

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. 1514/DEL/2016
[A.Y 2011-12]

BMW India Private Ltd.
7th Floor, Tower-B, Building
No. 8, DLF Cyber City, Phase
II, Gurgaon
PAN:AABCB7140C

Vs.

The Dy. DCIT
Circle-1(1)
Gurgaon

(Applicant)

(Respondent)

Assessee By : Shri Percy Pardiwala, Sr. Adv
Shri Divyanshu Agarwal, Adv

Department By : Shri H.K. Choudhary, CIT-DR

Date of Hearing : 22.01.2019

Date of Pronouncement : 25.01.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is directed against the order dated 19.02.2016 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 2011-12.

2. The grievance of the assessee is three-fold, viz., firstly, the assessee is aggrieved by the additions/adjustments on account of Advertisement, Marketing and Promotion [AMP] expenditure. Secondly, the assessee is aggrieved by the enhancement of its income by Rs. 1,71,32,019/- by holding that transaction pertaining to receipt of Information Technology Support Services does not satisfy the Arm's Length Price, and, thirdly, the assessee is aggrieved by the disallowance of Rs. 83,70,085/- being payment made to M/s Bhumi Consultants.

3. The assessee company was set up in 2006 as a sales subsidiary with an assembly plant in Chennai. The company is 99.99% owned by BMW Holdings, B.V. Netherlands and the balance shares being held by BMW, AG Germany. During the year under consideration, the assessee was engaged in the import and resale of CBUs of the 6-series, 7-series, X3,X5,X6, Z and M Models of cars from BMW group for resale in the Indian market.

4. The company also carried out assembling of CKD Kits for BMW 3 and 5 series and X1² from its assembly facility in Chennai. The plant in Chennai started its commercial operations from early 2007. During the

year, the assessee company provided certain procurement support and training services to BMW Group.

5. During the year, the assessee has undertaken the following international transactions with its AEs:

| Nature of Transaction | Value | Method Used |
|--|----------------|--------------------|
| Purchase of raw materials | 8,44,93,14,008 | RPM/TNMM |
| Purchase of traded vehicles | 2,62,57,40,86 | RPM/TNMM |
| Purchase of spare parts | 67,19,73,711 | RPM/TNMM |
| Interest paid on delayed payments | 99,20,566 | RPM/TNMM |
| Purchase of fixed assets | 5,22,98,047 | TNMM |
| Commission Received | 52,96,590 | TNMM |
| Receipt of IT Support services | 1,71,32,019 | TNMM |
| Provision of procurement services | 9,02,15,985 | TNMM |
| Provision of training services | 1,19,70,651 | TNMM |
| /Reimbursement of expenses (Paid) | 22,59,31,587 | TNMM |
| Reimbursement of expenses by group | 14,37,99,955 | CUP |
| Payment of Interest of foreign currency loan | 3,92,17,218 | CUP |

6. During the course of TP assessment proceedings, on perusal of the TP Study of the assessee, the TPO noticed that the assessee has incurred expenditure for trade mark, brand name, promotion and development of marketing intangibles as under:

| | | |
|-------|---------------------------|-----------------------|
| (i) | Expenditure on AMP | Rs. 42,32,58,681/- |
| (ii) | Value of gross sales | Rs. 19,29,20,43,581/- |
| (iii) | AMP/Sales of the assessee | 2.19% |

7. The TPO was of the opinion that the assessee has incurred a cost in connection with the benefit and services provided to the AEs under a mutual agreement. Accordingly, AMP expenditure of Rs. 42.32 crores was treated as an international transaction u/s 92B(1) read with clause (v) of section 92F of the Act.

8. The TPO further noticed that though the assessee undertakes entire responsibility for promoting BMW brand in India by undertaking huge amount of advertising, marketing and promotion expenditure but has not received any cost sharing/reimbursement at all from its AEs or group companies even though the AE directly benefits from the brand promotion activity of the assessee.

9. In order to bench mark the transactions, the TPO proposed to compare AMP expenditure of the assessee with the AMP of other comparables engaged in distribution business using AMP to the sales ratio for comparability analysis.

