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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 6253/DEL/2012
[A.Y 2008-09]

L.G. Electronics India Pvt. Ltd A-27, Mohan Co-operative Industrial Estate, Mathura Road New Delhi	Vs.	The Asstt. C.I.T Circle - 3 Noida [U.P]
PAN : AAACL 1745 Q		
[Appellant]		[Respondent]

Date of Hearing : 13.12.2018
Date of Pronouncement : 14.01.2019

Assessee by : Shri Ajay Vohra, Sr. Adv
Shri Neeraj Jain, Adv
Shri Ramit Katyal, Adv

Revenue by : Shri H.K. Choudhary, CIT-DR
Smt. Namita Ramdev, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is directed against the order dated 27.11.2012 framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] pertaining to A.Y 2008-09.

2. The assessee has raised as many as 12 grounds of appeal. Ground Nos. 1 and 2 are of general in nature and need no separate adjudication.

3. Ground Nos. 3 to 3.34 relate to Transfer Pricing adjustment of Rs. 2,64,96,14,750/-/- on account of advertisement, marketing and sales promotion expenses [AMP]

4. Briefly stated, the facts of the case are that the assessee is a Private Ltd. Company, engaged in trading, manufacturing, marketing and sale of electronics, home appliances and I.T. products. For the year under consideration, assessee has disclosed total sales of Rs. 69,52,69,05,000/-. The assessee has also disclosed 'Other Income' of Rs. 2,03,43,86,000/-. Net profit was at Rs. 3,51,82,77,000/-. The assessee has claimed exempted income of Rs. 20,33,38,565/- u/s 10B of the Act and deduction of Rs. 44,50,635/- u/s 80JJAA of the Act.

5. The assessee had made international transactions with Associated Enterprises [AEs], namely :

(i) Arcelik-LG Klima San Ve Tic A.S., Turkey
(ii) Hitachi LG Data Storage INC, Japan.
(iii) LG Alina Electronics, Russia.
(iv) LG Chem Ltd, Korea
(v) LG CNS INC, Korea, etc

6. Accordingly, a reference was made to the TPO for determining the ALP of international transactions. The TPO proposed to make an adjustment of Rs. 3,20,72,55,985/-. Based on the TPO's recommendation, draft assessment was passed on 30.12.2011 wherein the assessment was completed making an adjustment of Rs. 4,53,15,20,469/-. The assessee approached the DRP. The DRP passed order u/s 144C(5) of the Act and pursuant to the directions of the DRP, assessment order was framed.

7. Coming to the grounds of appeal Nos. 3 to 3.34, during the course of T.P. proceedings, it came to the notice of the officer that the assessee has incurred advertisement and AMP expenses aggregating to Rs.6,89,60,79,670/- for the purpose of its business. The Transfer Pricing Officer undertook benchmarking analysis of AMP expenses incurred by the assessee applying bright line test by comparing ratio of AMP expenses to sale of the assessee with that of the comparable

companies and holding that any expenditure in excess of the bright line was for promotion of the brand/trade name owned by the AE, which needed to be suitably compensated by the AE. By applying bright line test, the TPO compared AMP expenditure incurred by the assessee as percentage of total turnover at 8.01% with average AMP expenditure of 4.93% of the following comparable companies:

Sl. No.	**Name of the comparable companies**	**AMP/ Sales**
1.	Home Solutions Retails (India) Ltd.	7.67%
2.	Vivek Ltd	3.79%
3.	Infiniti Retail Ltd.	7.90%
4.	Allied Photographic India Ltd	0.38%
	Average	**4.93%**

8. The TPO observed that since AMP expenses incurred by the assessee as percentage of sales was more than similar percentage for comparable companies, the assessee had incurred such AMP expenditure on brand promotion and development of marketing intangibles for the AE. The TPO further added a mark-up of 15%, which was subsequently reduced to 12.5% by the DRP and, accordingly, adjustment of Rs. 2,64,96,17,750/- was made, which was computed as under:

Computation of TP adjustment	**Rs.**
Value of sales	8605,67,65,713
AMP / Sales of the comparables	4.93%
Arms Length Price (as per Bright Line)	424,25,98,549
Expenditure on AMP by the appellant	689,60,79,670
Expenditure in excess of bright line	265,34,81,121
Mark-up at 12.5% on excessive AMP as per DRP direction	33,16,85,139
Reimbursement that appellant should have received.	298,51,66,260
Reimbursement that appellant has received.	33,55,48,510
Adjustment to assessee's income	**264,96,17,750**

9. Before us, the ld. AR has vehemently stated that the TPO has proceeded by inferring the expenses of international transaction by applying BLT by drawing support from the judgment of the Special Bench of the Tribunal in the case of assessee in ITA No. 5140/DEL/2011.

10. At the outset, we have to state that the Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communications India Pvt Ltd

vs CIT 374 ITR 118 has discarded the BLT. The Hon'ble High Court, at para 120 held as under:

"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 broad-brush 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."

11. Respectfully following the judgment of the Hon'ble High Court of Delhi [supra], we hold that BLT has no mandate under the Act and accordingly, the same cannot be resorted to for the purpose of ascertaining if there exists an international transaction of brand promotion services between the assessee and the AE.

12. In our considered opinion, while dealing with the issue of bench marking of AMP expenses, the Revenue needs to establish the existence of international transaction before undertaking bench marking of AMP expenses and such transaction cannot be inferred merely on the basis of BLT. For this proposition, we draw support from the judgment of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd 381 ITR 117.

13. In this case, the Hon'ble High Court held that existence of an international transaction needs to be established de hors the Bright Line Test. The relevant finding of the Hon'ble High Court reads as under:

> *"43. Secondly, the cases which were disposed of by the 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*** *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.*

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51. The result of the above discussion is that in the considered view of the Court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL. Secondly, the Court is of the view that the decision in ***Sony Ericsson*** *holding that there is an international transaction as a result of the AMP expenses cannot*

*be held to have answered the issue as far as the present Assessee MSIL is concerned since finding in **Sony Ericsson** to the above effect is in the context of those Assessees whose cases have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding AMP expenses.*

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60. As far as clause (a) is concerned, SMC is a non-resident. It has, since 2002, a substantial share holding in MSIL and can, therefore, be construed to be a non-resident AE of MSIL. While it does have a number of 'transactions' with MSIL on the issue of licensing of IPRs, supply of raw materials, etc. the question remains whether it has any 'transaction' concerning the AMP expenditure. That brings us to clauses (b) and (c). They cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of MSIL is "any other transaction having a bearing" on its "profits, incomes or losses", for a 'transaction' there has to be two parties. Therefore for the purposes of the 'means' part of clause (b) and the 'includes' part of clause (c), the Revenue has to show that there exists an 'agreement' or 'arrangement' or 'understanding' between MSIL and SMC whereby MSIL is obliged to spend excessively on AMP in order to promote the brand of SMC. As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i) (a) to (e) to Section 92B are described as 'international transaction'. This might be only an illustrative list, but significantly it does not list AMP spending as one such transaction.

61. The submission of the Revenue in this regard is: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for the same has been paid or remains payable or there is a mutual agreement to not charge any compensation for the service or benefit." Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to Section 92F (v) which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means' part and the 'includes' part of Section 92B (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC.

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68……In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the 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. Therefore, the existence of an international transaction will have to be established de hors the BLT."

14. In the light of the aforesaid finding of the Hon'ble High Court, before embarking upon a benchmarking analysis, the Revenue needs to demonstrate on the basis of tangible material or evidence that there exists an international transaction between the assessee and the AE. Needless to mention, that the existence of such a transaction cannot be a matter of inference.

