The aforesaid position finds recognition and was accepted in CIT v. B. C. Srinivasa Setty [1981] 128 ITR 294 (SC); [1981] 2 SCC 460, a relating transfer to goodwill. Goodwill, it was held, was a capital asset and denotes benefits arising from connection and reputation. A variety of elements go into its making and the composition varies in different trades, different businesses in the same trade, as one element may pre-dominate one business, another element may dominate in another business. It remains substantial in form and nebulous in character. In progressing business, brand value or goodwill will show progressive increase but in falling business, it may vain. Thus, its value fluctuates from one moment to another, depending upon reputation and everything else relating to business, personality,

business rectitude of the owners, impact of contemporary market reputation, etc. Importantly, there can be no account in value of the factors producing it and it is impossible to predicate the moment of its birth for it comes silently into the world unheralded and unproclaimed. Its benefit and impact need not be visibly felt for some time. Imperceptible at birth, it exits unwrapped in a concept, growing or fluctuating with numerous imponderables pouring into and affecting the business. Thus, the date of acquisition or the date on which it comes into existence is not possible to determine and it is impossible to say what was the cost of acquisition. The aforesaid observations are relevant and are equally applicable to the present controversy. It has been repeatedly held by the Delhi High Court that advertisement 110 expenditure generally is not and should not be treated as capital expenditure incurred or made for creating an intangible capital asset. Appropriate in this regard would be to reproduce the observations in CTT v. Monto Motors Ltd. [2012] 206 Taxman 43 (Delhi), which read:

> *"4. . . . Advertisement expenses when incurred to increase sales of products are usually treated as a revenue expenditure, since the memory of purchasers or customers is short. Advertisement are issued from time to time and the expenditure is incurred periodically, so that the customers remain attracted and do not forget the product and its qualities. The advertisements published/displayed may not be of relevance or significance after lapse of time in a highly competitive market, wherein the products of different companies compete and are available in abundance. Advertisements and sales promotion are conducted to increase*

sale and their impact is limited and felt for a short duration. No permanent character or advantage is achieved and is palpable, unless special or specific factors are brought on record. Expenses for advertising consumer products generally are a part of the process of profit earning and not in the nature of capital outlay. The expenses in the present case were not incurred once and for all, but were a periodical expenses which had to be incurred continuously in view of the nature of the business. It was an on-going expense. Given the factual matrix, it is difficult to hold that the expenses were incurred for setting the profit earning machinery in motion or not for earning profits.".

(Also see, CIT v. Spice Distribution Ltd., I. T. A. No. 597 of 2014, decided by the Delhi High Court on September 19, 2014 [2015] 374 ITR 30 (Delhi) and CTT v. Salora International Ltd. [2009] 308 ITR 199 (Delhi).

Accepting the parameters of the "bright line test" and if the said para meters and tests are applied to Indian companies with reputed brands and substantial AMP expenses would lead to difficulty and unforeseen tax implications and complications. Tata, Hero, Mahindra, TVS, Baja], Godrej, Videocon group and several others are both manufacturers and owners of intangible property in the form of brand names. They incur substantial AMP expenditure. If we apply the "bright line test" with reference to indicators mentioned in paragraph 17.4 as well as the ratio expounded by the majority judgment in L. G. Electronics India Pvt Ltd.'s case (supra) in paragraph 17.6 to bifurcate and segregate the AMP expenses towards brand

building and creation, the results would be startling and unacceptable. The same is the situation in case we apply the parameters and the "bright line test" in terms of paragraph 17.4 or as per the contention of the Revenue, i.e., AMP expenses incurred by a distributor who does not have any right in the intangible brand value and the product being marketed by him. This would be unrealistic and impracticable, if not delusive and misleading (aforesaid reputed Indian companies, it is patent, are not to be treated as comparables with the assessee, i.e., the tested parties in these appeals, for the latter are not the legal owners of the brand name/trade mark).

112. Branded products and brand image is a result of consumerism and a commercial reality, as branded products "own" and have a reputation of intrinsic believability and acceptance which results in higher price and margins. Trans-border brand reputation is recognised judicially and in the commercial world. Well known and renowned brands had extensive goodwill and image, even before they became freely and readily available in India through the subsidiary associated enterprises, who are assessees before us. It cannot be denied that the reputed and established brands had value and goodwill. But a new brand/trade mark/trade-name would be relatively unknown. We have referred to the said position not to make a comparison between different brands but to highlight that these are relevant factors and could affect the function undertaken which must be duly taken into consideration in selection of the comparables or when making subjective adjustment and, thus, for computing the arm's length price. The aforesaid discussion substantially negates and rejects the Revenue's case. But there are aspects

and contentions in favour of the Revenue which requires elucidation."

60. Thus, the Hon'ble High Court after describing the concept of the "brand" had made a clear cut demarcation between development and exploitation of brand which is either in the form of trademark or goodwill which takes place over a passage of time by which its value depends upon and is attributable to intangibles other than trademark like, infrastructure, knowhow, ability to compete in the established market, lease, etc. Brand value does not represent trademark as asset and it is quite difficult to determine and segregate its value. Brand value largely depends upon the nature of goods and services sold, after sales services, robust distributorship, quality control, customer satisfaction and catena of other factors. The advertisement is more telling about the brand story, penetrating the mind of the customers and constantly reminding about the brand, but it is not enough to create brand, because market value of a brand would depend upon how many customers you have, which has reference to a brand goodwill. There are instances where reputed brand does not go for advertisement with the intention to increase the brand value but to only increase the sale and thereby earning greater profits. It is also not the case here that foreign AE is in the business of sale/transfer of brands. Their Lordships have also referred to Accounting Standard 26 which provides for computation of goodwill and brand equal value at a point of time but not its future valuation or how such an intangible asset will generate probable future benefit. Because, the value fluctuates from one moment to other depending upon reputation and other factors. Reputation of a brand only enhances the sale and profitability and here in this case is only benefitting the assessee company when

marketing its products using the trade mark and the brand of AE. Even otherwise also, the value of the brand which has been created in India by the assessee company will only be relevant when at some point of time the foreign AE decides to sell the brand, then perhaps that would be the time when brand value will have some significance and relevance. But to make any transfer pricing adjustment simply on the ground that assessee has spent advertisement, marketing expenditure which is benefitting the brand/trademark of the AE would not be correct approach. Thus, this line of reasoning given by the TPO is rejected.

61. Further in the final report of **Action 8-10 of Base Erosion and Profit Shifting Project (BEPS)** of OECD titled as **"Aligning Transfer Pricing Outcomes with Value Creation'.** It has been suggested that no adjustment is required on AMP expenditure incurred by full-fledged manufacturers. The report contains various examples pertaining to manufacturer. The following passage from the report is quite relevant which for the sake of ready reference is quoted hereinbelow:

> "6.40 The legal owner will be considered to be the owner of the intangible for transfer pricing purposes. If no legal owner of the intangible is identified under applicable law or governing contracts, then the member of the MNE group that, based on the facts and circumstances, controls decisions concerning the exploitation of the intangible and has the practical capacity to restrict others from using the intangible will be considered the legal owner of the intangible for transfer pricing purposes.
>
> 6.41 In identifying the legal owner of intangibles, an intangible and any licence relating to that intangible are considered to be

different intangibles for transfer pricing purposes, each having a different owner. See paragraph 6.26. For example, Company A, the legal owner of a trademark, may provide an exclusive licence to Company B to manufacture, market, and sell goods using the trademark. One intangible, the trademark, is legally owned by Company A. Another intangible, the licence to use the trademark in connection with manufacturing, marketing and distribution of trademarked products, is legally owned by Company B. Depending on the facts and circumstances, marketing activities undertaken by Company B pursuant to its licence may potentially affect the value of the underlying intangible legally owned by Company A, the value of Company B's licence, or both.

6.42 While determining legal ownership and contractual arrangements is an important first step in the analysis, these determinations are separate and distinct from the question of remuneration under the arm's length principle. **For transfer pricing purposes, legal ownership of intangibles, by itself, does not confer any right ultimately to retain returns derived by the MNE group from exploiting the intangible, even though such returns may initially accrue to the legal owner as a result of its legal or contractual right to exploit the intangible**. **The return ultimately retained by or attributed to the legal owner depends upon the functions it performs, the assets it uses, and the risks it assumes, and upon the contributions made by other MNE group members through their functions performed, assets used, and risks assumed**. For example, in the case of an internally developed intangible, if the legal owner performs no relevant

functions, uses no relevant assets, and assumes no relevant risks, but acts solely as a title holding entity, the legal owner will not ultimately be entitled to any portion of the return derived by the MNE group from the exploitation of the intangible other than arm's length compensation, if any, for holding title."

From the above quoted passage, it can be seen that the guidelines clearly envisage that legal ownership of intangibles, by itself, does not confer any right ultimately to retain returns derived by MNE group from exploiting the intangibles, even though such returns is initially accruing to the legal owner as a result of its legal/contractual right to exploit the intangible. The return depends upon the functions performed by the legal owner, assets it uses, and the risks assumed; and if the legal owner does not perform any relevant function, uses no relevant assets, and assumes no relevant risks, but acts solely as a title holding entity, then the legal owner of the intangible will not be entitled to any portion of the return derived by the MNE group from the exploitation of the intangible other than the Arm's Length compensation if any for holding the title. Here also the PepsiCo Inc which is legal owner of the trademark license to the assessee has not performed any relevant function or used any assets or assumed any risk *albeit* has acted only as a title holder. It is not even entitled to any return for holding such title and in such circumstances, there seems to be no reason as to why it should compensate its subsidiary in India for the marketing activities while operating in India as a full-fledged manufacturer who alone is reaping the profit from the operation in India. It has been clearly demonstrated by the assessee that the risk with respect to its manufacturing operation in India was undertaken

wholly by the assessee and not by the US parent AE. This is even evident from the various clauses of the agreement also.