10. The ratio of AMP/Sales in the case of the assessee has been mentioned elsewhere at 2.19%. The TPO found that in the distribution segment, the assessee has used 21 comparables, which are functionally similar. The TPO accordingly used the same comparables for the purpose of comparison of AMP expenditure on gross basis. The following comparables were used:

| Sl. No | Company Name | Advertising Expenses | Marketing Expenses | Distribution Expenses | Total | Sales | AMP/Sales (%) |
|--------|---------------------------------------|----------------------|--------------------|-----------------------|-------|---------|---------------|
| 1 | ACL Components Ltd | | 0.02 | 0.01 | 0.03 | 1.66 | 1.8% |
| 2 | AVG Motors Ltd | | | 0.54 | 0 | | |
| 3 | Associated Auto Parts Pvt Ltd | | 2.51 | | 3.05 | 62.66 | 4.87% |
| 4 | CAI Inds. Pvt. Ltd | | | | 0 | | |
| 5 | CML Holdings Ltd | 0.09 | 0 | | 0.09 | 26.38 | 0.34% |
| 6 | Competent Automobiles Co. Pvt Ltd | 0.93 | 0.38 | | 1.31 | 710.82 | 0.18% |
| 7 | Eastman Industries Ltd | 0.26 | 1.82 | 5.38 | 7.46 | 181.85 | 4.10% |
| 8 | Em Pee Motors Ltd | | | | 0 | 169.13 | 0.00% |
| 9 | Goldrush Sales & Services Ltd | | | | 0 | | |
| 10 | India Motor Parts & Accessories | | | | 0 | 429.3 | 0.00% |
| 11 | Jullundur Motor Agency [Delhi] Ltd | | 0.16 | | 0.16 | 277.5 | 0.06% |
| 12 | Lexicon Commercial Enterprises Ltd | 0 | 0.48 | 0.01 | 0.49 | 67.84 | 0.72% |
| 13 | Machino Techno Sales Ltd | | | | | | |
| 14 | Marikar [Motors] Ltd | 0.04 | | | 0.04 | 76.83 | 0.05% |
| 15 | Popular Vehicles & Services Ltd | 1.33 | 39.35 | | 40.68 | 1347.52 | 3.02% |
| 16 | Rohan Motors Ltd | 0.7 | 6.25 | 0.45 | 7.4 | 668.35 | 1.11% |
| 17 | Sai Service Pvt. Ltd | 1.37 | 5.95 | | 7.32 | 1602.33 | 0.46% |
| 18 | Sai Service Spares & Accessories. Ltd | 0.02 | 0.55 | | 0.57 | 54.36 | 1.05% |
| 19 | Shinrai Auto Service Ltd | 1 | | 0.3 | 1.3 | 329.47 | 0.39% |
| 20 | Sri Aruna Auto Service Ltd | 0 | 0.43 | | 0.43 | 14.32 | 3.00% |
| 21 | Stanes Motor Parts Ltd | 0.01 | 0.33 | 0.1 | 0.44 | 24.6 | 1.79% |
| | | | | | | Average | 1.35% |

11. Taking a leaf out of Bright Line Test [BLT], the TPO was of the firm belief that any expenditure in excess of the Bright Line is for the promotion of brand/trade name which is owned by the AE that needs to be suitably compensated by the AE. The amount which represents the Bright Line and the amount that should have been compensated to the assessee company were computed as under:

| | |
|---|-----------------|
| <i>Value of gross sales</i> | 19,29,20,43,581 |
| <i>AMP Sales of the comparables</i> | 1.35% of sales |
| <i>Amount that represents bright line</i> | 26,04,42,588 |
| <i>Total expenditure on AMP by the assessee</i> | 42,32,58,681 |
| <i>Expenditure in excess of the bright line</i> | 16,28,16,093 |