15. The Hon'ble Delhi High Court in case of Whirlpool of India Ltd vs DCIT 381 ITR 154 has held that there should be some tangible evidence on record to demonstrate that there exists an international transaction in relation with incurring of AMP expenses for development of brand owned by the AE. In our considered opinion, in the absence of such demonstration, there is no question of undertaking any benchmarking of AMP expenses. The relevant findings of the Hon'ble High Court in the case of Whirlpool of India Ltd [supra] read as under:

> *"32. Under Sections 92B to 92F, the pre-requisite for commencing the TP exercise is to show the existence of an international transaction. The next step is to determine the price of such transaction. The third step would be to determine the ALP by applying one of the five price discovery methods specified in Section 92C. The fourth step would be to compare the price of the transaction that is shown to exist with that of the ALP*

and make the TP adjustment by substituting the ALP for the contract price.

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34. The TP adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE.

35. It is for the above reason that the BLT has been rejected as a valid method for either determining the existence of international transaction or for the determination of ALP of such transaction. Although, under Section 92B read with Section 92F (v), an international transaction could include an arrangement, understanding or action in concert, this cannot be a matter of inference. There has to be some tangible evidence on record to show that two parties have "acted in concert".

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37. The provisions under Chapter X do envisage a 'separate entity concept'. In other words, there cannot be a presumption that in the present case since WOIL is a subsidiary of Whirlpool USA, all the activities of WOIL are in fact dictated by Whirlpool USA. Merely because Whirlpool USA has a financial interest, it cannot be presumed that AMP expense incurred by the WOIL are at the instance or on behalf of Whirlpool USA. There is merit in the contention of the Assessee that the initial onus is on the Revenue to demonstrate through some tangible material that the two parties acted in concert and further that there

was an agreement to enter into an international transaction concerning AMP expenses.

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39. It is in this context that it is submitted, and rightly, by the Assessee that there must be a machinery provision in the Act to bring an international transaction involving AMP expense under the tax radar. In the absence of any clear statutory provision giving guidance as to how the existence of an international transaction involving AMP expense, in the absence of an express agreement in that behalf, should be ascertained and further how the ALP of such a transaction should be ascertained, it cannot be left entirely to surmises and conjectures of the TPO.

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47. For the aforementioned reasons, the Court is of the view that as far as the present appeals are concerned, the Revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between WOIL and Whirlpool USA. In the absence of that first step, the question of determining the ALP of such a transaction does not arise. In any event, in the absence of a machinery provision it would be hazardous for any TPO to proceed to determine the ALP of such a transaction since BLT has been negatived by this Court as a valid method of determining the existence of an international transaction and thereafter its ALP."

16. The case of the Revenue is that Indian subsidiary incurred certain expenses for the promotion of brands in India and for development of the Indian market and the creation of marketing intangibles in India which remain the functions of the parent company

which is the entrepreneur. The brands are owned by the parent company. The Indian subsidiary only acts on behalf of the parent company. The Revenue alleges that eventual beneficiary of the acts of the Indian subsidiary is the parent company. Any benefit that may accrue to the Indian subsidiary is at best incidental to the entire exercise. This action of the Indian subsidiary amounts to rendering of a service to its foreign AE for which arm's length compensation was payable by foreign AE to its Indian subsidiary.

17. It is the say of the ld. DR that the functions carried out by the assessee are in the nature of development, enhancement, maintenance, protection and exploitation of the relevant intangibles and thus, the assessee deserves compensation.

18. The case of the ld. DR is that the act of incurring of AMP expenses by the assessee is not a unilateral act and is an international transaction for following reasons:-

i) Though, the AMP expenditure may be for the purpose of business of the assessee but it is in performance of function of market development for the brands and products of the AE that enhances the value of the marketing intangibles owned by the

foreign AE, and hence there is a transaction of rendering of service of market development to the AE.

ii) The short term benefit of the transaction accrues both to assessee and AE in terms of higher sales but long term benefit accrues only to the AE.

iii) The benefit to the AE is not incidental but significant. Once, it is established that the act of incurring of AMP expenditure is not a unilateral act of the assessee; the AE needs to compensate the assessee for AMP expenses.

iv) It is a fact that brands are valuable and even loss making enterprises having no real assets are purchased for substantial value for their brand and marketing intangibles.

v) The issue is not that of transfer of marketing intangibles to AE as the brands and marketing intangibles are already owned by the AE. The issue is that of addition in the value of marketing intangibles owned by the AE owing to the services of development of brand and markets by the assessee for the AE

and that of compensation for rendering these services not provided unilaterally by the assessee.

19. We do not find any force in the aforesaid contentions of the ld. DR. As mentioned elsewhere, the Revenue needs to establish on the basis of some tangible material or evidence that there exists an international transaction of provisions of brand building service between the assessee and the AE. We find support from the decision of the Hon'ble Delhi High Court in the case of Honda Seil Power Products Ltd vs DCIT ITA No 346/2015.

20. The Hon'ble Delhi Court in its recent decision in the case of CIT vs Mary Kay Cosmetic Pvt Ltd (ITA No.1010/2018), too, dismissed the Revenue's appeal, following the law laid down in its earlier decision (supra) and held as under:

"We have examined the assessment order and do not find any good ground and reason given therein to treat advertisement and sales promotion expenses as a separate and independent international transaction and not to regard and treat the said activity as a function performed by the respondent-assessee, who was engaged in marketing and distribution. Further, while segregating / debundling

and treating advertisement and sales promotion as an independent and separate international transaction, the assessing officer did not apportion the operating profit/ income as declared and accepted in respect of the international transactions."

21. In our understanding of the facts and law, mere agreement or arrangement for allowing use of their brand name by the AE on products does not lead to an inference that there is an "action in concert" or the parties were acting together to incur higher expenditure on AMP in order to render a service of brand building. Such inference would be in the realm of assumption/surmise. In our considered opinion, for assumption of jurisdiction u/s 92 of the Act, the condition precedent is an international transaction has to exist in the first place. The TPO is not permitted to embark upon the bench marking analysis of allocating AMP expenses as attributed to the AE without there being an 'agreement' or 'arrangement' for incurring such AMP expenses.

22. The aforesaid view that existence of an international transaction is a sine qua non for invoking the transfer pricing provisions contained in Chapter X of the Act, can be further supported by analysis of

section 92(1) of the Act, which seeks to benchmark income / expenditure arising from an international transaction, having regard to the arm's length price. The income / expenditure must arise qua an international transaction, meaning thereby that the (i) income has accrued to the Indian tax payer under an international transaction entered into with an associated enterprise; or (ii) expenditure payable by the Indian enterprise has accrued / arisen under an international transaction with the foreign AE. The scheme of Chapter X of the Act is not to benchmark transactions between the Indian enterprise and unrelated third parties in India, where there is no income arising to the Indian enterprise from the foreign payee or there is no payment of expense by the Indian enterprise to the associated enterprise. Conversely, transfer pricing provisions enshrined in Chapter X of the Act do not seek to benchmark transactions between two Indian enterprises.

23. The Revenue further contends that the assessee is not an independent manufacturer but is manufacturing for the benefit of the group entities and his status is akin to that of a contract manufacturer. Hence AMP activity is not for the sole benefit of the assessee but for the group as a whole.