62. Before us, learned CIT-DR submitted that the stand of the Revenue is that, the expenditure incurred by the Indian subsidiary of an MNE group on market function amounts to incurring of such expenses for and on behalf of the parent company outside India because;

- *Firstly*, such kind of expenses promote the brand/trademarks that are legally owned by the foreign parent AE;
- *Secondly*, these expenditures create or develop marketing intangibles in the form of brands, trademarks, customer list dealer/distribution channels, etc. even though Indian company may not be the owner or have any right in these intangibles, but development of such intangibles deserves compensation for computing the value of compensation and the required adjustment. A comparison of the average of AMP spent by the comparables in a similar line of business has to be made to determine the routine amount spent on AMP for the product sale and any such expenditure over and above is purely for developing the brand value or other marketing intangibles for the benefit of the AE; and it is in the form of the service to the AE which requires adjustment along with the markup of the service charge on the same work out on the cost plus basis.
- *Lastly,* the functions relating to DEMPE (Development, Enhancement, Maintenance, Protection and Exploitation) results into many direct and indirect benefits, which are by way of increase revenue from the territory on account of sale/royalty/FTS etc. and in some cases it may make revenue

enhancement in the other parts of the world. The direct benefit is by way of obtaining an advantage in the terms of the development of market for themselves and also leads to enhancement of the exit value.

63. Before examining as to whether any transfer pricing adjustment on AMP is required or not for the reason stated above, the first and foremost condition is that, existence of an international transaction in relation to any service of benefit has to be established before the transfer pricing provision can be triggered so as to place value on service of benefit for the purpose of determining the compensation. Mere fact of excessive AMP expenditure cannot establish the existence of such a transaction. It is only when such a transaction is established then perhaps it may be possible to bench mark it separately. Under the Indian Transfer Pricing provisions, it has been well established over the period of time that detailed FAR analysis has to be carried out to identify all the functions of resident tax payer company and the non-resident AEs pertaining to all the international transactions like purchase of raw material, payment of royalty, purchase of finished goods, export of finished goods, support services or whether there is any direct sales by AE in India. Further it needs to be seen, whether marketing activities relating to DEMPE functions reflected in any such expenditure incurred by the resident tax payer company and the non-resident AE in India are in conformity with the functions and risk profiles and the benefit derived by the tax payer company and the AE. It is also very relevant to examine, whether the AE is assuming any kind of risk in the Indian market or is benefitting from India in one way or the other. Thus, FAR analysis is the key which needs to be seen what kind of functions is being carried out by the AE in India, the nature

of assets which have been deployed and the risk which have been assumed. If there is no risk of such attributes which is being carried out by the non-resident AE in India then there is no question of AE compensating to its subsidiary in India for any marketing expenses. Here, we have already stated at several places that parent AE of the assessee-company has not carried out any function in India and had not assumed any risk in India and even for the license for use of trademark, no royalty has been paid. Hence, no benefit whatsoever has accrued to the parent AE. Accordingly, we are of the opinion that under these facts and circumstances of the case it is very difficult to attribute any kind of Arm's Length compensation which is supposed to be made by the AE to the assessee company.

64. Thus, in view of discussion made above, we hold that, *firstly*, there is no international transaction in the form of any agreement or arrangement on AMP expenditure incurred by the assessee company; and *secondly*, under FAR analysis also, no such benefit from the AMP expenditure having any kind of bearing on the profits, income, losses or assets as accrued to the AE or any kind of benefit has arisen to the AE.

65. As stated above, from the Assessment Years 2006-07 to Assessment Year 2008-09, the TPO has applied BLT not only for identifying the international transaction but also for making the adjustment. From the Assessment Years 2010-11 to 2012-13 TPO has changed his stand and adjustment has been made by applying **'Profit Split Method'**. As per Rule 10B(1)(d) PSM has to be applied, vis-à-vis the international transaction involving unique intangibles in the following manner: -

(i) the combined net profit of the associated enterprises ("AEs") arising from the international transaction in which they are engaged is to be determined first;

(ii) the relative contribution made by each of the AEs to the earning of such combined net profit is to be evaluated thereafter on the basis of functions performed, assets employed and risks assumed by each enterprise (FAR) and on the basis of reliable external market data vis-à-vis independent parties;

(iii) the combined net profit is to be then split amongst the AEs in proportion to their relative contributions;

(iv) the profit thus apportioned to the assessee is to be taken into account to arrive at an arm's length price (ALP) in relation to the international transaction.

(v) Alternatively, the combined net profit may be initially partially allocated to each enterprise so as to provide it with a basic return appropriate for the type of international transaction, in which it was engaged, with reference to market returns achieved for similar types of transactions by independent enterprises, and thereafter, the residual profit remaining after such allocation may be split amongst the enterprises in proportion to their relative contribution as per (ii) and (iii) above, and in such a case the aggregate of the net profit allocated to the enterprise in the first instance together with the residual net profit apportioned to that enterprise is to be taken to be the net profit arising to that enterprise from the international transaction."

The OECD Transfer Pricing Guidelines, 2010 provides that PSM first requires the identification of the profits which is to be split among

the AEs, from the controlled transactions in which the AEs were engaged (the combined profit). Thereafter, the combined profit between the AEs is required to be split on an economically valid basis that approximates the division of profits that would have been anticipated and reflected in an agreement made at arm's length. The combined profit to be split should only be those arising from the controlled transaction. In determining those profits, it is essential to first identify the relevant transaction to be covered under PSM. Where a taxpayer has controlled transactions with more than one AE, it is also necessary to identify the parties in relation to that transaction. Comparable data is relevant in the profit split analysis to support the division of profits that would have been achieved between independent parties in comparable circumstances. However, where comparable data is not available, the allocation of profits may be based on division of functions (taking account of the assets used and risks assumed) between the AEs. Further, the TP Guidelines also suggest two approaches in the effective application of PSM, which are: -

(i) **Contribution analysis**: Under the contribution analysis, the combined profits, which are the total profits from the controlled transactions under examination, would be divided between the associated enterprises based upon a reasonable approximation of the division of profits that independent enterprises would have expected to realize from engaging in comparable transactions.

(ii) **Residual analysis:** Under the residual analysis, the combined profits from the controlled transactions under examination is done in two stages; in the first stage,

each participant is allocated an arm's length remuneration for its non-unique contributions in relation to the controlled transactions in which it is engaged; and in the second stage, any residual profit (or loss) remaining after the first stage division would be allocated among the parties based on an analysis of the facts and circumstances.

As per the aforesaid guidelines which has also been referred by the TPO in his order and the relevant rules, we are of the opinion that, first of all, TPO is required to determine the combined profit arisen from international transaction of incurring AMP expenses and then he is required to split the combined profit in proportionate to the relative contribution of the assessee and the AE. Here, the TPO has neither applied PSM correctly nor has he analysed the contribution made by both entities on the relative value of FAR of each of the entity. He has also not provided any reliable external data based on which the relative contribution of the entities involved in the transaction could have been evaluated either. He has applied PSM by taking the finance of the US part AE and has determined the rate of 35% allocable towards marketing activities by relying upon judgment of the Tribunal in Roll Royce PLC vs. DDIT (supra) and has applied the same to the global net profit of the US parent AE to arrive at the global profit of US parent AE from marketing activities. Thereafter, he has compared the AMP spent by the AE with that of the assessee company and multiplied that ratio with the global net profit of the US parent AE arising from marketing activities to compute the Transfer Pricing Adjustment on account of AMP expenses. Such an approach of the learned TPO at the threshold is wholly erroneous, because PSM is applicable mainly in international

transaction involving transfer of unique intangibles or in multiple international transactions which are interrelated and interconnected that they cannot be evaluated separately for the purpose of determining the Arm's Length Price of any one transaction. Here in this case this is not in dispute that no transfer of any unique intangibles has been made accept for license to use trademark which too was royalty free. According to the Rule, under the PSM, combined net profit of the AEs arising from the international transaction has to be determined and thereafter, if incurrence of AMP expenses is to be considered from the value of such international transaction then the combined profit has to be determined from the value of such international transaction. No FAR analysis of AE has been carried out or even demonstrated that any kind of profit has been derived by the AE from the AMP expenses incurred in India. Otherwise also, the profit earned on account of AMP expenses incurred by the assessee by way of economic exploitation of the trademark/brand in India already stands captured in the profit and loss account for the assessee company and the same has duly offered to tax and hence there was no logic to compute or make any Transfer Pricing Adjustment on this score.

66. The TPO has followed the same reasoning in the Assessment Year 2013-14 also, but the DRP did not find any substance in the TPO's approach and directed the application of **'Other Method'** as prescribed under Rules as against the application of PSM. By applying 'Other Method', adjustment had been made by comparing the AMP/sales ratio of the US parent AE with that of the assessee company and thereafter the DRP has considered the excessive AMP spent by the assessee company as a Transfer Pricing Adjustment.

The only difference between the earlier approach of the TPO and the approach adopted by the DRP is that, earlier TPO compared the AMP/sales of the party, i.e., the assessee with that of the third party and now the DRP compares the AMP/sales of the assessee company with that of the parent AE. In our opinion, even the 'Other Method' has been incorrectly implied for the sake of ready reference Rule 10AB reads as under: -

> **"Other method of determination of arm's length price.**
> *10AB. For the purposes of clause (f) of sub-section (1) of section 92C, the other method for determination of the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts."*

The aforesaid Rule provides that that "Other Method" shall be any method which takes into account the price which had been charged or paid for the same or similar uncontrolled transaction with or between non-associated enterprises under similar circumstances. Comparison of the AMP over sales ratio of the assessee with the AMP ratio of Pepsi Co Group on a worldwide basis was nothing but a distorted version of the BLT.

67. In view of the above discussion, we hold that in none of the years impugned before us, the AMP adjustment made by the TPO/Assessing Officer can be sustained and accordingly, same is directed to be deleted.

68. In result thereof, Grounds No. 4 to 4.14 in I.T.A. No. 1334/CHANDI/2010 pertaining to AY 2006-07; Grounds No. 4 to 4.10 in I.T.A. 1203/CHANDI/2011 pertaining to AY 2007-08; Grounds No. 5 to 5.30 in I.T.A. 2511/DEL/2013 pertaining to AY 2008-09; Grounds No. 4 to 6.22 in I.T.A. 1044/CHANDI/2014 pertaining to AY 2009-10; Grounds No. 3 to 26 in ITA 4516/DEL/2016 pertaining to AY 2010-11; Grounds No. 3 to 26 in ITA 4517/DEL/2016 pertaining to AY 2010-11; Grounds No. 3 to 26 in ITA 4518/DEL/2016 pertaining to AY 2011-12; Grounds No. 7 to 32 in ITA 6537/DEL/2016 pertaining to AY 2012-13; and Grounds No. 3 to 28 in I.T.A. No. 6582/DEL/2017 pertaining to AY 2013-14 are decided in favour of the assessee and accordingly these grounds are allowed.