12. Since the TPO was of the firm belief that the assessee company has provided some services for promoting intangibles owned by the AE, therefore, for these services, the assessee company is eligible for remuneration equivalent to the cost mark up being earned by market support services/business services companies. Accordingly, total of 10.84% mark up on AMP spend was considered to be appropriate. The TPO finally computed AMP adjustment as under:

| | |
|---|------------------------|
| <i>Value of Gross Sale</i> | <i>19,29,20,43,581</i> |
| <i>AMP/Sales of the Comparables</i> | <i>1.35% of sales</i> |
| <i>Amount that represents bright line</i> | <i>26,04,42,588</i> |
| <i>Total expenditure on AMP by the assessee</i> | <i>42,32,58,681</i> |
| <i>Expenditure in excess of the bright line</i> | <i>16,28,16,093</i> |
| <i>Mark up @ 10.84%</i> | <i>1,76,49,264/-</i> |
| <i>Adjustment u/s 92CA</i> | <i>18,04,65,357</i> |

13. The assessee raised objection before the DRP but without any success.

14. Dismissing the objection of the assessee, the DRP held as under:

"As per Rule 10B(1(c)) appropriate mark-up is arrived at by comparison with comparable uncontrolled transactions after adjusting and taking into account functional and other differences. However, for this purpose it is essential to have a set of comparables performing similar functions that is providing services of advertisement and marketing to an independent enterprise taking into account the FAR analysis of the taxpayer. No such list of comparables have been provided by the TPO as the benefit of decision of Sony Ericsson was not available with the TPO. Even the assessee, in response to the notice specifically issued by order sheet entry dated 03-12-2015, response to which was given vide letter dated 08-12-2015, to clarify as to why the Gross Profit

Rate should not be applied as mark up in view of the decision of the Hon'ble High Court, has failed to provide appropriate comparables, as discussed above. The Gross Profit Rate, in respect of the distribution segment, is the Income the assessee expects to earn on its services and. thus takes into account its FAR as well as its other costs. The assessee did not file any list of comparables which fulfilled the criteria laid down by the Hon'ble Court. In absence of such comparable uncontrolled transactions, the Panel is left with no alternative except to utilize the gross profit of the assessee as an appropriate mark-up for the services rendered by the assessee to its AE. Thus, the TPO is directed to take the average gross profit of the distribution segment of the assessee as mark-up towards the opportunity cost of funds. In view of the above discussion, the assessee's Grounds of objections on this issue are dismissed."

15. Pursuant to the directions of the DRP, the Assessing Officer finally made addition of Rs. 53,11,37,361/-. Aggrieved by this, the assessee is before us.

16. At the very outset, the ld. AR stated that Bright Line Test adopted by the TPO has been discarded by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India Pvt Ltd vs CIT 374 ITR 118.

17. The ld. AR further stated that nowhere the TPO has brought any tangible material on record to show that there exists an international transaction in so far as AMP spend is concerned. In support of his contention, the ld. AR relied upon the decision of the Hon'ble High Court of Delhi in the case of Maruti Suzuki India Ltd 381 ITR 117, Whirlpool of India Ltd vs DCIT 381 ITR 154, Bausch & Lomb Eye Care [India] Pvt Ltd TA No. 643/2014 and 675/2014, Valvoline Cummins Pvt Ltd TA No. 158/2016 and Mary Kay Cosmetic Pvt. Ltd in ITA No. 1010/2018.

18. It is the say of the ld. AR that the Hon'ble High Court of Delhi in these cases have categorically held that the onus is on the Revenue to demonstrate that the AMP spend is an international transaction and further stated that since there is no machinery provision, therefore, bench marking cannot be done.

19. Per contra, the ld. DR strongly supported the findings of the DRP. It is the say of the ld. DR that the Tribunal, in assessee's own case in A.Y 2010-11 has considered AMP spend as international transaction and since the assessee is performing the same functions as performed in earlier A.Ys, decision of the coordinate bench should be followed.

20. We have given thoughtful consideration to the submissions of both the sides. We have also considered the orders of the co-ordinate bench in assessee's own case in A.Y 2010-11 and the various judicial decisions relied upon by the ld. AR and also by the ld. DR.