24. It is the say of the ld. DR that pricing regulations are to applied keeping in mind the overall scheme of the tax payer's business arrangement. The contention of the ld. DR can be summarized as under:

a) The assessee being part of a group is not completely independent in its pricing policies including price of raw material purchased from AE, payments in respect of copyrights and patents payable to the AE. Even their product pricing is not completely independent. Linder such circumstances, the benefits emanating from the AMP function cannot be enjoyed by the assessee alone. The assessee is not an independent manufacturer who takes all the risks and enjoys all the benefits of the functions performed by them.

b) The assessee is not engaged only in manufacture. It is also engaged in distribution of goods by its own admission. In fact, the assessee has a dual function of manufacturer and distributor. In any case, given its distribution function, the assessee is covered by the judgement of Hon'ble Delhi High Court in M/s Sony Ericsson.

c) The benefits to the AE from AMP function continue to be the same as in the case of distributor like increase in sale of raw material, components and spare parts, increase in dividend, and increase in copyright and patent payments apart from creation/enhancement of Brand value. Therefore, the argument advanced by the assessee would not have any bearing on the existence of 'international transaction' just because it is engaged in manufacture has not merit.

25. Considering the aforesaid contention of the Revenue, we are of the considered view that the Hon'ble High Court in the case of Maruti Suzuki India Ltd [supra] held that the findings of the Hon'ble High Court with regard to existence of international transaction was only with respect to the case of three limited risk distributors namely, Sony Ericsson, Canon and Reebok etc., wherein the existence of international transaction was admitted and not in dispute. The Court accordingly held that such findings in the case of Sony Ericsson cannot be applied to the case of the manufacturers.

26. The Hon'ble High Court held as under:

> *"43. Secondly, the cases which were disposed of by the Sony Ericsson 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.*
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> *45. Since none of the above issues that arise in the present appeals were contested by the Assessees who appeals were decided in the Sony Ericsson case, it cannot be said that the decision in Sony Ericsson, to the extent it affirms the existence of an international transaction on account of the incurring of the AMP expenses, decided that issue in the appeals of MSIL as well."*

27. At this stage, it would not be out of place to refer to para 6.38 of the OECD Transfer Pricing Guidelines which apply only to limited risk distributors and not to full risk manufacturers like the assessee. The said para from OECD TP Guidelines read as under:

"6.38 Where the distributor actually bears the cost of its marketing activities (i.e. there is no arrangement for the owner to reimburse the expenditures), the issue is the extent to which the distributor is able to share in the potential benefits from those activities. In general, in arm's length transactions the ability of a party that is not the legal owner of a marketing intangible to obtain the future benefits of marketing activities that increase the value of that intangible will depend principally on the substance of the rights of that party. For example, a distributor may have the ability to obtain benefits from its investments in developing the value of a trademark from its turnover and market share where it has a long-term contract of sole distribution rights for the trademarked product. In such cases, the distributor's share of benefits should be determined based on what an independent distributor would obtain in comparable circumstances. In some cases, a distributor may bear extraordinary marketing expenditures beyond what an independent distributor with similar rights might incur for the benefit of its own distribution activities. An independent distributor in such a case might obtain an additional return from the owner of the trademark, perhaps through a decrease in the purchase price of the product or a reduction in royalty rate."

28. The Hon'ble High Court in the case of Sony Ericsson Mobile Communications India Pvt Ltd (supra) has further held that no transfer pricing adjustment in respect of AMP expenses can be made where the assessee (Indian entity) has economic ownership of the brand/logo/trademark in question, in the case of long term right of use of the same. This principle also squarely covers the present case. The assessee has a long term agreement for the use of the trademark 'LG' in India. This clearly evidences the fact that the economic benefit arising out of the alleged promotion of the AE's logo is being enjoyed by the assessee. There is a clear opportunity and reasonable anticipation for the assessee to benefit from the marketing activities undertaken by it. This is clearly evidenced by the significantly higher profits made by assessee compared to its industry peers and also the very sizeable year on year increase in its turnover. In view of the aforesaid, it is respectfully submitted that the economic ownership of the trademark 'LG' rests with the assessee. The Hon'ble High Court in the case of Sony Ericsson Mobile Communications India Pvt Ltd (supra) disagreed with the finding of the Special Bench that the concept of economic ownership is not recognized under the Act. The relevant observations in paras 151 to 154 of the judgement are reproduced hereunder:

"151. Economic ownership of a trade name or trade mark is accepted in international taxation as one of the components or aspects for determining transfer pricing. Economic ownership would only arise in cases of long-term contracts and where there is no negative stipulation denying economic ownership. Economic ownership when pleaded can be accepted if it is proved by the assessed. The burden is on the assessed. It cannot be assumed. It would affect and have consequences, when there is transfer or termination of economic ownership of the brand or trademark.

152. Determination whether the arrangement is long-term with economic ownership or short-term should be ordinarily based upon the conditions existing at the start of the arrangement and not whether the contract is subsequently renewed. However, it is open to the party, i.e. the assessed, to place evidence including affirmation from the brand owner AE that at the start of the arrangement it was accepted and agreed that the contract would be renewed.

153. Economic ownership of a brand is an intangible asset, just as legal ownership. Undifferentiated, economic ownership brand valuation is not done from moment to moment but would be mandated and required if the assessed is deprived, denied or transfers economic ownership. This can happen upon termination of the distribution-cum-marketing agreement or when economic ownership gets transferred to a third party. Transfer Pricing

valuation, therefore, would be mandated at that time. The international transaction could then be made a subject matter of transfer pricing and subjected to tax.

154. Brand or trademark value is paid for, in case of sale of the brand or otherwise by way of merger or acquisition with third parties. …. ….. …..

Re-organisation, sale and transfer of a brand as a result of merger and acquisition or sale is not directly a subject matter of these appeals. As noted above, in a given case where the Indian AE claims economic ownership of the brand and is deprived or transfers the said economic ownership, consequences would flow and it may require transfer pricing assessment." (emphasis supplied)

29. As held by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications (supra), if the Indian entity is the economic owner of the brand and is incurring AMP expenses for the purpose of promotion of such brand, benefit is only received by the Indian entity. It wa submitted that the economic ownership of the brand rests with the assessee and accordingly, the assessee cannot be expected to seek compensation for the expenditure incurred on the asset economically owned by it. No Transfer Pricing adjustment on account of AMP expenses would be warranted. The aforesaid test is fully satisfied in the case of the assessee and the Transfer Pricing

adjustment on account of AMP expenses made by the TPO is liable to be deleted.

30. The assessee being a full-fledged manufacturer, entire AMP expenditure is incurred at its own discretion and for its own benefit for sale of LG products in India. In the case of the appellant, the advertisements are aimed at promoting the sales of the product sold under trademark 'LG' manufactured by the assessee and not towards promoting the brand name of the AE. In such circumstances, the alleged excess AMP expenditure does not result in an international transaction and the assessee cannot be expected to seek compensation for such expenses unilaterally incurred by it from the AE.

31. The Revenue has strongly objected for the aggregated bench marking analysis for the AMP. According to the Revenue, the assessee company has not been able to demonstrate that there is any logic or rationale for aggregation or that the transactions of advertisement expenditure and the other transactions in the distribution activity are inter-dependent, the clubbing of transactions cannot be allowed. According to the Revenue, bench marking of AMP transaction is to be

carried out using segregated approach and for determination of ALP of such transactions, Bright Line is used as the tool.

32. This contention of the Revenue is no more good as BLT has been discarded by the Hon'ble High Court of Delhi as mentioned elsewhere. The Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communications India Pvt Ltd in Tax Appeal NO. 16 of 2014 has held that if the Indian entity has satisfied Transactional Net Margin Method (TNMM), i.e., as long as the operating margins of the Indian enterprise are higher than the operating margins of comparable companies, no further separate compensation for AMP expenses is warranted. The Hon'ble Court held as under:

> *"101. However, once the Assessing Officer/TPO accepts and adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would as noticed above, lead to unusual and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the inter-linked transaction. This would be also in consonance with Rule 10B(1)(e), which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the assumption that*

functions, assets and risk being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible."

