IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I' NEW DELHI

BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER
&
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

Stay Application no. 475-476/Del/2018
(Arising out of ITA no. 1811 & 7691/Del/2017)
(Assessment Year: 2012-13, 2013-14)

Amadeus India Pvt. Ltd. E-9, Connaught House, Connaught Place, New Delhi PAN : AAACA0364L	Vs.	ACIT, New Delhi
Appellant		**Respondent**

Assessee by : Sh. Tarundeep Singh & Tarun Singh, Adv.
Revenue by : Shri Sanjay I.Bara, CIT-DR & Sh. Sandeep Kr. Mishra, Sr. DR

Date of Hearing	**30.01.2019**
Date of Pronouncement	**27.02.2019**

ITA no. 1662/Del/2016
Assessment Year : 2011-12

Amadeus India Pvt. Ltd. E-9, Connaught House, Connaught Place, New Delhi PAN : AAACA0364L	Vs.	ACIT, New Delhi
Appellant		**Respondent**

Assessee by : Sh. Tarundeep Singh, Adv.
Revenue by : Shri Sanjay I.Bara, CIT-DR

Date of Hearing	**29.01.2019**
Date of Pronouncement	**27.02.2019**

ORDER

PER SUDHANSHU SRIVASTAVA, J.M. :

These appeals have been filed challenging additions/ disallowances made by the Assessing Officer (AO) in the final order of assessment passed u/s 144C/143(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') for Assessment Years 2011-12 to 2013-14. Since, both the parties agree that facts for all the years are common we first take up for consideration appeal in ITA No.1662/Del/2016 for AY 2011-12.

2.0 This appeal has been filed by assessee being aggrieved against final order of assessment dated 30th January, 2016 passed by the Dy. Commissioner of Income Tax, Circle 2(2), New Delhi. The impugned order has been passed by the AO in conformity with the directions issued by Ld. Disputes Resolution Panel (DRP) vide order dated 31st December, 2015.

2.1 Following grounds of appeal have been raised:-

"1. That on facts and in law the orders passed by the Assessing Officer (hereinafter referred as the "AO") / Dispute Resolution Panel (hereinafter referred as the "DRP) / Transfer Pricing Officer (hereinafter referred as the "TPO") are bad in law and void ab-initio.

1.1 Without prejudice, on facts and in law, the TPO/DRP erred in not granting a proper opportunity of being heard and thereby violating the settled principals of audi alteram partem.

2. That on facts and in law the AO/TPO/DRP erred in making / proposing/upholding an addition to total income of Rs.114,98,39,926/- under Chapter X of the Income Tax Act, 1961 (hereinafter referred as "the Act").

3. That on facts and in law the AO/TPO/DRP erred in making / proposing/upholding Transfer Pricing adjustment of Rs.114,98,39,926/- on account of Advertisement, Marketing and sales promotion expenses

3.1.That on facts and in law the AO/TPO/DRP erred in not appreciating that in absence of a "transaction" as envisaged under section 92F of the Act between appellant and its AE for brand promotion or for establishing a marketing intangible the TPO had no jurisdiction to propose adjustment on account AMP expenses.

3.2.That on facts and in law the TPO erred in holding and the DRP inter alia erred in upholding / observing that the :

- *(i) Appellant had incurred AMP expenditure totaling to Rs.94,31,24,844/- on promotion of proprietary marks and for development of marketing intangible for the benefit of AE.*
- *(ii) AMP expenditure of Rs. 94,31,24,844/- incurred by the assessee is an "International Transaction" u/s 92B of the Act.*

(iii) AMP transaction is being made at the behest and under control of the AE.

(iv) AE is directly benefited by any expenditure incurred by assessee on AMP.

(v) Legal ownership of the marketing intangible would get transferred to the AE without any consideration on termination of the Distribution Agreement.

(vi) Applying transaction-by-transaction approach AMP transaction is to benchmarked in a segregated manner.

(vii) "International Transaction" on account of AMP expenses cannot be benchmarked applying TNMM as the Most Appropriate method.

4. Without prejudice, that on facts and in law the AO/TPO/DRP erred in not appreciating that the alleged transactions of AMP were "closely linked" with the main activity carried on by the appellant and hence it cannot be segregated and benchmarked on a stand-alone basis.

5. That on facts and in law the TPO erred in making TP adjustment of Rs. 114,89,41,243/- disregarding following directions issued by DRP ;

(a) Rejecting use of "Bright Line" method for benchmarking AMP expenses

(b) Excluding Selling Expenses from the ambit of AMP.

5.1 That on facts and in law the TPO erred in making TP Adjustment on account of AMP expenses invoking "Bright Line Method".

5.2 That on facts and in law the TPO erred in treating Expenditure of Rs.89,50,72,373/- incurred by the assessee as "incentives" akin to AMP expenditure.

6. That without prejudice on facts and in law the TPO/DRP erred in making / upholding the applicability of a markup of 26.42% on the alleged excessive AMP expenses incurred by the appellant on behalf of the Associated Enterprise.

7. That on facts and in law the TPO/AO/DRP erred in proposing/making/upholding an adjustment of Rs.8,98,683/- on account of alleged "transaction" for notional interest attributable to delayed payments receivable from the AE.