21. A perusal of the transactions with related parties at page 128 of the paper book Volume I shows that there was a reimbursement of marketing/business promotion/other expenses from ultimate holding company amounting to Rs. 3,33,945/- in F.Y. 2009-10, which is not there during F.Y under consideration. This means that in the immediately preceding F.Y, the assessee itself has reported reimbursement of marketing/business promotion/other expenses, accepting the same as international transaction. On these peculiar facts of F.Y. 2009-10, the coordinate bench came to the conclusion that AMP spend is an international transaction and set aside the assessment to the file of the Assessing Officer/TPO for determining ALP of international transaction of AMP spend afresh in accordance with the manner laid down by the Hon'ble High Court in Sony Ericsson Mobile Communications India Pvt Ltd. [supra].

22. In our considered opinion, facts of each A.Y. have to be considered and facts for the year under consideration show that the assessee has not shown any reimbursement on account of AMP spend as international transaction.

23. Having said that, let us now examine the Importation Agreement which is exhibited at pages 687 to 691 of the paper book.

24. At clause 1.2, it has been mentioned “BMW India operates its business in its own name on its account and at its own risk. It has no authority or power to legally bind BMW AG”.

25. At clause 2.2, under the head “Responsibility in the Contract Territory”, it is mentioned “Furthermore, BMW India undertakes the following functions in the Contract Territory in accordance with the laws of the contracting territory:

- (i) establishment and supervision of an efficient BMW distribution network;
- (ii) performance of an adequate advertisement and sales promotion as well as public and media relations; and

(iii) collection, evaluation and communication of market information to BMW AG.”

26. At Clause 3.1 under the head “Responsibilities for Sales and Advertising”, it is mentioned “BMW of India will meet its responsibility for the promotion of sales and the full utilisation of the market potential for the contract goods by applying its best efforts and adequate resources towards effective sales promotion and advertising for the contract goods including available optional equipment and accessories”.

27. On a careful perusal of the relevant clauses of Importation Agreement, it can be seen that it is the duty of the BMW India is to import and distribute BMW CBUs, CKD kits and original BMW parts/accessories and in doing so, BMW India will operate its business in its own name and is responsible for promoting the sales in India. Nowhere it is agreed that BMW India shall promote the brand name owned by the AEs.

28. There is no dispute that the TPO has made adjustment applying BLT which was enhanced by DRP though for a different reason.

29. 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."

30. 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.

31. 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.

32. 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 Assesseees Canon, Reebok and Sony Ericsson were all of distributors of products manufactured by foreign AEs. The said Assesseees 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 Assesseees 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 negated by the

Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT."

33. 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.

34. 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 negated by this Court as a valid method of determining the existence of an international transaction and thereafter its ALP."

35. The case of the Revenue is that BMW India has incurred certain expenses for promotion of brands in India and for development of Indian market and creation of marketing intangibles in India which remain the functions of the AE who owns the brand. The Revenue alleges that eventual beneficiary acts of the BMW India, is its AE. This action of the BMW India amounts to rendering of a service to the foreign AE for which Arms Length compensation was payable by foreign AE to the assessee company.

36. Except for the decision of the co-ordinate bench for A.Y 2010-11, the Revenue has not brought anything on record to establish that there exists an international transaction of provisions of brand building services between the assessee and the AE.

37. 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.”

38. 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 that 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.

39. 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.

40. 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."

41. Considering the aforementioned findings of the Hon'ble Jurisdictional High Court of Delhi in the case in hand, the relevant ratios can be understood from the following:

| Particulars | BMW - India | TP Documentation Comparables' Effective arm's length Result adjusted for assembly return | Margin of comparables' Effective arm's length Result adjusted for assembly return (FY 2010-11) |
|-------------|----------------|--|--|
| GP/Sales | 21.44% | 11.60% | 11.40% |
| OP/Sales | 12.60% | 3.65% | 4.08% |

Most of the companies selected by Assessee have AMP functions. The margin computation after excluding 2 companies which do not incur any expense on account of AMP is as follows:

| Particulars | BMW India | Margin of comparables' Effective arm's length Result adjusted for assembly return (FY 2010-11) (after excluding 2 companies with Zero AMP) |
|-------------|--------------|--|
| Sales | 21.44% | 11.58% |
| OP/Sales | 12.60% | .3.93% |

42. Since the operating margins of the assessee are in excess of the selected comparable companies, no adjustment on account of AMP expenses is warranted.