Transfer Pricing Adjustment amounting to INR 49,71,908/- pertaining to the IT support services segment [Ground Nos. 29 to 34 in ITA No. 6582/Del/2017 pertaining to AY 2013-14]

69. The AO/TPO have made a Transfer Pricing Adjustment of INR 49,71,908/- in the IT Support Services Segment by re-characterizing the assessee, who is back-end service provider, as a software developer. Mr. Chopra, submitted that the said issue has been rendered academic since the entire amount of adjustment has been deleted in the final assessment order dated 27.09.2017 after the grant of working capital adjustment as directed by the DRP vide order dated 21.08.2017.

70. In view of the above, grounds pertaining to incorrect characterization of the functional profile of the assessee, do not require adjudication at this stage, hence same is dismissed.

Accordingly, Grounds No. 29 to 34 in I.T.A. No. 6582/DEL/2017 for AY 2013-14 are dismissed as being academic.

Re: Transfer Pricing Adjustment amounting to INR 10,42,067/- on account of receivables [Ground Nos. 35 to 41 in ITA No. 6582/Del/2017 pertaining to AY 2013-14]

71. During AY 2013-14, the TPO has made a Transfer Pricing Adjustment amounting to INR 10,42,067/- on account of re-characterization of the outstanding receivables from overseas AEs as loan facility and thereby imputing interest at the rate equal to rate of 6 months LIBOR plus 400 basis points i.e. an interest rate of 4.45690% per annum, as the most appropriate CUP, on receivables outstanding in the books of the Assessee beyond 30 days. The TPO on the perusal of the balance-sheet noted that there were receivables from which he pointed out that the payment for the invoices raised by the assessee were not received within the stipulated time. The TPO opined that in such circumstances the delayed payment had to be treated as unsecured loans advanced to the AEs on which he proposed to charge a normal rate of interest for the period of delay in receipt of the payment beyond the time stipulated in the services agreement. The assessee in response to the show-cause notice submitted that the benchmarking of receivables could not have been done as it was not an international transaction which warranted any kind of benchmarking. However, the TPO after detailed discussions and relying upon the provisions of section 92B(1) read with section 92F(v), held that it was an international transaction and after detailed discussion, held that interest rate of 4.45690% per annum based on 6 months LIBOR plus 400 basis points should be applied; and accordingly, made the

adjustment after detailed calculation which worked out to INR 10,42,067/-. The DRP confirmed the said action of the TPO, which culminated in the final assessment order dated 27.09.2017.

72. Before us, the learned counsel for the assessee, at the outset, submitted that as per commercial policy of the assessee, it does not charge interest from AEs as well as Non-AEs and thus, there is an internal CUP for benchmarking the transactions, i.e., both for the controlled and uncontrolled transactions assessee had not been charging interest, and therefore, no adjustment could be made. In support, he drew our attention to Note 21 to the Profit & Loss A/c of the assessee for AY 2013-14. It was also brought to our notice that the assessee had availed interest free External Commercial Borrowings (ECBs) amounting to INR 705 crores from its AE. The said ECB was disclosed in Note 5 to the Profit & Loss A/c of assessee for AY 2013-14 and reads as under: -

(Rs. in lacs)

Note 5	Non current portion		Current portion	
	As at 31 March 2013	As at 31 March 2012	As at 31 March 2013	As at 31 March 2012
Long-term borrowings (unsecured)				
Deferred payment liability - Sales tax	581	996	342	336
External commercial borrowing (ECB)*	70,558	66,209	-	-
	71,139	**67,205**	**342**	**336**

*The Company has taken Inter company ECB from PepsiCo Panimex Inc. Mauritius (holding company) which carries Nil rate of interest. The loan was received over 2009-2011 and is repayable after 5 years starting from 2014.

It was further pointed out by Mr. Chopra, that for A.Y. 2013-14, total receivables outstanding for period exceeding six months from the date they became due for payments had been disclosed in Note 16 to the Profit & Loss A/c of the assessee for AY 2013-14, which revealed that: -

(i) Receivables due from AEs – INR 17 crores.

(ii) Receivables due from Non - AEs – INR 320 crores.

On the basis of these documents, the learned counsel argued that, since it was not charging any interest from its unrelated parties, it was not fair for the TPO to allege that the assessee was trying to confer a benefit upon its AEs by not charging interest on its outstanding receivables. He further submitted that TPO's allegations are not tenable in view of the fact that even assessee's AEs were also not charging interest from the assessee. Ld. Counsel strongly relied upon two recent decisions in the case of **B.C. Management Services (P) Ltd vs. DCIT [IT APPEAL NOS. 5829, 6134 (DELHI) OF 2015, 6572 (DELHI) OF 2016 dated 25.05.2017]** and **Axis Risk Consulting Services (P.) Ltd. vs. DCIT [IT APPEAL NO. 3693 (DELHI) OF 2014 dated 22.02.2018]** wherein it was held that "*Where assessee gave similar credit period to third parties as was given to AE, TP adjustment made by TPO by imputing interest on delay in receipt of receivables from AE was uncalled for*".

73. He further submitted that it was a settled principle of law that where there was complete uniformity in act of an assessee in not charging interest from both AEs and non-AEs debtors, for delay in realization of export proceeds, it was not open to the TPO/AO to make addition on account notional interest on delayed receivables to assessee's ALP. The assessee, in this regard, placed reliance on the decisions of a coordinate bench of this Tribunal in Micro Inks Ltd. vs ACIT [2013] 144 ITD 610 (Ahmedabad - Trib.). Further reliance was placed on the decisions of; CIT vs. Indo-American Jewellery Ltd. (supra), Bartronics India Ltd. Vs. DCIT [2017] 86 taxmann.com 254 (Hyderabad - Trib.), Deputy Commissioner of Income-tax, Circle - 16(1), Hyderabad vs. Lanco Infratech Ltd. [2017] 81 taxmann.com 381 (Hyderabad - Trib.), Dinurje Jewellery

(P.) Ltd. vs. Income-tax Officer, 5(1)(3), Mumbai [2014] 51 taxmann.com 41 (Mumbai - Trib.) and M/s Lintas India Pvt. Ltd. v. ACIT [TS-713-ITAT-2012 (Mum)-TP].

74. Thereafter, he cited the decision of a coordinate bench of this Tribunal in **BC Management Services (P.) Ltd. v. DCIT [2017] 83 taxmann.com 346 (Delhi Trib.)**, wherein it was observed that when a similar credit period is given to both AEs as well as third parties, then, there cannot be any adjustment as in such situations there is a direct comparable uncontrolled price to analyze. Further, as per the terms of the agreement, there was no credit period specified for the transactions to which the receivables pertained and as picked up by the TPO. In this regard, our attention was drawn to the decision of a coordinate bench of this Tribunal **GSS Infotech Limited vs. ACIT TS-298-ITAT-2016(HYD)-TP**, wherein, the Hon'ble Tribunal deleted the interest charged on receivable outstanding beyond two months. In addition to above, the Ld. counsel submitted that the TPO and the DRP fell in error as it is settled position of law that where outstanding receivable are inextricably linked with the main international transaction, benchmarking of which has been accepted by the TPO, no further adjustment on account of notional interest is warranted. In this regard, the learned counsel for the assessee placed reliance on the decision of the Hon'ble High Court of Delhi in **Sony Ericsson Mobile Communication India (P.) Ltd. (supra)**, wherein the Hon'ble High Court explained the theory of 'bundled transaction approach' as follows:

> *"In case the tested party is engaged in single line of business, there is no bar or prohibition from applying the TNM Method on entity level basis. The focus of this method is on net profit*

amount in proportion to the appropriate base or the PLI. In fact, when transactions are inter-connected, combined consideration may be the most reliable means of determining the arm's length price. There are often situations where closely linked and connected transactions cannot be evaluated adequately on separate basis...

Where the Assessing Officer/TPO accepts the comparables adopted by the assessed, with or without making adjustments, as a bundled transaction, it would be illogical and improper to treat AMP expenses as a separate international transaction, for the simple reason that if the functions performed by the tested parties and the comparables match, with or without adjustments, AMP expenses are duly accounted for. It would be incongruous to accept the comparables and determine or accept the transfer price and still segregate AMP expenses as an international transaction"

75. The learned counsel for the assessee also placed reliance on the decision of a coordinate bench of this Tribunal in **DCIT vs. Indo American Jewellery Limited [2012] 50 SOT 528 (Mumbai)**, wherein the Hon'ble Bench held as follows:

"On close reading of section 92B of the Act, it transpires that the transactions of 'sale' and 'lending money' have been distinctly set out. Transaction of 'sale' results into profit and that of 'lending money' gives interest income. Thus, it is evident that interest income is associated only with the lending or borrowing of money and not with sale. So if the international transaction is that of 'sale', the arm's length price is determined qua the 'sale price'. Of course, while determining the ALP in a sale transaction, all the relevant aspects including the credit period

allowed are taken into view. On the other hand, if the international transaction is that of 'lending or borrowing money', the arm's length price is gauged qua the 'interest'. When the international transaction is that of 'sale', the interest aspect is embedded in it. There can be no separate international transaction of 'interest' in the international transaction of sale. Early or late realization of sale proceeds is only incidental to the transaction of sale, but not a separate transaction in itself. If the ALP in respect of an international transaction of 'sale' is determined, then there can be no question of treating the non-receipt of interest in such sale transaction as a separate international transaction warranting any further adjustment. One may also contend that the expression 'any other transaction having a bearing on the profits, income, losses .' as employed in section 92B defining international transaction would encompass such interest from sale as the non-receipt of due interest would have the effect on profits or income. This contention also does not merit acceptance because when 'sale' and 'lending money' have been specifically included in definition of 'international transaction' under section 92B, then the expression 'any other transaction' used in the later part of this provision will exclude all the items separately covered. In this view of the matter, it becomes manifest that there can be no separate international transaction of interest income which is part of the transaction of sale. Once ALP is determined in respect of the sale transaction, it would be deemed to be covering all the elements and consequences of the transaction of sale. Having determined ALP in a sale transaction, it cannot be accepted that separate adjustment de hors such determination is required in respect of interest."