33. Considering the aforementioned findings of the Hon'ble Jurisdictional High Court of Delhi In the case in hand, the operating profit margin of the assessee is at 5.01% in the manufacturing segment and 4.52% in the distribution segment and the same is higher than that of the comparable companies at 4.04% in the manufacturing segment and 4.46% in the distribution segment. TNMM has undisputedly been satisfied. Since the operating margins of the assessee are in excess of the selected comparable companies, no adjustment on account of AMP expenses is warranted.

34. Considering the facts of the case in hand in totality, we are of the view that the Revenue has failed to demonstrate by bringing tangible material evidence on record to show that an international

transaction does exist so far as AMP expenditure is concerned. Therefore, we hold that the incurring of expenditure in question does not give rise to any international transaction as per judicial discussion hereinabove and without prejudice to these findings, since the operating margins of the assessee are in excess of the selected comparable companies, no adjustment is warranted. Ground Nos. 3 to 3.34 of the assessee are allowed.

35. Ground Nos. 4 to 4.4 relate to Transfer Pricing adjustment on account of international transaction of payment of royalty of Rs.34,30,08,092/-.

36. On examination of agreement submitted, the TPO noted that the assessee company used to pay 1% royalty to LGEK till 1.1.2003 which was then increased to 3% and was subsequently increased to 5% of both domestic and export sales w.e.f. 01.01.2004. The TPO observed that rate of royalty payment have been unilaterally increased from 1% to 5% within a span of three years without commensuration enhancement in the right and benefit of the assessee company. The assessee company bench marked this transaction by applying Comparable Uncontrolled

Price [CUP] method and selected the following comparables for the purpose of bench marking analysis:

Name of Foreign Collaborator	Name of Indian Company	Date of approval	Items of Manufacture	Royalty Rates – Domestic	Royalty Rates-Export	Duration of the agreement (Years)
Toshiba Corporation Japan	Videocon International Limited	Sep-99	Colour Television Receivers	4%	3%	7
Hitachi Limited	Volta Limited	Nov-99	Steam fired vapour	5%	5%	5
Eatco Williams Group	Blue Star Limited	Jan-03	Invicts PAC usage of Air Conditioning	5%	5%	5
Kenwood Design Corporation	Videocon International Limited	Mar-99	Television	5%	5%	5
Samsung Electronics Co. Limited	Videocon Appliances Limited	Mar-99	Showcase of Reach-in-type and open type reach-in-cooler and open freezer	5%	5%	5
Victor Company of Japan	Mirc Electronics Limited	Apr-03	Colour Television Receiver Set and Sub-assemblies	5%	5%	7
SRS Labs Inc	Salora International Limited	Apr-03	Speaker	5%		3
Vilter Manufacturing Corporation	Frick India limited	Jan-03	Refrigeration Compressors	5%	8%	5

37. Out of the aforesaid 8 comparables, DRP/TPO considered only 3 comparables engaged in manufacture of colour television, viz., Toshiba Corporation, Japan, Kenwood Design Corporation and Victor Company of Japan and disregarded the remaining 5 comparables. Accordingly, the TPO arrived at average royalty rate of 4.50%. The DRP/TPO further made an adhoc adjustment of 1% from the average rate of royalty of 3 comparables of 4.5%, allegedly on the ground that the royalty agreement of the assessee is in perpetuity, while the agreement of the comparables is for a definite period. The DRP further observed that since the assessee has made payment of design and development charges to LGEK, the payment of royalty should be lower by 1%. Accordingly, the arm's length royalty was determined at 3.50% resulting into adjustment of Rs 34,30,08,092/-.

38. Before us, the ld. AR stated that all the comparable companies are engaged in manufacture of similar white goods/electronic products and, therefore, for undertaking benchmarking analysis, all the comparables should be taken into consideration. It is the say of the ld. AR that since royalty paid @ 5%, being the average rate of royalty of all the comparables, no adjustment on account of payment of royalty is warranted.

39. We have carefully considered the underlying facts in issue. We find that an identical issue was considered by the coordinate bench in assessee's own case in A.Y 2007-08 in ITA No. 5140/DEL/2011. The relevant findings of the Tribunal read as under:

> "10.7 The next question is about the determination of such reduction in the rate of royalty. Both the sides fairly agreed that the issue of quantification of adjustment to be allowed on account of fixed term and perpetual license is a virgin issue inasmuch as there is no precedent available on this point. We find that the TPO determined comparable average rate of 3.5% of the companies having fixed term agreements. Considering the fact that the assessee had a perpetual license, he discounted the uncontrolled royalty rate by 2%, thereby calculating the arm's length royalty rate at 1.5%. The DRP computed average rate of royalty of three comparable companies at 4.5% and, thereafter, reduced 1% on account of limited period of license used by the comparables vis-a-vis the assessee using the perpetual license. 10.8. There can be no quarrel on the fact that, other things being equal, a landlord intending to have a tenant for a long-term may compromise some amount of rent, in comparison with a landlord finding a tenant requiring the premises for a short-term.
>
> The rate of rent in a former case will be lower for a variety of reasons, such as, not undergoing the process of finding a tenant every now and then, fear of the property remaining vacant for

some time after the exit of the first tenant and incurring costs at the time of each let out. Difference between the rent charged by the landlord or paid by the tenants in the afore discussed two situations is nothing but a discount allowed to a tenant of long-term on the available market rate of rent. This analogy can be applied to the present facts by considering the discount which a licensor with a perpetual license may allow or the premium which a licensor with a fixed term license may charge. It can be seen that the TPO downgraded 2% on this score and reduced the unadjusted comparable rate of 3.5% to the adjusted 1.5%. To put it differently, the TPO treated the premium charged by the comparable licensors on account of fixed term licenses at 57% (2/ 3.5*100), or in other words, the discount at such rate to the prevalent market rate on account of perpetual license. However, the DRP treated such discount for perpetual license at 22% (1/4.5*100). Considering the entirety of the facts and circumstances of the instant case, we find that the rate of premium on the license with fixed term at 22% is on a higher side. In our considered opinion, the rate of such premium should be restricted to 10% of the average rate of royalty of the comparable cases.

10.9. It has been held above that the DRP rightly considered three companies as comparable, whose average rate of unadjusted royalty comes at 4.5% within the meaning of sub- clause (i) of rule 10B(1)(a). When rate is discounted with 10% under sub-clause (ii), resulting into a deduction of 0.45% (10% of 4.5), the arm's length rate of royalty as per sub-clause (iii) of rule 10B(1)(a) comes to

4.05% (4.5-0.45). It is this rate, which is directed to be applied as arm's length rate of royalty payment. V. Rule of Consistency."

40. Respectfully following the findings of the co-ordinate bench, we direct the TPO to determine the Arm's Length royalty @ 4.05%. Ground Nos. 4 to 4.4 are partly allowed.

41. Ground Nos. 5 - 5.5 relate to Transfer Pricing adjustment on account of Allocation of Asian Region Office Expenses of Rs 4,59,20,550/-.

42. Facts relating to this issue are that LG Electronics Singapore Limited provides services to the assessee in connection with Marketing, Finance, Human Resource, Supply Chain Management, After Sales Support etc. In consideration for the services, the assessee paid a sum of USD 381,257 per month as fee in terms of agreement dated 01.01.2008. The fee for the services is based on the value added costs incurred by the RHQ and is inclusive of 5% mark-up.