43. The DRP, while dismissing the objection of the assessee observed that the panel is left with no alternative except to utilize the gross profit of the assessee as an appropriate mark-up for the services rendered by the assessee to its AE.

44. Nowhere the DRP has brought on record or referred to any tangible material which could suggest that there are expenses of international transaction in so far as AMP spend is concerned. The DRP was well aware with the decision of the Hon'ble Delhi High Court in the case of Maruti Suzuki [supra], yet neither the DRP itself brought on record any material to suggest that the AMP spend is an international nor it directed the TPO to do the same. Therefore, we see no reason to remit the matter to the file of the TPO as is prayed for by the ld. DR. Remand to the assessment stage cannot be a matter of routine. It has to be so done only when there is anything in the facts and circumstances to so warrant or justify. In our considered opinion, no

new facts have emerged and all the facts brought on record during the course of scrutiny assessment proceedings do not indicate legally sustainable basis for remitting the matter to the file of the TPO.

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

46. In A.Y 2010-11, the co-ordinate bench was seized with the matter where the assessee itself has admitted that there exists an international transaction. Facts of the year under consideration are totally different in so far as this issue is concerned.

47. This Ground of the assessee is allowed.

48. The next issue relates to adjustment of Rs. 1,71,32,019/- by holding that the transaction pertaining to receipt of Information Technology Support Services does not satisfy the Arm's Length principle.

49. With respect to I.T related needs of the company, BMW group supports BMW India by providing online trouble shooting for its various hardware/software related problems and helps maintaining the I.T. infrastructure used by BMW India. In lieu of this support, BMW India paid certain IT support service charges to BMW Group during the year. The services availed by the company in this regard are as under:

- (i) Active directory operations;
- (ii) Site management;
- (iii) Domain controller configuration;
- (iv) Desktop and office services;
- (v) Provisioning of BMW standard office applications;
- (vi) Automated software distribution; and
- (vii) Physical Inventory/asset management.

50. To justify its claim, the assessee provided I.T. support diagram depicting an overall arrangement of the process flow. Further, the assessee submitted screen shots from companies I.T. system, which provides details of services, such as, wholesale integrated template, SAP licenses, third level support, etc. provided by the AEs to the assessee company.

51. Payment for intra group services to the AE was treated as separate international transaction, independent of final result and capable of verifiable separately and the TPO accordingly determined ALP separately rather than aggregating it with other transactions under TNMM.

52. The assessee raised objection before the DRP but without any success.

53. Before us, the Id. AR stated that once the services have been accepted to be rendered by the AEs, then ALP has to be determined as per the provisions of law.

54. The ld. DR strongly supporting the findings of the TPO/DRP, pointed out that the services claimed to have been received by the assessee are very routine. It is the say of the ld. DR that the assessee has not given details of total costs incurred by the AE on a particular service and how the same or basis on which the AE has charged the cost to the tax payer.

55. We have carefully considered the orders of the authorities below. We find that a similar quarrel arose in A.Y 2010-11 and the matter travelled upto the Tribunal which, in ITA No. 1406/DEL/2015 held as under:

"31. In the ultimate analysis, the Hon'ble jurisdictional High Court in Knorr Bremse (supra) remitted the matter for fresh adjudication by noting in para 3 of its judgment that : `The determination of the arm's length price by the authorities is based on certain findings of law which we have dealt with in the judgment. The entire computation of the arm's length price, therefore would have to be reconsidered and reassessed based on our findings. We are, therefore, left with no alternative but to remand the matter' for a fresh consideration in the light of the observations made in the body of the order. That is how, the Hon'ble High Court

restored the matter for fresh determination of the issue despite noticing that the TPO determined Nil ALP of the international transaction of intra-group services after applying the CUP method. However, this was done without expressing any opinion on the part bracketed by it from the judgment of Cushman (supra): 'such services exist or benefits have accrued. That exercise - of factual verification is retained by the Assessing Officer under [Section 37](#) in this case.' This shows that despite being aware of the fact that the TPO determined nil ALP of the international transaction of intra group services in the same manner as has been done in the case under our consideration by applying the CUP method, it did not order for the deletion of addition, but chose to remit the matter for fresh adjudication. This judgment, being that of the Hon'ble jurisdictional High Court, has primacy over the judgments of the other Hon'ble High Courts or of the Tribunal. There is hardly any need to accentuate that judgment of a jurisdictional High Court bears binding force and cannot be overlooked even if there are judgments of the other High Courts holding to the contrary.