The said ruling of the Tribunal has been affirmed by the Hon'ble Bombay High Court in **CIT vs. Indo American Jewellery Ltd. [2014] 223 Taxman 8 (Bombay)(MAG)**.

76. Thereafter, the learned counsel for the assessee placed reliance on the decision of the decision of a coordinate bench of this Tribunal in **Kusum Healthcare (P.) Ltd. vs. ACIT [2015] 42 ITR(T) 77**, wherein it was observed that the approach of the assessee in aggregating the international transactions pertaining to sale of goods to AE and receivables arising from such transactions which are undoubtedly inextricable connected is in accordance with established transfer pricing principles as well as ratio laid down by the Hon'ble jurisdictional High Court in the case of **Sony Ericsson Mobile Communication India (P.) Ltd (supra)**. It was submitted that the said decision has been affirmed by the Hon'ble High Court of Delhi in **PCIT vs. Kusum Healthcare Pvt. Ltd. ITA 765/2016 (judgment delivered on 25.04.2017)**.

76. On the other hand, the learned DR relied upon the order of the TPO and the DRP in support of his contentions.

77. After considering the rival submission and on perusal of the relevant finding given in the impugned order, we find that the assessee company as a matter of commercial policy neither charged interest on AEs nor from the non-AEs on outstanding trading receivables. In that scenario, there is an internal CUP for bench marking the transaction, i.e., under the control and uncontrol transaction, assessee has not been charging interest. Assessee has also availed external commercial borrowing amounting to Rs.705

crore which has already been incorporated above and for the Assessment Year 2013-14 total receivable outstanding for the period exceeding six months from the date it had become due for payment had been disclosed in the P&L account which reveals that receivable dues from AEs were Rs.317 crore, whereas from the non-AEs it was Rs.320 crore. Once, no interest has been charged on receivables from unrelated parties, then to allege that assessee is conforming any benefit to its AE by not charging the interest on its outstanding receivable would not be correct under the Arm's Length scenario, because here in this case in a comparability analysis of both control and uncontrol transaction, no benefit has arisen from delay in trade receivables from the AE. Now it is quite well settled proposition in the wake of various judicial pronouncements as has been relied upon by the learned counsel that, when there is a complete uniformity in the act of the assessee in not charging interest from both AEs and non AEs debtors for delay in realization of export proceeds then Assessing Officer/TPO cannot make addition on account of notional interest on delay receivables, because similar credit period of given to both related and unrelated parties. Hence, no adjustment should be called for. Accordingly, we hold that no adjustment on account of notional interest is warranted.

78. In the result, Ground No.3 pertaining to Assessment Year 2013-14 are allowed.

Jurisdictional issue.

79. In Ground No. 4 to 6 in I.T.A. No. 6537/DEL/2016 for AY 2012-13, the assessee has challenged the final assessment order dated 22.11.2016 passed by the AO as being barred by limitation.

The assessee has not pressed this ground and therefore, the same is decided against the assessee and in favour of the revenue.

Corporate Tax issues:

Re: Disallowance of Price Support given to Bottlers:

80. In Grounds No. 5 to 5.5 in I.T.A. No. 1203/CHANDI/2011 for AY 2007-08, Grounds No. 6 to 6.4 in I.T.A. No. 2511/DEL/2013 for AY 2008-09 and Grounds No. 8 to 8.5 in I.T.A. No. 1044/DEL/2014 for AY 2009-10, the assessee has challenged the addition made by the AO on account of Price Support given to Bottlers. The Price Support given by the assessee, to its bottlers, for the year under consideration, is as under: -

AMOUNTS IN RS.

S.NO.	AY	AMOUNT OF PRICE SUPPORT GIVEN TO BOTTLERS
1.	2007-08	6,00,52,116/-
2.	2008-09	14,23,72,674/-
3.	2009-10	10,49,82,000/-

81. The learned counsel for the assessee placed on record order dated 05.10.2016 passed in assessee's own appeal bearing ITA 1334/CHANDI/2010 for AY 2006-07, wherein this Tribunal has decided the said issue in favour of the assessee in the following manner:

> *"6. Ground nos. 5 and 6 are against the addition of Rs.12,04,92,210/- on account of Price support expenses and Rs.10,67,15,568/- towards provision for Price support expenses to non-related parties.*

7. Since these two grounds are related to each other, we have clubbed them for disposal. Briefly stated, the facts of these grounds are that the assessee claimed deduction for a sum of Rs.50.95 crore towards 'Price support expenses' in its Profit & Loss Account on a sale turnover of Rs.358.05 crore. The AO observed that this expenditure at 14.23% of total sales was excessive. The assessee was called upon to furnish the details of the scheme of Price support to the bottlers, whether related or unrelated. The assessee explained vide its letter dated 11.8.2009 that volume discount/price support was allowed to bottlers in view of prevailing low price of aerated and non-aerated beverages products due to competition pressure on the basis of volume of sales under different rates/schemes. The assessee also contended that the price support/volume discount allowed in the instant year at Rs.50.95 crore was less than the preceding year's figure of Rs.62.52 crore. The assessee further provided details of parties to whom domestic sales exceeding Rs.5 lac were made during the year and who were allowed volume discount/price support.....

8. The AO noticed that there was a wide variation in the percentage of price support given vis-à-vis the sales turnover to various bottlers, which ranged from as low as 0% to maximum of 32.9%. He observed that total price support given to the bottlers stood at Rs.43.72 crore on the sales made to the tune of Rs.370.68 crore. After excluding the bottlers, to whom no price support was paid, the AO worked out the percentage of total price support to total sales at 11.79%. This percentage was applied as a reasonable basis and the excess amount of price support was disallowed by means of tabulation as under:-

.....

9. That is how, the disallowance of Rs.12,04,92,210 was made. The assessee remained unsuccessful before the Dispute Resolution Panel (DRP). This led to the making of the first disallowance of Rs.12.04 crore.

10. The AO further observed from the details of Price support given to unrelated parties which stood at Rs.28.49 crore that there was a debit of provision totaling Rs.17.87 crore and there was a credit of provision in this account to the tune of Rs.7.20 crore. The differential amount of Rs.10,67,15,568/- which, in the opinion of the AO, was a provision and not actual expenditure of price support to non-related parties, was held to be not allowable. The assessee, again, remained unsuccessful before the DRP, which resulted in making the addition of Rs.10.67 crore. The assessee is aggrieved before us against these two additions.

11. We have heard the rival submissions and perused the relevant material on record. It is observed that the assessee gave incentive to its related and non-related bottlers in terms of volume discount. Such amount of price support to the tune of Rs.50.95 crore was claimed as deduction. From a perusal of the first chart drawn above, it can be seen that the Price support has been allowed to three related parties mentioned at Sl. nos.1, 10 and 16 and the percentage of such price support to sales is 12.42% in the case of party at Sl. no.1, 0% in the case of party at Sl. no.10 and 13.67% in the case of party at Sl.

no.16. Apart from these three related parties, the assessee also paid Price support to 18 non-related parties and the percentage of such volume discount ranges from 0% to 32.90%. The ld. AR contended that the magnitude of price support, being volume discount, depends on numerous factors, such as, the location of the party, its terms of payment, the competitiveness in that particular area, etc., etc. It is apparent from the calculation of percentage of Price support to sales that out of 21 parties, the assessee did not pay any price support to 8 parties including one related party. Such volume discount to remaining 13 parties varied from 3.72% to 32.90%. We fail to appreciate the view point of the AO in picking up only those 12 parties to whom price support was allowed and, then, averaging the percentage of price support to total sales as a benchmark for the purposes of disallowance. This course of action has no legal sanctity and is unfounded. If the AO was not satisfied with the explanation given by the assessee for allowing of discount at varying rates, it was open to him to specifically examine each and every party to whom volume discount was allowed for ascertaining whether it was genuinely paid or not and further whether it was commensurate with the business requirements and trade practices. Nothing of this sort has been done by the AO, who went by a mathematical exercise in making disallowance of Rs.12.04 crore. Such a mechanism for making disallowance in our considered opinion cannot be sustained. We, ergo, overturn the impugned order on this score and order for the deletion of this addition.

12. The next part is disallowance of Rs.10.67 crore, which again has been made by the AO on an improper understanding

of the facts. Whereas the assessee paid total Price support amounting to Rs.50.95 crore, the AO picked up certain items of debits and credits from the same Price support account which were categorized by the assessee as provision. The difference between two such totals of debits and credits was disallowed. This disallowance was made on the premise that the provision for Price support could not be allowed as deduction. On the contrary, the assessee is paying Price support in two ways. While to some of the parties, the amount is straight away paid and directly debited to this account, to others, a monthly provision is made on the sales made to them during the respective month. Subsequently, such provision is reduced or enhanced with the actual amount of discount. To illustrate, if the sales made during a month to a bottler is Rs.100/-, on which discount allowable is Rs.15/-, the assessee will create a provision at the end of the month for Rs.15/- and debit this amount to the Price support account with a parallel credit to the account of the concerned party. Subsequently, when the actual amount is paid, respective account of the party is credited without routing it through the Price support account. Sometimes, the actual amount of Price support is enhanced or reduced from the amount of provision made at the end of the respective month, depending upon the negotiations between the parties and the market conditions. If in the above illustration, the assessee actually pays Price support of Rs.14/-, it will reverse the provision of Price support with Re. 1 by crediting this account. If on the other hand, volume discount is actually paid at Rs.16, the assessee will further debit Re.1 to the Price support account. Thus, it is manifest that the debit and credit of provision in the Price support account is not a provision in the

real sense, but an actual expenditure or its adjustment. The amount of provision of Rs.15 created at the end of each month is credited to the respective bottler's account and the payment made does not enter into the Price support account to the extent of the provision already debited. The AO has misunderstood the provision debited and credited to the Price support account as a mere provision and not as an actual expense. When this provision is a part and parcel of the total Price support expense, such part of provision, which actually represents the expenditure incurred, cannot be disallowed.

13. Be that as it may, it is seen that the amount of Rs.10.67 crore disallowed by the AO is part of the overall expenditure of Rs.50.95 crore, out of which he made the first addition of Rs.12.04 crore on the basis of the average worked out at 11.79%. When the amount of Rs.10.67 crore is part of Rs.50.95 crore, out of which the AO picked up Rs.43.72 crore for making disallowance, the further addition of Rs.10.67 crore amounts to double addition which even otherwise cannot be sustained. We, therefore, order for the deletion of these two additions amounting to Rs.12.04 crore and Rs.10.67 crore."