43. During the year under consideration, the Regional Headquarter provided the following services to the assessee:

Division	Nature of Services
Marketing	Brand management Marketing planning, control and training
Executive	General management and administration Strategic business planning & development
Human Resource	General management and administration
Finance	Financial and treasury Legal and tax advisory Investment research analysis
Supply Chain Management	Global procurement Supply chain management Logistic management
After Sales Services	Technical Call Centre

44. In consideration for the aforesaid services, the regional head quarter charged fees on the basis of cost plus mark up of 5%, and accordingly, the assessee paid a sum of Rs 4,59,20,550/-.

45. The Revenue alleges that the assessee is not even in possession of the information with regard to the utilisation of intra-group services of marketing and finance and, hence, it is not in a position to co-relate the exact application of the above mentioned services and benefit derived by the segment/ division of the company on account of intra group service charges and is only making a vague

representation of deriving benefit. The Revenue further contends that the assessee has not adduced evidence sufficient to justify the need, benefit and arm's length nature of intra group service charges paid to its AE.

46. The ld. DR vehemently stated that there is a high possibility of duplication of services in the sense that the taxpayer itself could have performed the aforesaid services and there was no need for the same to have been done by AEs. The ld. DR further stated that the assessee has also not been able to demonstrate that any tangible gains achieved are indeed the result of efforts of the overseas team and not a result of the efforts of the assessee. The ld. DR further stated that the allocation key for the allocation of expenses, which is the ratio of turnover of various entities is also not justified since the turnover cannot be co-related to the services claimed to be received from the AE. It is the say of the ld. DR that the assessee has failed to establish any direct nexus which may have helped its case of having received enhanced turnover as a result of services provided by the AE.

47. In our considered opinion, for the purpose of determination of ALP of intra group services, the following issues have to be taken into consideration:

i) Whether the services were required?

ii) Whether the services were rendered?

iii) Whether the services benefitted the assessee?

iv) Whether the price paid for such services is at arm's length?

48. We find that the lower authorities have not disputed the factum of rendering of services but have held that the services rendered by RHQ are duplicative and hence were not required by the assessee. Further, the Revenue has also alleged that these were share holder services.

49. In our humble opinion, it is the prerogative of the assessee to decide as to whether or not the services are required. Documentary evidences brought on record show that significant services were rendered by RHQ benefitting the assessee to name a few such services, brand analysis, product analysis, market analysis, etc. Further, we find that the RHQ engages third party renowned consultants, such as,

Mckinsey & Co to conduct market research and prepare reports. RHQ also conducts various training courses from time to time which are conducted with a view of imparting soft skills to the employees of the assessee company and for this purpose, executives from the RHQ visit the assessee company.

50. In so far as the allegation that these are share holder services, we do not find any merit in this argument of the Revenue. Services are provided by LG Electronics Singapore Pte Ltd, which is not a shareholder of the assessee company and was created to provide managerial support services to various entities in the region, in the form of undertaking market research, market performance analysis, conducting consumer interviews engaging the services of third party consultants for undertaking market/industry analysis, provision of supply chain management services, provision of after sale services etc. and such activities cannot be termed as share holder activity.

51. We find that the assessee engaged a third party consultant to determine the arm's length price of the services provided by the RHQ. The consultant determined ALP at Rs. 6,521/- per hour as against the

comparable uncontrolled price of Rs. 11,670/- per hour. Since the hourly rate charged by RHQ is lower than comparable hourly rate of third parties transaction of regional head quarter charges meets the arm's length test.

52. The Revenue has made the adjustment holding that the assessee was not required to incur such expenditure which are duplicative in nature. In our considered view, the assessee is free to conduct business in the manner that assessee deems fit and the commercial or business expediency of incurring any expenditure has to be seen from the assessee's point of view.

53. The Hon'ble Delhi High Court in the case of CIT vs Reebok India Co Ltd ITA No 213/2014, while deleting transfer pricing adjustment made by the TPO on the basis of similar reasoning held as under:

> *"183. On the question whether the royalty should have been paid or not, we are in agreement with the finding of the Tribunal that question of payment of royalty cannot be determined on the basis of profitability or earnings of the assessed, once it is accepted that know-how and technical information was provided. It is not alleged or the case of the Revenue that the technology or know-how was*

hopeless and useless. The finding of the Assessing Officer/TPO, that the assessee had not derived any commercial benefit as technology and know-how had not resulted in any substantial profit increase, has been rightly rejected as totally unsustainable. Profitability of the assessed could have been lower or varied due to various reasons and lower profitability in one or more years cannot lead to the conclusion that no benefits were derived or technology was unproductive. The justification given by the assessee for lower profits on account of bad debts, high rent, increase in legal cost stand highlighted and accepted by the Tribunal. 184. Transfer pricing provisions, as noted above, recognise separate entity principle. Therefore, as a sequitur, it follows that the AE is a separate entity and when it avails and secures advantage of technical know-how, it should pay arm's length price for the right to use. The arm's length price would be the fair market price of the technical know-how, which is licensed.

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185. Royalty payable for availing the right to use would depend upon corresponding price, which would have been paid by an independent or unrelated enterprise. This is judged by applying comparables. TPO has not rejected the quantum of royalty on the said principle. The reasoning given by the TPO is not only erroneous for the reasons stated above, but is also contrary to the Rules. Depending upon the method selected, net profit or gross profit of the assessed has to be compared with profit margins of related enterprise. The formula prescribed under the Rules does not accept the ratiocination adopted and applied by the TPO.

54. The Hon'ble Delhi High Court in the case of CIT vs Lumax Industries Limited ITA No 102/2014 held that the Transfer Pricing provisions do not authorize disallowance of any expenditure on the basis that it was not necessary for the assessee to incur the expenditure. The Hon'ble Court held as under:

> *"16. On the question of addition made by the AO on account of ALP for the payment of royalty, learned counsel for the Assessee has rightly referred to the decision in Commissioner of Income Tax v. Sony Ericsson Mobile Communication (2015) 374 ITR 118 where the determination of the ALP of the royalty paid as Nil was not approved. The Court's attention has also been drawn to the decision in Commissioner of Income Tax v. EKL Appliances Limited (2012) 345 ITR 241 wherein it was held that Rule 10B (1) (a) did not authorize disallowance of any expenditure on the ground that it was not necessary for the Assessee to have incurred such expense. It was observed that though the quantum of expenditure could be examined, the entire expenditure could not be disallowed on the ground that it was not necessary."*

55. Further, the Hon'ble Delhi High Court in the case of CIT vs Cushman and Wakefield (India) Pvt Ltd. ITA 475 of 2012 has held that the authority of the TPO is to conduct a TP analysis to determine the ALP and not to determine whether the tax payer derives a benefit from

the service. The Hon'ble Delhi High Court has opined that the determination of benefit to the tax payer is in the domain of the AO. The Hon'ble High Court held as follows:

"34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in Dresser-Rand India Pvt. Ltd. v. Additional Commissioner of Income Tax, 2012 (13) ITR (Trib) 422.

35. The TPO's Report is, subsequent to the Finance Act, 2007, binding on the AO. Thus, it becomes all the more important to clarify the extent of the TPO's authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise – of factual verification is retained by the AO under Section 37 in this case. Indeed, this is not to say that the TPO cannot – after a consideration of the facts – state that the ALP is 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure. That decision is outside the authority of the TPO…."

56. Considering this issue from another angle in the light of the decision of the Hon'ble Delhi high Court in the case of CIT vs Lumax Industries Limited ITA No 102/2014 we are of the opinion that once the assessee has satisfied the TNMM method i.e. the operating margins of the assessee are higher than those of the comparable companies [as mentioned elsewhere], no separate adjustment is warranted.