32. To sum up, we hold that the international transaction of 'Receipt of I.T. Support Services' is required to be separately benchmarked, distinct from the international transactions of purchase etc. Since the view of the TPO as

regards the receipt of no services etc. has been set aside by us, we remit the matter to the AO/TPO for determining the ALP of this international transaction afresh as per law after allowing a reasonable opportunity of being heard to the assessee."

56. Respectfully following the findings of the coordinate bench, we direct accordingly. Ground No. 2 is treated as allowed for statistical purposes.

57. Third grievance is in respect of disallowance of Rs. 83,70,085/-.

58. Facts on record show that during the year under consideration, legal and professional expenses were claimed as deduction. When called for details, the assessee submitted the copy of invoices, alongwith TDS certificates including details of M/s Bhumi Consultants. It was explained that M/s Bhumi Consultants is in the business of providing consultancy and adversary services in the field of investment, accountancy, legal, income tax, company law, sales tax, VAT, excise, customs and service tax matters. It was further explained that the assessee engaged M/s Bhumi Consultants represented through

Shri Anuj Gupta for providing assistance in reassessment of the bills entry, assisting in drafting of application to be filed before the custom authorities, attending to hearing for customs duty refund.

59. The Assessing Officer issued a commission u/s 131(1)(a) of the Act and accordingly, an Inspector was send to serve the notice as well as make personal investigation and conduct local enquires of M/s Bhumi Consultants. The said Inspector made out a report to the effect that the company does not exist at the given address and there was no indication, such as, sign boards, letter box, etc. The Inspector also made extensive local enquiries but despite his best efforts, he could not trace out the existence or the office of M/s Bhumi Consultants.

60. Pursuant to the report of the Inspector, entire claim of expenditure was disallowed.

61. Before the DRP, the assessee once again furnished related documents of the company M/s Bhumi Consultants and pointed out that the transaction in question happened during FY 2010-11 whereas the Inspector carried out his inspection on 23.03.2015. It was claimed that the company must have moved from the given address.

62. The contention of the assessee did not find any favour with the DRP who was of the opinion that the assessee has not discharged the onus satisfactorily and the addition made by the Assessing Officer was justified.

63. Before us, the ld. AR reiterated what has been stated before the lower authorities.

64. The ld. DR strongly supported the findings of the TPO/DRP.

65. We have carefully considered the orders of the authorities below. There is no dispute that the impugned transaction took place in F.Y. 2010-11. The Inspector carried out his inspection in the month of March 2015. There is every possibility that M/s Bhumi Consultants must have moved away from the given address. Be that as it may, the assessee should have filed documentary evidences to prove that the assessee did receive services from M/s Bhumi Consultants. Before us also, no such evidence has been brought on record. Whatever evidences the assessee has furnished only establishes the identity of M/s Bhumi Consultants and that the payments have been made through banking channel after deducting tax at source. But not a single

evidence has been place on record which could conclusively prove that the assessee did receive services from M/s Bhumi Consultants in lieu of which payments were made. We are of the considered view that unless such evidences are brought on record, the expenses cannot be considered as allowable expenditure. We, therefore, remit this issue to the file of the Assessing Officer. The assessee is directed to demonstrate that the impugned payment was in relation to the services received from M/s Bhumi Consultants. The Assessing Officer is directed to examine the claim and decide the issue afresh after giving reasonable opportunity of being heard to the assessee. Ground No. 3 is treated as allowed for statistical purposes.

66. In the result, the appeal of the assessee in ITA No. 1514/DEL/2016 is allowed in part for statistical purposes.

The order is pronounced in the open court on 25.01.2019.

Sd/-

**[SUCHITRA KAMBLE]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 25th January, 2019

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

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| 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 | |
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