It has been pointed out that the said ruling has now been affirmed by the Hon'ble High Court of Delhi in PCIT vs. Pepsi Foods Pvt. Ltd. ITA No. 474/2017 (judgment delivered on 13.11.2017). He placed on record the order of the Hon'ble High Court, wherein the Hon'ble Court observed as under:

"1. The Revenue's Appeal, under Section 260A of the Income Tax Act, 1961, complains that the Income Tax Appellate Tribunal (ITAT) fell into error in directing that the sum of

Rs.12,04,92,210/- brought to tax, on the ground of excessive price support paid by the assessee, is erroneous.

2. The business model, which the Assessee adopts, is premised upon sales of its product i.e. bottlers, its various parts and other articles to its distributors in various parts of the country.

3. For Assessment Year 2006-2007, the Assessee claims deduction for Rs.50.95 crores on account of price support expenses; its profit and loss account reflected sale turnover of Rs.358.05 crores. The price support was provided to 21 parties – 18 of them concededly were unrelated. The other three were related parties, of which the transaction in question is concerned with two parties. The Assessing Officer was of the opinion that on analysis of the inter - price support on record – provided to whole all the purchasers – the average expenditure that could be reasonably claimed was 11.79%. In this, the A.O. concededly adopted a method of averaging out the entire expenditure after taking into account the total sum.

4. The Assessee attempted to have this determination rectified before the DRP – against the TPO's determination –but was unsuccessful and the amount was added back in assessment. It, therefore, approached the ITAT, which after considering the submissions of the parties, directed that the sum should be reversed.

5. The Revenue's counsel urges that the Tribunal fell into error in interfering with the Assessing Officer's reasoned determination. He relied upon the observations in the Assessing Officer's order and the TPO's order as well as the DRP to suggest that when the Assessee did not furnish the requisite information and the rationale given, high rate of price support

even upto 49% in one case disclosed, was completely lacking and in these circumstances, the averaging exercise carried out was a reasonable and legitimate.

6. The ITAT, in its impugned order, took into account all the facts including the parties that were afforded the price support, the extent thereof and also the so - called transactions which according to the Assessing Officer, involved "excess price support". The Tribunal thereafter recorded its findings in the following terms:-

.....

7. This Court is of the opinion that the reasoning of the ITAT, cannot be faulted. The Assessing Officer concededly adopted the same characteristic to all parties related and unrelated as to the prevailing and local market conditions. There may be several reasons why an Assessee or a commercial venture might be compelled to provide discounts/price support etc. for ensuring the marketability of its product at the price that they proposes.

8. Having regard to these, the method of averaging, to say the least, is illegal, this Court, therefore, is of the opinion that no question of law arises on this aspect.....
For the above reasons, the Appeal is dismissed."

82. Thus, respectfully following the binding precedence on the same issue rendered in the earlier years in assessee's own case which has been upheld by the Hon'ble Delhi High Court also as incorporated above, we decide this issue in favour of the assessee.

83. Accordingly, Grounds No. 5 to 5.5 in I.T.A. No. 1203/CHANDI/2011 for AY 2007-08, Grounds No. 6 to 6.4 in I.T.A. No. 2511/DEL/2013 for AY 2008-09 and Grounds No. 8 to 8.5 in I.T.A. No. 1044/DEL/2014 for AY 2009-10 are decided in favour of the assessee and against the Revenue. In that manner, the appeals of the assessee are allowed to such extent.

Re: Addition of INR 11,35,700/- on account of un-utilized MODVAT credit.

84. In Ground No. 6 in I.T.A. No. 1203/CHANDI/2011 for AY 2007-08, the assessee has challenged the addition on account of un-utilized MODVAT credit. The Ld. Counsel informed that assessee is not pursuing this ground and therefore, this ground is dismissed as not pressed.

Re: Addition of INR 73,57,892/- on account of un-utilized CENVAT credit

85. In Ground No. 7 in I.T.A. No. 2511/DEL/2013 for AY 2008-09, the assessee has challenged the addition on account of un-utilized CENVAT credit under section 145A of the Act. The Ld. Counsel informed that assessee is not pursuing this ground and hence, this ground is dismissed as being not pressed.

Re: Addition of INR 70,30,540/- being provision for bad and doubtful debts to book profits.

86. In Ground No. 8 in I.T.A. No. 2511/DEL/2013 for AY 2008-09, the assessee has challenged the adjustment made to book profit

amounting to INR 70,30,540 (provisions for bad and doubtful debts) under section 115JB of the Act. Again, the assessee is not pursuing this ground and therefore, this ground is dismissed as not pressed.

Re: Disallowance of INR 3,85,15,497/- being sponsorship fees paid to ICC

87. In Grounds No. 7 to 7.3 in I.T.A. No. 1044/DEL/2014 for AY 2009-10, the assessee has challenged the disallowance of INR 3,85,15,497/- being sponsorship fees paid by the assessee to ICC. Our attention was drawn to paras 4 to 4.3 of the final assessment order wherein the said issue has been discussed by the AO. It has been submitted that during the relevant previous year the assessee entered into an agreement dated 20.08.2008 with ICC Development (International) Limited (ICC) for obtaining sponsorship rights in respect of various ICC cricketing events around the world. The assessee paid an amount of Rs. 3,85,15,497/- for sponsoring cricketing events held during 2008 to ICC. The said amount was proposed to be disallowed by the AO in the Draft Assessment Order, for the following reasons: -

(i) Similar expense has been disallowed in the earlier years as part of the Transfer Pricing Adjustment on account of AMP expenses.

(ii) Assessee has been bearing substantial portion of the fees paid to ICC for acquiring sponsorship rights even though benefit of the same is derived by the other entities of the world.

88. Aggrieved by the addition proposed by the AO, the assessee had filed objections before the DRP. The DRP vide directions dated

20.12.2013 upheld the action of the AO, on the ground, that the expenditure was benefitting all the entities across the globe and hence, it could not be said to have been incurred wholly and exclusively for the business of the assessee.

89. The learned counsel for the assessee submitted that the said disallowance was unwarranted since the said expense was incurred in view of the fact that major viewership of cricket is in the Indian subcontinent. He also referred to various newspapers reports which demonstrated the popularity of the sport in India to support the aforesaid contentions. It was also submitted that the assessee company has consistently promoted its range of products using cricket as an advertising platform. It was also to our notice that payment of sponsorship fees to ICC was remitted by the assessee after deduction of tax at source as instructed by the Income Tax Department. Further, the assessee had obtained the approval of the Ministry of Youth Affairs and Sports for sponsoring the events covered under the agreement. Copy of the order under section 195 of the Act and the approval received from the Ministry of Youth Affairs and Sports has been enclosed at pages 247 to 249 and 224 of the paper-book respectively. He further submitted that the expenditure was wholly and exclusively for the business of the assessee company and had not been disputed by the revenue. Any incidental benefit that may arise to any other person or entity cannot be a bar for allowance of expenditure under section 37 of the Act, as per the settled position of law. Reference in this regard was made to the decisions of the Hon'ble Supreme Court of India in **CIT vs. Chandulal Keshavlal & Co. [1960] 38 ITR 601 (SC), Sasson J. David and Co. P. Ltd vs. CIT 118 ITR 261(SC) and SA Builders Ltd. vs. CIT 288 ITR 1(SC.** He further submitted that the Revenue

cannot step into the shoes of an assessee to determine the commercial expediency of an expenditure incurred by it.

90. On the other hand, the learned DR relied upon the order of the AO and the DRP in support of his contentions.

91. After considering the rival submissions and on perusal of the impugned orders, we find that, here the disallowance of Rs.3,85,15,497/- has been made on account of sponsorship fee by the assessee to the ICC on the ground that similar expenditure was disallowed in the earlier years as part of Transfer Pricing Adjustment on account of AMP expenses; and secondly, assessee has been bearing substantial portion of the fees to the ICC for acquiring the sponsorship rights even though benefit of the same is derived by either entity of the world. The contention raised by the learned counsel that since major viewer of cricket is an Indian sub-continent looking to its mass popularity in India, the assessee company has been consistently promoting its range of products using cricket as an advertisement platform. The said payment has been made after obtaining the approval of Ministry of Health Affairs and Sports and after deducting TDS u/s.195. Once the expenditure has been incurred wholly and exclusively for the purpose of business which fact has not been disputed by the Department, then even if some incidental benefit which may arise to any other entity cannot be a bar for allowance of expenditure u/s. 37. Under the principle of commercial expediency such an expenditure has to be seen from the angle, whether the decision taken by the assessee for paying sponsorship fees was for the purpose of business or not. Here in this case, the commercial expediency has not been doubted but rather it has been held by the AO that in all the years transfer pricing adjustments has been made on this score and benefit is

arising to the other AEs also. What is relevant for an expense to be allowable as revenue expense is that, whether it has been incurred during the course of business and is for the purpose of business. Benefit factor to other related parties is relevant under transfer pricing provision and not while allowability of business expense u/s 37(1). It is well known fact that companies use sports event as a platform to advertise their range of products as it has a very high viewership. Any such incurring of expenditure is ostensibly for promotion of business only and hence, no disallowance is called for. Accordingly, Grounds No.7 to 7.3 in ITA No.1044/Del/2014 pertaining to A.Y. 2009-10 are allowed.

Re: Disallowance under section 14A of the Act.

92. In Grounds No. 27 to 31 in I.T.A. No. 4517/DEL/2016 pertaining to AY 2010-11, Grounds No. 27 to 31 in I.T.A. No. 4518/DEL/2016 pertaining to AY 2011-12 and Grounds No. 33 to 36 in I.T.A. No. 6537/DEL/2016 pertaining to AY 2012-13, the assessee has challenged the disallowance computed by the AO as per the provisions of section 14A read with Rule 8D. Details of the dividend income earned by the assessee company and the consequential disallowance computed by the AO, is as under: -

AMOUNTS IN RS.