57. Same view was taken by the Hon'ble Delhi High Court in the case of Magneti Marelli Powertrain India Pvt. Ltd. ITA No 350/2014 wherein the Hon'ble High Court held as under:

> *"17. As far as the second question is concerned, the TPO accepted TNMM applied by the assessee, as the most appropriate method in respect of all the international transactions including payment of royalty. The TPO, however, disputed application of TNMM as the most appropriate method for the payment of technical assistance fee of 38,58,80,000 only for which Comparable Uncontrolled Price ("CUP") method was sought to be applied. Here, this court concurs with the assessee that having accepted the TNMM as the most appropriate, it was not open to the TPO to subject only one element, i.e payment of technical assistance fee, to an entirely different (CUP) method. The adoption of a method as the most appropriate one assures the applicability of one standard or criteria to judge an international transaction by. Each method is a*

package in itself, as it were, containing the necessary elements that are to be used as filters to judge the soundness of the international transaction in an ALP fixing exercise. If this were to be disturbed, the end result would be distorted and within one ALP determination for a year, two or even five methods can be adopted. This would spell chaos and be detrimental to the interests of both the assessee and the revenue. The second question is, therefore, answered in favour of the assessee; the TNMM had to be applied by the TPO/AO in respect of the technical fee payment too."

58. Considering the facts in totality in the light of the judicial decisions discussed hereinabove, the adjustment computed by the TPO/DRP on account of allocation of RHQ expenses is uncalled for and deserves to be deleted. Ground Nos. 5 to 5.5 are allowed.

59. Ground Nos 6 – 6.1 relate to Transfer Pricing adjustment on account of payment of overseas marketing related services of Rs 1,30,08,500/-.

60. Facts on record show that during the year under consideration, the assessee requested its associated enterprises to carry out market survey for its overseas operations. Actual costs of carrying out such

survey, such as, personnel costs and other direct expenses, were reimbursed by the appellant to its associated enterprises. No mark up was charged by the associated enterprises on this transaction. Further, the appellant incurred certain sales promotion expenses towards overseas market development through its AEs. The AEs incurred such expenditure on behalf of the assessee which was reimbursed to its AEs.

61. During the year under consideration, the assessee reimbursed LG Electronics S.A. Ltd. an amount of Rs. 1,973,000/- towards overseas market development charges and reimbursed cost of market survey carried out by LGEK amounting to Rs. 14,981,500/-. The TPO disallowed part of market survey expenses amounting to Rs. 1,30,08,500 on account of non-furnishing of evidences.

62. Before us, the ld. AR pointed out that the results of the survey undertaken by the AE were provided to the assessee in the form of a report and the report was submitted before the DRP. The DRP dismissed the same stating that it did not pertain to the current year, only incidental benefit has been derived by the appellant, and the services were in the nature of shareholder activities. It is the say of

the ld. AR that the DRP grossly erred by not considering the evidences placed in relation to overseas marketing services. The ld. AR pointed out that the directions issued were in relation to the analysis of evidences submitted for Allocation of Asia Region Office expenses.

63. We find that the facts have not been properly appreciated by the lower authorities. It appears that the evidences furnished by the assessee have been considered in the light of allocation of expenses by RHQ. In the interest of justice and fair play, we restore this issue to the file of the TPO. The assessee is directed to furnish evidences specifically mentioning the issues under consideration and the TPO is directed to verify the same and decide the issue afresh after giving reasonable opportunity of being heard to the assessee. Ground Nos. 6 to 6.1 are allowed for statistical purposes.

64. Ground No. 7 relates to segregation of closely linked transactions.

65. This issue is covered by our findings given in Ground Nos 3 to 6 and, therefore, goes in favour of the assessee and against the Revenue.

66. Ground Nos. 8 to 8.1 relate to addition on account of Sales-tax subsidy of Rs. 46,29,42,435/- holding the same to be revenue receipt.

67. Brief facts relating to this issue are that the assessee set up a manufacturing unit with an initial investment of Rs.62,05,18,132/- upto 28th March, 1998 and additional investment of Rs.60,13,83,450/- was made during the financial years 1998-99 to 2000-01.

68. The U.P. Government, under U.P. State Industrial Policy, 1994, had formulated policy to encourage the setting up of new industrial units or substantial expansion of existing industrial units during a particular period in certain specified areas of U.P. in the form of, inter alia, sales tax exemption, with the object of achieving economic & industrial development and generation of employment opportunities. The scheme and the purpose for which it was framed by the State shows that the incentive was given for encouraging setting up of

manufacturing facilities, resulting in enhancement of necessary industrial infrastructure for rapid industrialization of the state and creating employment opportunities.

69. For purposes of the aforesaid policy, the Government issued Notification dated 31.3.1995, clarifying that the subsidy in the form of sales tax exemption would also be available to substantially expanded industrial units, which came into existence during the specified period and fulfilled the condition of additional investment of more than Rs.50 crores in such a unit during the specified period. Therefore, with the objective to promote the development of certain industries which had been set-up or undertaken modernisation, diversification, backward integration by way of fixed capital investment of Rs. 50 crores or more. The exemption from sales tax was available to those units which had started production or had carried out expansion or modernisation or backward integration, etc., between 1-12-1994 and 31-3-2000.

70. Considering that the assessee satisfied the aforesaid condition precedent for availing subsidy in the form of sales tax exemption, the Addl. Director of Industries, Greater Noida, in accordance with the provisions of Industrial Policy and section 4A of the U.P. Sales Tax Act,

1948, read with Notification No.640/641 dated 21.2.1997, issued certificates bearing No. 4027, 1344, 3249, 328, 519, 449 & 327, dated 7.3.2003 on various dates, granting the Greater Noida unit of the appellant company subsidy in the form of sales tax exemption, in order to compensate the investment made for setting up the unit in the State of U.P. The total amount of exemption initially granted was Rs.203,73,53,192, which was to be utilized within a period of 15 years, commencing from 27.3.1998 to 26.3.2013.

71. In accordance with the aforesaid Policy, the assessee sold the products manufactured in the aforesaid unit at the same price (Dealer Price), at which products manufactured at other units (non-exempt units) were sold, which is inclusive of sales tax. The modus operandi followed is described hereunder:

72. The assessee sells the products at dealer price (DP) across the country, which is uniform in the State of U.P. and other States. This price is inclusive of sales tax. As per the said exemption, the appellant is not required to pay sales tax on sale in U.P. and is eligible to retain the entire selling price, i.e., DP inclusive of sales tax. However, by selling the products in states other than U.P., the appellant is required

to deposit the corresponding sales tax with the State Government. Thus by selling the goods at the same DP in State of U.P. and other States, the company has received excess price in the State of U. P., by way of incentive allowed by the U. P. Government, in the form of Sales Tax, which is not required to be paid back to the U. P. Government, as compared to net price (DP less sales tax paid to the State Government) received in the other States. Thus, the amount of sales tax retained on sale of products in U.P is the subsidy received by the appellant.

73. In case of exempt units (unit at U.P.), sales tax was not separately reflected in the bills, unlike bills raised from non-exempt units, but was collected and retained by the appellant as part of incentive / subsidy, by virtue of exemption granted by the U.P. Government. The sales tax incentive was the subsidy given to the appellant under the Industrial Policy of the State to encourage setting up of industries, with the object of achieving economic & industrial development and generation of employment opportunities, in backward area and not for assisting the appellant in carrying out its business operations.

74. During the relevant year, the appellant received subsidy in the form of sales tax exemption for an amount of Rs. 46,29,42,435/- which was treated as capital receipt, not exigible to income-tax in the return of income.

75. The contention of the assessee was dismissed by the Assessing Officer who found that in the earlier year, the Assessing Officer has treated Sales Tax component as revenue receipt liable to tax.

76. Before us, the ld. AR vehemently contended that though in the earlier A.Ys the decision has gone against the assessee, but due to subsequent judicial developments on this issue, the findings given in earlier years assessments become redundant. The ld. AR heavily relied upon various judicial decisions to support his contention.

77. The ld. DR drew our attention to the orders of the Tribunal for A.Y 2002-03 and subsequent A.Ys and stated that the Tribunal has decided this issue against the assessee and in favour of the Revenue and the same view should be followed.

78. We have given thoughtful consideration to the orders of the authorities below. We have also considered the orders of the coordinate bench in assessee's own case and the various judicial decisions relied upon by the ld. AR. In A.Y 2002-03, the coordinate bench in ITA No. 1404/DEL/2007 has held as under:

"9. We have heard both the parties and gone through the material available on record. In this case the assessee had collected sales tax as a part of dealers' price. At the year end the sales tax portion, which formed the part of dealers' price had been bifurcated and has been claimed as capital subsidy. We have also gone through the Notification No. 1179 dated 31.03.1995 issued by the State Government of Uttar Pradesh. The State Govt. has provided sales tax exemption with an objective to promote the development of certain industries which have been set up or undertaken modernisation, diversification, backward integration by way of fixed capital investment of Rs.50 crores or more. The exemption of from sales tax or benefit of reduced rate of tax is available to those units which have started production or have carried out expansion or modernisation or backward integration etc. between 1.12.1994 and 31.03.2000. Para 2 of the notification specifies that the exemption or reduction in the rate of sales tax including the additional tax would not be more than 5 per cent of sale of goods. In case where tax rate was more than 5 per cent including additional tax, the balance was to be paid by the unit.

Para7 (2) of the notification provides for the exemption of sales tax to the extent of exemption or reduction in tax. Item (2) of the Schedule includes Greater Noida Industrial Development Area wherein exemption from sales tax to the extent of 200 per cent of capital investment has been provided. None of the clauses of the Notification authorises the assessee to collect the sales tax and retain the same with it. The exemption of sales tax was available from the date of first sale or the date within the period of six months from the date of production, whichever is earlier.

The said notification also provided that the eligibility certificate to the assessee will be issued by the joint/additional director of concerned Development Authority and the same will be produced before the concerned assessing officer. The Addl. Director Industries, Greater Noida Industrial Development Authority, vide letter No. 1344 dated 23/06/1999 issued eligibility certificate to the assessee. As per this certificate fixed capital investment is of Rs.51,57,95,446/-. The date of commencement of production is 9/03/1998 and the first sale was affected on 27th March, 1998. The assessee applied for exemption from trade tax [sales tax] vide application dated 10/09/1998. The exemption from trade tax [sales tax] was provided from 27th March, 1998 to 26th March, 2013 for a period of 15 years or till the time the exemption of sales tax was availed of to the extent of 200 per cent of fixed capital investment i.e. Rs.1,02,75,90,892/- whichever was earlier. This certificate also provided the items i.e. Colour TV, Washing machine and Air-conditioners on which exemption from sales tax

was provided. Another certificate was issued on 27th September, 2000 vide letter No. 1519 in respect of printed circuit voice for CTV number 8,12,000 and Micro-wave Oven 1,00,000. In this certificate, the sales tax exemption in first three years has been provided to the extent of 100 per cent, next three years 75 per cent, next two years 50 per cent and next two years 25 per cent. In all exemption from sales tax was provided for 10 years.

10. Neither the certificates issued by Greater Noida Industrial Development Authority nor the Notification issued by the State Govt. authorises the assessee to collect sales tax from its customers. The assessee has been exempted from collecting the sales tax from customers on the sales made with effect from 27th March, 1998. In fact, the ld. counsel for the assessee made a statement at the bar, during the course of hearing, that neither the Notification has authorized the assessee to collect sales tax nor the assessee had collected the sales tax as such. The assessee had included the element of sales tax in the dealers' price as a sale price of the product. In the States other than Uttar Pradesh, the sales tax so collected as a part of dealers' price has been paid to respective State Governments, whereas in the case of the assessee, since the assessee was not liable to pay sales tax, as exemption has been provided to the extent of 200 per cent of fixed capital investment, the sales tax element which is embedded in the sale price have been retained by the assessee as excess sales consideration. At the year-end the assessee has allocated the sales tax element from dealer's price and has claimed the same as

capital subsidy. Therefore, the collection of dealers' price has been made in the ordinary course of trading activities. When the assessee is not permitted to collect the sales tax under the notification issued by the State Govt. the collection of sales tax as a part of dealers' price is nothing but constitutes a trading receipt……."

79. In A.Y 2003-04, the coordinate bench in ITA No. 3729/DEL/2009 has held as under:

"In view of the above, Ld. Departmental Representative claimed that the issue is squarely covered in favour of the Revenue. However, ld. Counsel of the assessee submitted that the Tribunal has not considered the matter properly. He submitted that the appeal against the tribunal order is pending in the Hon'ble High Court of All. However, upon careful consideration, we find that there is no proper justification to deviate from the decision of the ITAT in assessee's own case. The appeal against the Tribunal order is still pending in Hon'ble High Court. Under the circumstances, the judicial propriety mandates that we adhere to the decision of the Tribunal in assessee's own case. Accordingly, respectfully following the precedent as above, we uphold the order of the Ld. Commissioner of Income Tax(A)."

80. We find that the assessee's appeal against the order of the Tribunal for A.Y 2002-03 is pending before the Hon'ble High Court. Judicial propriety mandates that we adhere to the decision of the coordinate bench in assessee's own case. Respectfully following the precedents [supra] we decline to interfere with the findings of the CIT(A). Ground No. 8 is accordingly dismissed.

81. Ground Nos 9 - 9.2 relate to Provision for service warranty of Rs.38,02,141/-.

82. During the course of scrutiny assessment proceedings and on perusal of Schedule O of the balance sheet, the Assessing Officer observed that the assessee has made provisions for service warranty of Rs. 38,02,141/-. The assessee was asked to explain the nature of these provisions and was required to show cause as to why it should not be disallowed as per last year.

83. The assessee explained that it is generally providing one year warranty on sale of its products. As per its accounting policy, the service warranty expenses are provided in the books of accounts based

upon well established scientific and realistic methods. It was further explained that sales price includes the component of service warranty thereby the income stand increased by this element of service warranty being income embedded in the sales price. The contention of the assessee did not find any favour with the Assessing Officer who was of the firm belief that there is no definite element to the liability and disallowed Rs. 38,02,141/-.

84. When the matter was agitated before the DRP, the DRP observed that similar issues arose in A.Ys 2002-03 to 2007-08 wherein similar disallowances have been deleted by the CIT(A). Since the Revenue's appeals were pending before the Hon'ble High Court of Allahabad, the DRP confirmed the findings of the Assessing Officer.

85. We do not find any force in the findings of the DRP. When in A.Ys 2002-03, 2003-04, 2004-05 and 2007-08 this issue has been settled in favour of the assessee and against the Revenue, we do not find any reason why the same should not be followed for the year also. Respectfully following the findings of the coordinate benches, we

direct the Assessing Officer to delete the addition of Rs. 38,02,141/-. Ground No. 9 is allowed.

86. Ground Nos 10 – 10.1 pertain to disallowance of payment of royalty of Rs.85,75,19,908/- holding the same to be capital expenditure.

87. The AO has disallowed the royalty payments amounting to Rs. 85,75,19,908/- paid to LG Electronics Inc. Korea ('LGEK') as capital expenditure.

88. We find that the Tribunal in assessee's own case for A.Y. 2007-08 has decided this issue in favour of the assessee and against the Revenue. Respectfully following the findings of the coordinate bench, we direct the Assessing Officer to treat royalty payment of Rs. 85.75 crores as revenue expenditure. Ground No. 10 is allowed.