SL. NO.	AY	EXEMPT INCOME EARNED BY ASSESSEE DURING THE YEAR	DISALLOWANCE MADE BY AO
1.	2010-11	54,46,12,846/-	1,18,82,315/-
2.	2011-12	35,33,15,430/-	69,84,350/-
3.	2012-13	6,81,75,880/-	24,36,362/-

Further, during the course of the hearing and also vide submissions dated 13.03.2018, details of the investment which had fetched exempt income during the year(s) under consideration was furnished and the same is as under: -

ALL AMOUNT IN RS.

	NAME OF THE INVESTEE	INVESTMENTS YIELDING EXEMPT INCOME FOR AY 2010-11	
		AT THE BEGINNING OF THE YEAR	AT THE END OF THE YEAR
Equity shares	Pearl Group	1,64,84,000/-	1,64,84,000/-
	Varun Beverages Ltd.	2,86,00,000/-	2,86,00,000/-
Preference shares	Pearl Group	56,88,14,000/-	56,88,14,000/-
	Varun Beverages Ltd.	77,37,64,000/-	77,37,64,000/-
TOTAL		**138,76,62,000/-**	**138,76,62,000/-**

	NAME OF THE INVESTEE	INVESTMENTS YIELDING EXEMPT INCOME FOR AY 2011-12	
		AT THE BEGINNING OF THE YEAR	AT THE END OF THE YEAR
Equity shares	Pearl Group	1,64,84,000/-	14,84,000/-
	Varun Beverages Ltd.	2,86,00,000/- (Refer Schedule 5)	2,86,00,000/-
Preference shares	Pearl Group	56,88,14,000/-	9,76,38,000/-
	Varun Beverages Ltd.	77,37,64,000/- (Refer Schedule 5)	0
TOTAL		**138,76,62,000/-**	**12,77,22,000/-**

	NAME OF THE INVESTEE	INVESTMENTS YIELDING EXEMPT INCOME FOR AY 2012-13	
		AT THE BEGINNING OF THE YEAR	AT THE END OF THE YEAR
Equity shares	Varun Beverages Ltd.	2,86,00,000/- (Refer Note 12)	2,86,00,000/-
TOTAL		**2,86,00,000/-**	**2,86,00,000/-**

AY	NAME OF THE INVESTEE	EXEMPT INCOME EARNED
2010-11	Pearl Group	16,89,58,788/-
	Varun Beverages Limited	37,56,54,058/-
2011-12	Pearl Group	8,00,00,000/-
	Varun Beverages Ltd.	27,33,15,430/-
2012-13	Varun Beverages Ltd.	6,81,75,880/-

93. The aforesaid income was claimed by the assessee as exempt under Section 10(34) of the Act. The AO in his draft assessment order, held that since the assessee had earned exempt income during the relevant previous year, disallowance under section 14A read with Rule 8D of the Rules had to be mandatorily computed and accordingly, disallowed certain expenses as being connected with the earning of such dividend income. Aggrieved with the said disallowance, the assessee company had filed objections before the DRP. The DRP in all the relevant years in question, had directed the AO to compute the disallowance in accordance with the ratio laid down by the Hon'ble jurisdictional High Court in the case of

Cheminvest Ltd vs. CIT [2015] 378 ITR 33 (Delhi High Court) and **CIT vs. Holcim India (P) Ltd 272 CTR 282 (Del)**.

94. The learned counsel for the assessee submitted that the Hon'ble Delhi High Court in these cases had held that no disallowance under section 14A of the Act was warranted where investments were made with the objective of acquiring controlling interest in the company and not for the purposes of earning exempt income. The AO, however, did not delete the entire disallowance made under the draft assessment order. He restricted the disallowance to 0.5% of the average investments as under Rule 8D(2)(iii). The assessee, before us, is aggrieved by such disallowance.

95. The learned counsel for the assessee referred to the financial statements of the assessee for AY 2010-11 to 2012-13 and demonstrated that all the investments held by the assessee were strategic investments/investments in group companies. However, he fairly admitted that the same had no relevance after the decision of the **Hon'ble Supreme Court in Maxopp Investments Ltd. vs. CIT (Civil Appeal Nos. 104-109 of 2015, judgment dated 12.02.2018)**. However, the AO had computed the disallowance made under section 14A of the Act, without establishing any nexus between the expenditure incurred and exempt income earned during the relevant previous year. He submitted that the statute did not envisage that wherever there is an exempt, expenditure had to be disallowed under section 14A of the Act. He further submitted that it had to be seen as to whether any expenditure had been incurred by assessee in relation to earning of exempt income or not. He also placed reliance on the decision of the Hon'ble Supreme Court in **CIT**

vs. Walfort Share & Stock Brokers (P.) Ltd. [2010] 326 ITR 1 (SC) wherein it was observed that there should be a proximate relationship between the expenditure incurred and the exempt income. It was also observed therein that if the assessee had prima facie demonstrated that no expenditure had been incurred for earning of exempt income, then, in the absence of any contrary finding by the AO, provisions of section 14A could not be invoked. Thereafter, he placed reliance on the decision of the Hon'ble High Court of Delhi in **H.T. Media Ltd. vs. PCIT [2017] 85 taxmann.com 113 (Delhi)** to contend that there was a failure on the part of the AO to comply with the mandatory requirement of section 14A (2) read with Rule 8D(1) and the same was clearly evident from the draft assessment order placed on record for all these years. Therefore, he submitted that the question of applying Rule 8D(2)(iii) did not arise. He submitted that it was a settled legal position in terms of the decision of the Hon'ble High Court of Delhi in **Eicher Motors Ltd. vs. CIT [2017] 86 taxmann.com 49 (Delhi)** that the AO had to record reasons for disagreeing with the submission of the assessee that it had incurred no expenditure for earning such exempt income. The learned counsel for the assessee also relied upon the decision of the coordinate benches in **Leena Kasbekar vs. ACIT [2017] 166 ITD 440 (Mum-Trib), Justice Sam P. Bharucha vs. ACIT [2012] 53 SOT 192 (Mum) (URO)** and **ACIT vs. SIL Investments Ltd [2012] 54 SOT 54 (Delhi-Trib)** to further support the said averment. He further submitted that invocation of section 14A was in this case was not called for as investments which had yielded exempt income during the years under consideration, were made from its own funds and no part of the borrowed funds were utilized. No fresh investments were made during the years under consideration, in the companies from whom

dividend income was received. In view of these facts, he submitted that the allegation of the AO that expenditure was incurred for maintaining these investments was unsustainable.

96. Thereafter, the learned counsel for the assessee invited our attention to a recent decision of a special bench of this Tribunal in **ACIT vs. Vireet Investment (P.) Ltd. [2017] 82 taxmann.com 415 (Delhi - Trib.)** (SB), wherein it was observed that for the purposes of computing average value of investment under Rule 8D(2)(iii), only those investments were to be considered which have yielded exempt income during the year. He referred to following paragraph from the said decision: -

> *"11.16 Therefore, in our considered opinion, no contrary view can be taken under these circumstances. We, accordingly, hold that only those investments are to be considered for computing average value of investment which yielded exempt income during the year."*

In view of the aforesaid submissions the learned counsel submitted that, since there was no nexus established by the AO between the expenditure that he sought to disallow and the exempt income that the assessee earned, coupled with aforementioned decision of the Hon'ble special bench, the disallowance made under section 14A of the Act read with Rule 8D(2)(iii) of the Rules deserves to be quashed.

97. On the other hand, the learned DR relied upon the order of the AO and the DRP and further submitted that assessee has not offered any disallowance and had also not demonstrated before the authorities below that having regard to the accounts and nature of expenses debited no disallowance is called for, hence onus cast

upon by the assessee had not been discharged. Thus, disallowance made under Rule 8D(2)(iii) is justified.

98. After considering the rival submission and on perusal of the impugned orders, it is seen that the Assessing Officer has made the disallowance under Rule 8D2(iii) which is 0.5% of the average investment. One of the contentions raised by the learned counsel before us is that the learned Assessing Officer having regard to the accounts maintained by the assessee and on the facts and circumstances of the case has not been recorded any 'satisfaction' in terms of section 14A (2) before invoking the disallowance under Rule 8D (2). Secondly, for the purpose of computing the average value of investment under Rule 8D(2)(iii) only those investments are to be considered have yielded exempt income and no other investment which has not yielded any exempt income. In so far as second contention raised by the learned counsel is concern, we find that the same finds support from the judgment of Hon'ble Delhi High Court in the case of **ACB India vs. CIT, reported in (2015) 374 ITR 108,** wherein it has been held that instead of taking into account total investment attributable to dividend was required to be adopted and thereafter, disallowance has to be arrived. Same view has been taken by the Special Bench in the case of ACIT vs. Vireet Investment Pvt. Ltd. in (2017) 165 ITD 27 (Del. Tri.) (SB). Accordingly, we hold that Assessing Officer following the judicial precedence should remove those investments from the working of average value which have not yielded exempt income.

99. In so far as first contention is concerned, we find that assessee has not made any disallowance nor has been able to substantiate before the AO as to why no expenditure can be said to

be attributable at least looking to the nature of indirect expenditures debited to the P&L account looking to the fact that huge exempt income has been earned in the form of dividend income. Assessee's main contention has been that the investments made were for strategic investments, which now in wake of the Judgement of Hon'ble Apex Court in case of Maxopp Investments Ltd. is not acceptable. It is only when the assessee is able to substantiate its claim from the nature of exempt income from the investments made and having regard to accounts maintained and the nature of expenditure debited that nothing is attributable for the earning of exempt income, the onus stands discharged. If assessee is able to demonstrate its claim, then onus shifts upon the Assessing Officer, who has to then examine the nature of accounts and having regard to such accounts maintained, he has to record his satisfaction that assessee's claim is not correct before proceeding to make the disallowance u/s.14A. Thus, contention of the learned counsel cannot be accepted under the facts and circumstances of the case. Accordingly, Assessing Officer is directed to compute the disallowance in view of the aforesaid direction.

Re: Industrial Promotion Assistance (IPA) Subsidy

100. In Grounds No. 37 to 39 in I.T.A. No. 6537/DEL/2016 pertaining to AY 2012-13 and Grounds No. 42 to 44 in I.T.A. No. 6582/DEL/2017 pertaining to AY 2013-14, the assessee has challenged the addition made by the AO on account of IPA subsidy received by the assessee under the West Bengal Incentive Scheme, 2004, details of which are as under: -

AMOUNT IN RS.

S. NO.	ASSESSMENT YEAR	AMOUNT OF DISALLOWANCE MADE BY AO
1.	2012-13	2,95,10,993/-
2.	2013-14	3,93,52,756/-

101. In the relevant years involved, the assessee received subsidy from Government of Bengal for WBIDC Plant and Government of Maharashtra for Paithan Plant. The said subsidy was credited in the profit and loss account and had accordingly been reduced while computing the taxable income for the years under consideration claiming the same to be in the nature of capital receipt. Subsidy from the Government of West Bengal was received for setting up a new project in West Bengal under the *West Bengal Incentive Scheme, 2000* read with *West Bengal Incentive Scheme, 2004*. The said schemes were introduced by the State Government of West Bengal to promote the establishment of industries in the State. The aforesaid subsidy inter-alia consists of the following:

(i) State Capital Investment Subsidy (SCIS): SCIS is computed at the rate of 15 percent of fixed capital investment, subject to a limit of INR 1.5 crores.

(ii) IPA: this is computed by way of refund of 75 percent of sales tax paid in the previous year on sale of finished goods for a period of 15 years, subject to a maximum of the fixed capital investment made in the new project.

The AO during both the relevant years, allowed the claim of subsidy received from Government of Maharashtra as being capital in nature. Further, he also allowed the claim of the assessee vis-à-vis

SCIS, however, he disallowed the claim of the assessee vis-à-vis IPA received from Government of West Bengal. The AO was of the view that IPA received from the Government of West Bengal was given as assistance to the assessee for business promotion and was not specifically related to any capital expenditure. He held that the reliance placed by the assessee on the decision of **CIT vs. Rasoi Ltd:** [2011] 335 ITR 438 (Calcutta), was misplaced Rasoi Ltd. (supra) pertained to the West Bengal Incentive Scheme of 2000 whereas in the instant case, the scheme of 2004 was involved. The AO held that both the schemes had different objectives and therefore, the decision in the case of Rasoi Ltd. (supra) did not, in any which way, support the case of the assessee. In that manner, the AO held the IPA received to be in the nature of revenue receipt and sought to tax the same.

102. The DRP for both the relevant years, upheld the action of the AO in the following manner:

> *"The Ld. AR argued at length and placed reliance on various case laws also which have been considered by the Panel. It has been submitted that is the purpose of subsidy and not the time, mode and manner of subsidy which conclusively determines the nature – revenue or capital and accordingly, the Ld AR submitted that the subsidy was capital in nature. It is seen from the material placed before this panel that the subsidy was given to assessee in form of reimbursement of Sales tax @ 75% on operations of the assessee and it is directly relatable to the operations – as more the operations, more would be the subsidy. Ultimately, the state subsidizes the private enterprise to help in expansion of the industrial enterprise to enhance the economy of the area. In the instant matter, the state is doing this by facilitating the assessee*

growth in terms of increased turnover and volumes. The certificate issued by WBIDC for incentives under WBIS 2004, the assessee was declared eligible for the following incentives:

- *State Capital Investment Subsidy*
- *Industrial Promotion Assistance ('IPA')*

The AO has allowed certain components of the subsidy to the assessee as capital in nature and upon examination of the details has treated only one part of such subsidy as revenue in nature.

The assessee has placed reliance on the judgment of the jurisdictional High Court in case of the Rasoi Ltd (2011) 335 ITR 438 (Cal HC) in support of its contention that subsidy received on account of Sales tax deferment/ remission and Industrial Promotion Assistance' are capital receipts not chargeable to tax. The judgment is not applicable in case of the assessee as the facts in case of the assessee are quite different from the case cited. The ratio of this citation outlines different factual matrix in case of the assessee and does not help the case of the assessee. Similar issue was also examined by the Hon'ble Delhi ITAT in case of Jindal Power & Steel [reported in [2013] 38 taxmann.com (Delhi-Trib.)] wherein the case of Rasoi Limited, apart from other relevant judgment was also considered. The ITAT Delhi has, in their detailed order in this case held such subsidy to be revenue in nature. The present case is also squarely covered by the ratio of decision of Hon'ble Supreme Court in the case of Sahney Steel & Press Works Ltd. reported in [1997] 228 ITR 253/94 Taxman 368 (SC). The nature of subsidy has to be based on case specific facts. Therefore, in each case one has to examine the nature of subsidy. Hon'ble Supreme Court in the case of Sahney Steel & Press Works Ltd. had observed that these subsidies were given to encourage

the setting up of Industry in the State of Andhra Pradesh by making the business of production and sales of goods in the State more profitable. This judgment has laid down the basic tests to be applied for judging the character of subsidy and that test is that the character of receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. The assessee was free to use the amount of subsidy in its business as per its discretion. In Ponni sugars & Chemicals Ltd. [2008] 306 ITR 392/ 17 Taxman 87 (SC) (para 21), the Hon'ble Supreme Court had held that the amount of subsidy is of capital nature only because (when) the subsidy was mean for repayment of term loans which were taken by the assessee for setting up of new unit and such repayment of term loans was on capital account whereas in the present case the subsidy is in the form of sales tax exemption, electricity duty exemption etc. which were revenue in nature. Hon'ble Supreme Court after noting similar scheme where the Hon'ble High Court of Madhya Pradesh had held that the subsidy to be of capital nature in the case of Dusad Industries (supra) had held as under:-

> *"The Madhya Pradesh High Court, however, failed to notice the significance fact that under the scheme framed by the Govt. no subsidy was given until the time production was actually commenced. Mere setting up of the industry did not qualify for industrialization for getting any subsidy. The subsidy was given as help not for setting up of the industry which was already there but is an assistance after the industry commenced its production. The view taken by the Hon'ble Madhya Pradesh High Court is erroneous."*

The above observations of Hon'ble Supreme Court put the whole gamut of grant of subsidy for setting up of the enterprises in proper perspective. The contextual clarification here above helps us see the matter in correct perspective to determine income taxable as per provisions of the income Tax Act 1961. It would also be important to observe here that the assessee has never made similar claim in the earlier assessment cycles for the prior periods – indicating clearly that the assessee itself was not seeking the subsidy as capital receipt with the best legal help available to it. Considering the facts and submissions of the assessee and in light of the above jurisprudence, the receipts on account of subsidy by the assessee are clearly Revenue in nature. The action of the AO is, accordingly, upheld by the panel."

103. The directions of the DRP culminated in the final assessment order of the AO for AY 2012-13 and 2013-14. Aggrieved by the said directions, the assessee is in appeal before us.

104. The learned counsel for the assessee placed before us the text of the West Bengal Incentive Scheme, 2004 and referred to the following passage from the scheme to contend that the object of the said scheme was to promote setting up/ expansion of projects in the concerned area:

"4. Applicability of the 2004 scheme:

4.1 the 2004 scheme shall generally be applicable to all large / small scale projects and tourism units in large / small scale sector to be set up and also expansion project of existing units on or after 1st April, 2004, the units may be in the private sector, co-operative sector, joint sector as also companies / undertakings owned or managed by the State Government."

Thereafter, he submitted that it was clear that the intent and object behind the introduction of the West Bengal Incentive Scheme of 2004 was to promote setting up and expansion of industries and hence, the subsidy was not made available to the existing industries unless they undertook substantial expansion. This fact, alone showed that the subsidy was not advanced for sustaining the business of the assessee as alleged by the AO and the DRP, but was for the purposes of incentivizing expansion of industries. Thus, the subsidy was clearly capital in nature. He further submitted that the "Mega Projects" eligible under the scheme of 2004 were not eligible for the interest subsidy and in lieu thereof, IPA was made available to them at the rate of 75% of the sales tax in the year previous to the year for which the claim was to be made. As per the scheme the unit was to be eligible for IPA and other subsidies only after:

(i) Total investment crossed the limit of INR 25 crores; and

(ii) On commencement of commercial production.

He submitted that the in the said scheme, it was stated that the total value of incentive was to not exceed 100% of the Fixed Capital Investment in any case. Therefore, it was patently clear that the subsidy was based upon the fixed capital investment made by an enterprise and only the mode of disbursement was in the form of re-payment of sales tax paid. It is a settled law that the objective of the scheme had to be considered for the purposes of determining the nature of subsidy given and not the mode and manner of payment. He also drew our attention towards various decisions, wherein, Courts have held that the character of subsidy in the hands of the recipient, whether capital or revenue, was to be determined after having regard to the purpose for which the subsidy was given. He

placed reliance on the decision of the Hon'ble Supreme Court in Sawhney Steel and Press Works Ltd vs CIT [1997] 228 ITR 253 (SC) wherein it was observed that the it was not the source from which the amount was paid to the assessee which was determinative of the question whether the subsidy payments were of revenue or capital nature. The Court further observed that if payments in the nature of subsidy from public funds were made to the assessee to assist him in carrying on his trade or business, they were to be treated as trade receipts. The Hon'ble Supreme Court had also observed that the sales tax upon collection formed part of the public funds of the State and if the assessee as per the scheme was to be given refund of sales tax on purchase of machinery as well as on raw materials to enable the assessee to acquire new plants and machinery for further expansion of its manufacturing capacity in backward area, the entire subsidy was to treated as a capital receipt in the hands of the assessee. He placed reliance on the Hon'ble Supreme Court's decision in **CIT vs Chaphalkar Brothers [2017] 88 taxmann.com 178 (SC)** wherein it was observed that where object of respective subsidy schemes of State Governments was to encourage development of Multiple Theatre Complexes, incentives was to be held to be capital in nature and not revenue receipts even though the incentive was in form of exemption from payment of entertainment duty for a period of 3 years from the date of commencement of commercial operations. He also placed heavy reliance on the decision of the Hon'ble Supreme Court in **CIT vs. Ponni Sugars and Chemicals Ltd [2008] 306 ITR 392 (SC)** and submitted that the Hon'ble Court had observed that the character of the receipt in the hands of the assessee had to be determined with respect to the purpose for which the subsidy was given. The said test was the called the 'purpose test' and that the point of time when

the subsidy was paid was not relevant and so was so source of subsidy. Reliance was also placed on the decision of the Hon'ble High Court of Punjab & Haryana in **CIT vs. Talbros Engineering Ltd. [2016] 386 ITR 154 (P&H)** wherein it was held that sales tax subsidy given by the State Government for encouraging industries for setting up units in remote or rural areas was to be treated as capital receipt. Further in the decision of the Hon'ble High Court of Delhi in **CIT vs. Bougainvillea Multiplex Entertainment Centre (P) Ltd: [2015] 55 taxmann.com 26 (Del HC)**.