89. Ground Nos. 11 & 11.1 pertain to disallowance of payment of export commission of Rs. 8,78,45,287/- holding the same to be diversion of profits to LG Electronics Korea 'LGEK'.

90. An identical issue was considered by the coordinate bench in A.Y 2007-08 and has decided the same against the assessee. The ld. AR contends that certain documents were not furnished by the assessee and if the same are considered as additional evidence, the issue may be set aside for fresh adjudication.

91. It is not in dispute that in A.Y 2007-08 this issue was decided against the assessee by the Tribunal. The assessee has filed application u/r 29 of the ITAT Rules for admission of additional evidence in support of payment of export commission to its AE. In our considered opinion, such additional evidences need to be verified before deciding this issue. We, accordingly, restore this matter to the file of the Assessing Officer. The assessee is directed to furnish relevant documentary evidences and the Assessing Officer is directed to consider the same and decide the same afresh after giving

reasonable opportunity of being heard to the assessee. Ground No. 11 is treated as allowed for statistical purposes.

92. Ground Nos. 12 & 12.1 relate to disallowance of deduction under section 80JJAA of the Act to the extent of Rs. 29,06,091/-

93. Facts on record show that the assessee claimed deduction u/s 80JJAA of the Act amounting to Rs. 44,50,635/-. The said amount pertained to deduction in respect of additional wages paid in financial years 2005-06, 2006-07 and 2007-08. The Assessing Officer has allowed the deduction in respect of claim pertaining to the A.Y under consideration amounting to Rs. 15.44 lakhs and disallowed the claim of deduction pertaining to A.Y 2006-07 and 2007-08 amounting to Rs. 29.06 lakhs.

94. Before us, the ld. AR contended that due to the amendment in section 80JJAA of the Act, the assessee is very much entitled for the claim of deduction. It is the say of the ld. AR that the only dispute is whether workmen who joined the assessee company in the earlier years and worked for less than 300 days in that year and therefore,

were not regarded as "regular workmen" in that year. It is the say of the ld. AR that if the amendment is considered in its true perspective, such workmen will be considered as "regular workmen" in the subsequent years in which their period of employment becomes equal to or more than 300 days.

95. Per contra, the ld. DR stated that the amendment brought in section 80JJAA is w.e.f. 1.4.2019 and, therefore, the same is not applicable for the year under consideration.

96. We have carefully considered the orders of the authorities below qua the issue. There is no dispute that he assessee satisfies all the conditions for claiming deduction u/s 80JJAA of the Act. For our convenience, section 80JJAA reads as under:

> *"80JJAA. (1) Where the gross total income of an assessee, being an Indian company, includes any profits and gains derived from any industrial undertaking engaged in the manufacture or production of article or thing, there shall, subject to the conditions specified in sub-section (2), be allowed a deduction of an amount equal to thirty per cent of additional wages paid to the new regular workmen*

employed by the assessee in the previous year for three assessment years including the assessment year relevant to the previous year in which such employment is provided.

(2) No deduction under sub-section (1) shall be allowed—

(a) if the business is formed by splitting up or the reconstruction of an existing business.

"**Provided further** that where an employee is employed during the previous year for a period of less than two hundred and forty days or one hundred and fifty days, as the case may be, but is employed for a period of two hundred and forty days or one hundred and fifty days, as the case may be, in the immediately succeeding year, he shall be deemed to have been employed in the succeeding year and the provisions of this section shall apply accordingly;".

97. The claim of the assessee is that the workmen who joined in the preceding year in which such workmen worked for less than 300 days should be considered provided that the period of employment of such workmen is equal to or more than 300 days in the relevant previous year. What the assessee contends is that new workmen, who did not fall in the category of “regular workmen”, on account of employment being for less than 300 days in the year of appointment, should be

considered as “regular workmen” in the subsequent year, provided such workmen continue to be employed with the company and the total period of their employment is equal to or more than 300 days in the subsequent year. Thought this contention of the assessee has been take care of by the second proviso, but the same has been given effect from 1.4.2019.

98. If the effect of the second proviso is given retrospectively, then the assessee’s claim of deduction is allowable. Memorandum explaining provisions of Finance Bill 2018 states that the amendment is intended to rationalize the deduction of 30% of additional wages “by allowing the benefit for a new employee who is employed for less than the minimum period during the first year but continues to remain employed for the minimum period in subsequent year.

99. In our considered opinion, this amendment i.e. second proviso is clarifactory in nature and is intended to remove the anomaly so as to advance legislative intention of providing incentive to new worker for more than 300 days and must be given retrospective effect. For this proposition, we draw support from the judgment of the Hon'ble

Supreme Court in the case of Allied Motors Pvt. Ltd Vs. CIT 224 ITR 677 [SC]. The relevant finding of the Hon'ble Supreme Court reads as under:

> "In the case of Goodyear India Ltd. v. State of Haryana and Anr. (188 ITR 402) this court said that he rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act.
>
> Therefore, in the well known words of Judge learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of R.B. Jodha Mal Kuthiala v. Commissioner of Income-tax, Punjab, Jammu & Kashmir and Himachal Pradesh (82 ITR 570), this Court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to made the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.
>
> This view has been accepted by a number of High Court. In the case of Commissioner of Income-Tax v. Chandulal Venichand ([1994] 209 ITR 7), the Gujarat High Court has held

that he first proviso to section 43B is retrospective and sales-tax for the last quarter paid before the filing of the return for the assessment year is deductable. This decision deals with assessment year 1984-85. The Calcutta High Court in the case of Commissioner of Income-tax v. Sri Jagannath Steel Corporation ([1991] 191 ITR 676), has taken a similar view holding that the statutory liability for sales-tax actually discharge after the expiry of accounting year in compliance with the relevant stature is entitled to deduction underSection 43B. The High Court has held the amendment to be clarificatory and, therefore, retrospective. The Gujarat High Court in the above case held the amendment to be curative and explanatory and hence retrospective. The Patna High Court has also held the amendment inserting the first proviso to be explanatory in the case of Jamshedpur Motor Accessories Stores v. union of India and Ors. ([1991] 189 ITR 70.), It was held that amendment inserting first proviso to be retrospective. The special leave petition from this decision of the Patna High Court was dismissed. The view of the Delhi High Court, therefore, that the first proviso to section 43B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his Principles of statutory Interpretation, 4th Edn. Page 291, "It is well settled that if a statute curative or merely declaratory of the previous law retrospective operation is generally intended." In fact the amendment would not serve its object in such a situation unless it is construed as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained."

100. Similar view was taken by the Hon'ble Supreme Court in the case of CIT Vs. Alom Extrusions Ltd 319 ITR 306 wherein the Hon'ble Supreme Court held that where a proviso in section is inserted to remedy unintended consequences to make section workable the proviso which supplies obvious omission therein in required to be read retrospectively in operation particularly to give effect to section as a whole.

101. Same view was followed by the Hon'ble Supreme Court in the case of CIT Vs. Kolkata Export Company 404 ITR 654.

102. Respectfully following the ratio laid down by the Hon'ble Supreme Court [supra] we direct the Assessing Officer to allow claim of deduction u/s 80JJAA of the Act as claimed by the assessee.

103. Ground Nos. 13 & 13.1 pertain to levying of interest u/s 234B and 234C of the Act.

104. Levy of penalty is mandatory though consequential to our decision. The Assessing Officer is directed to levy interest as per provisions of the law. Interest u/s 234C to be charged on the returned income.

105. In the result, the appeal of the assessee in ITA No. 6253/DEL/2012 is partly allowed.

The order is pronounced in the open court on 14.01.2019.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 14th January, 2019

VL/

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	