105. Thereafter, the learned counsel submitted that in the instant case also the subsidy was given by the Government of West Bengal for the purpose of industrialization of the state and hence, the subsidy was available only to new units or to existing units who were undertaking expansion. Merely the quantification of subsidy was based upon reimbursement of sales tax. In view of the said object of the scheme of 2004, the assessee treated the IPA receipt as a "capital receipt". He submitted that the AO and DRP erroneously treated the subsidy as a revenue receipt by looking at the mode of payment, which was by way of reimbursement of sales tax, and that the benefit was to be given only after the commencement of commercial production. He thereafter submitted various decisions wherein on the basis of similar facts that is (a) where subsidy was given in form of reimbursement of taxes paid on production / sales; and (b) subsidy was available only after the commencement of production / commercial operations; and (c) subsidy was not linked to any specific fixed assets; and (d) there was no stipulation in the scheme of subsidy regarding the manner in which the subsidy amount was to be utilized by the assessee, still, solely on the basis of object of the scheme, subsidy was held to be capital in nature.

Explaining the decision of the Hon'ble High Court of Calcutta in **CIT vs. Rasoi Ltd. [2011] 335 ITR 438 (Calcutta)**, he submitted that therein, the scheme in question was given effect to from 1-4-1994 and initially, was in force only for one year from that date and, thus, the benefit was then available to the assessee only for that year which was the relevant assessment year. From the objects and reasons of the aforesaid scheme, it was clear that the Government had decided to grant the subsidy by way of financial assistance to tide over the period of crisis for promotion of the industries mentioned in the scheme which had the manufacturing units in West Bengal and which were in need of financial assistance for expansion of their capacities, modernization and improving their marketing capabilities and thus, the subsidy was held to be capital in nature. The Hon'ble Court had observed therein that merely because the amount of subsidy was equivalent to 90 per cent of the sales tax paid by the beneficiary did not imply that the same was for operational purposes. Lastly, he placed reliance on the decision of the Hon'ble High Court of Jammu and Kashmir in **Shree Balaji Alloys vs. CIT [2011] 333 ITR 335 (J&K)** and pointed out that the same had now been affirmed by the Hon'ble Supreme Court. He placed reliance on the following passage from the decision of the Hon'ble High Court:

> *"Mere making of additional provision in the Scheme that incentives would become available to the industrial units from the date of commencement of the commercial production, and that these were not required for creation of New Assets cannot be viewed in isolation, to treat the incentives as production incentives, as held by the Tribunal, for the measure so taken, appears to have been intended to ensure that the incentives*

were made available only to the bona fide Industrial Units so that larger Public Interest of dealing with unemployment in the State, as intended, in terms of the Office Memorandum, was achieved. The other factors, which had weighed with the Tribunal in determining the incentives as Production Incentives may not be decisive to determine the character of the incentive subsidies, when it is found, as demonstrated in the Office Memorandum, amendment introduced thereto and the statutory notification too that the incentives were provided with the object of creating avenues for Perpetual Employment, to eradicate the social problem of unemployment in the State by accelerated industrial development."

106. On the other hand, the learned DR relied upon the order of the AO and the DRP.

107. We have heard the rival submissions and also perused the relevant findings given in the impugned orders. The assessee has received subsidiary from Government of West Bengal for WBIDC plant and Government of Maharashtra for Paithon plant. The subsidy from the Government of West Bengal was received for setting up for a new project in West Bengal under the West Bengal incentive scheme 2000 and 2004 which was to promote the establishment of the industries in the state. The nature of subsidy has already been described above. The Assessing Officer has allowed the claim of subsidy from Government of Maharashtra and also the State Capital Investment Subsidy by the West Bengal Govt. as it was computed on 15% of fixed capital investment which has been treated as capital in nature and allowed the claim of assessee. However, AO has disallowed the claim of the assessee on the IPA

subsidy received from Government of West Bengal on the ground that the subsidy received from Government of West Bengal was given to the assessee for business promotion and not specifically related to any capital expenditure. The Object of the West Bengal Incentive Scheme 2004 has already been incorporated above and from the perusal of the same it is seen that the same was to promote setting up and expansion of projects/industries and was not available to the existing industries unless they undertook substantial expansion. The Hon'ble Supreme Court in the case of **CIT vs. Ponni Sugar and Commercial Ltd.** (supra) observed that character of the receivables in the hands of the assessee had to be determined with respect to the purpose for which subsidy was given. The purpose for which subsidy is given assumes more significance rather than the manner in which it has been given. Here in this case also the subsidy was given by the Government of West Bengal for the purpose of industrialization of the State which was available only to new units or to existing units which were initiating substantial expansion. Under the Scheme IPA was made available @75% of the sales tax in the previous year for which the claim was made and the total value of incentive was not to exceed the fixed capital investment. Thus, Subsidy was based upon fixed capital investment made and only the mode of disbursement was in the form of re-payment of sales tax paid. The Hon'ble Supreme Court in the case of **CIT vs. Chaphalkar Brothers** (supra) held that subsidiary scheme of the State Government to encourage development of multiple theatre complexes is capital in nature and not revenue's receipts there also subsidy was in the form of exemption from payment of entertainment due for the period of three years. Merely because here in this case the quantification of subsidy was based on reimbursement of sales tax, it does not meant

that it is a revenue receipt. This view now is well supported by the various decisions as noted above that character of subsidy in the hands of the assessee is the determinative factor having regard to the purpose for which subsidy was given. Accordingly, we hold that the subsidy received by the assessee from the subsidy received under the West Bengal Incentive Scheme of 2004 is capital in nature and cannot be taxed as revenue receipts. Thus, this issue is decided in favour of the assessee.

108. In result thereof, Grounds No. 27 to 31 in I.T.A. No. 4517/DEL/2016 pertaining to AY 2010-11, Grounds No. 27 to 31 in I.T.A. No. 4518/DEL/2016 pertaining to AY 2011-12 and Grounds No. 33 to 36 in I.T.A. No. 6537/DEL/2016 pertaining to AY 2012-13 are allowed.

109. In Grounds No. 32 to 33 in I.T.A. No. 4518/DEL/2016 pertaining to AY 2011-12, the assessee has challenged the wrongful levy of interest under section 234A and 234B of the Act.

110. The learned counsel pointed out that the assessee had filed its return of income within the due date prescribed under Section 139(1) of the Act, i.e. on 26.09.2011. Since, the return of income had been filed within the due date, no interest under Section 234A could have been levied. As regards interest under Section 234B of he pointed out that as per the provision, no interest liability can arise if the amount of advance tax paid exceeds 90% of the assessed tax. In the instant case, the assessee had deposited advance tax amounting to Rs. 64,20,00,000/-. The assessee had filed an application before the AO for rectification of mistakes apparent from his order and pursuant to his order on such, the amount of

assessed tax stood at INR 70,97,80,046. Since, the amount of advance tax deposited was greater than 90% of the assessed tax, no interest under Section 234B of the Act could have been levied. He further submitted that a similar issue had been raised in Grounds No. 27 to 29 in I.T.A. No. 4516/DEL/2016 pertaining to AY 2010-11.

111. In view of the aforesaid facts submitted by the assessee, we direct the AO to verify the claim of the assessee and re-compute the interest leviable under section 234A/ 234B of the Act in as per law.

112. In Ground No. 35 in I.T.A. No. 4518/DEL/2016 pertaining to AY 2011-12, the assessee has challenged the credit of tax deduction at source (TDS), advance tax and self-assessment tax amounting to INR 84,90,70,726/- not given by the AO.

113. The learned counsel submitted that the said tax credit comprised of taxes deposited by the assessee and its group concerns namely PFL and Aradhana Soft Drinks Company. These group companies were amalgamated with the assessee vide amalgamation order dated 01.12.2011 of the Hon'ble Punjab and Haryana High Court with retrospective effect from 01.04.2010. Since the amalgamation application was pending in the Hon'ble Punjab and Haryana High Court at the time of due date of filing the return of income, group companies, in order to comply with the Act, filed its tax returns. Once the approval was received from the Hon'ble High Court, the assessee had prepared its financial statements and filed a revised consolidated return of income offering the income of the group companies to tax. Accordingly, the taxes paid by the group concerns were also claimed by the assessee in its return of income.

Now as a result of the amalgamation order by the Hon'ble High Court, the group companies ceased to exist from 01.04.2010 onwards and could not be regarded as a legal entity for F.Y. 2010-11 and onwards. Thus, it was submitted that the return filed by the group companies automatically became void-ab-initio. In such a scenario, any subsequent proceeding such as processing of return of income under Section 143(1) of the Act was also invalid. It was further submitted that the return of income filed by PFL for A.Y. 2011-12 had been rejected by CPC, Bangalore and assessment of the amalgamated entity was done by the AO. Reliance was placed on the decision of the Hon'ble Gujarat High Court in **Torrent (P.) Ltd. V. CIT [2013] 35 taxmann.com 300 (Gujarat)** wherein it was held that the transaction pursuant to the effective date of amalgamation could not be treated as a valid transaction. He also placed reliance on the decisions of the Hon'ble High Court of Bombay in Mafatlal Gangalbhai and Co. Pvt. Ltd. V. CIT [1979] 193 ITR 188 and New Shorrock Spg & Mfg Co Ltd v. CIT [1994] 208 ITR 765.

114. In view of the facts submitted by the assessee, we direct the AO to verify the claim of the assessee and allow the credit of taxes in accordance with the directions contained herein and as per law.

115. There are certain other grounds raised by the assessee in its appeals that pertain to the levy of interest as well as initiation of penalty proceedings and as such are consequential in nature. Therefore, the same are pre-mature at this stage and hence are being dismissed. Other grounds are either general or not pressed by the learned counsel for the assessee, which are also hereby dismissed.

116. In the result, all the appeals of the assessee are treated as partly allowed.

Order pronounced in the open Court on 19th November, 2018.

Sd/-	Sd/-
[PRASHANT MAHARISHI]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED: 19th November, 2018

Pkk