7.1 Without prejudice, that on facts and in law the TPO/DRP erred in not appreciating that once the "international transactions" executed by the appellant under the Distribution Agreement with Amadeus Spain have been accepted to be at ALP applying TNMM as the Most Appropriate Method then no further adjustment on account of advertising, marketing and promotional expenditure (hereinafter referred to as "AMP") or notional interest attributable to delayed payments receivable from the AE was called for.

8. Without prejudice, that on facts and in law the AO/TPO/DRP erred in not appreciating that the alleged transactions of AMP and notional interest are "closely linked" with the main activities carried out under the Distribution Agreement and hence they cannot be segregated and benchmarked on a stand-alone basis.

9. That on facts and in law the AO/ DRP erred in restricting allowance for deduction u/s 10A of the Act to Rs.59,39,683/- as

against a deduction of Rs.17,70,80,634/- claimed by the appellate in its return of income.

9.1 That on facts and in law the AO/DRP erred in holding / upholding that Data Processing Receipts pertaining to Unit-II are not eligible for claiming benefit of deduction u/s 10A of the Act.

9.2 That on facts and in law the AO/DRP erred in denying benefit of deduction u/s 10A of the Act as claimed in the return by erroneously being influenced by the findings recorded by appellate courts in cases relating to the AE.

9.3 That on facts and in law the AO/DRP erred in holding that the appellant has not been able to establish with evidence that it has rendered data processing services which are eligible for claim of deduction u/s 10A of the Act.

10. That on facts and in law the AO/DRP erred in charging/upholding levy of interest u/s 234A, 234B & 234C of the Act.

11. That on facts and in law, the assumption of jurisdiction by the AO/TPO to determine Arm's Length Price is bad in law and void ab-initio."

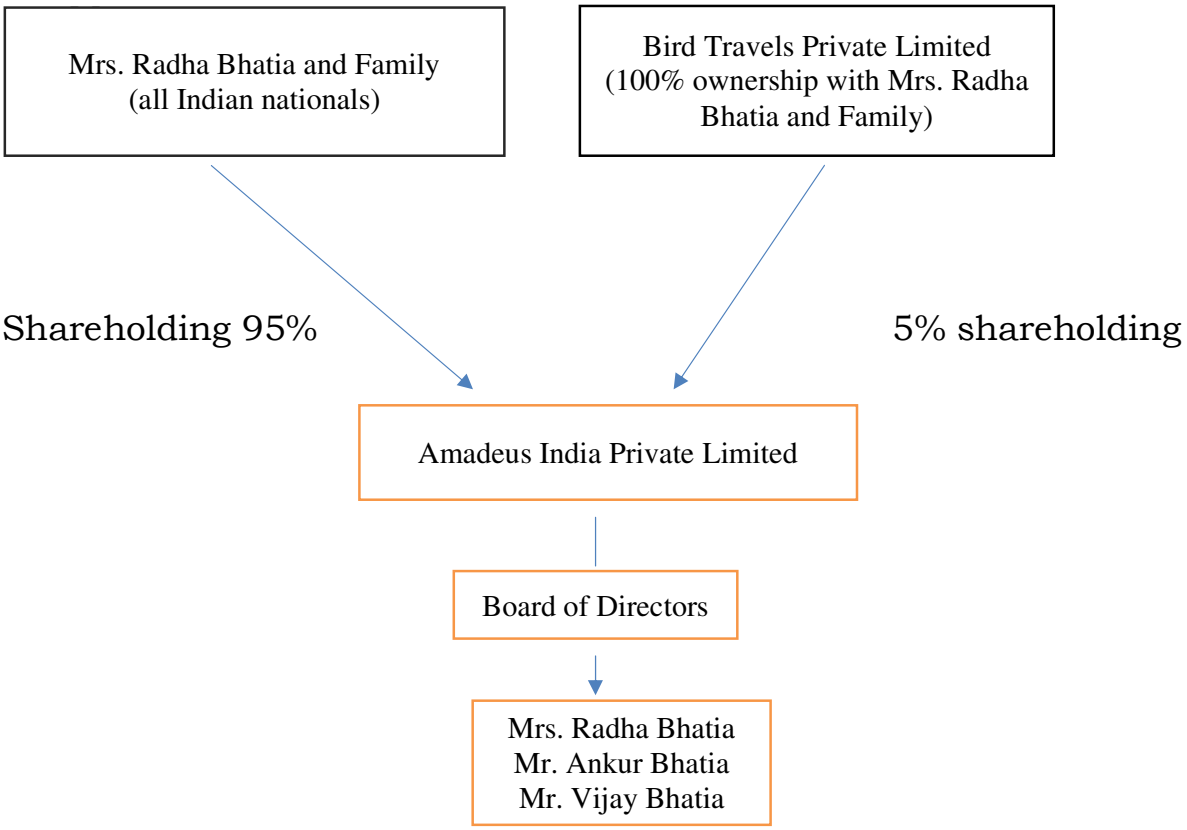
2.2 Thus, in crux, the assessee is aggrieved by the following additions/disallowances made by the AO in the instant case:-

(a) Transfer Pricing Adjustment on account of alleged excessive Advertising Marketing and Promotion (AMP) expenditure of Rs.114.89 crores.

(b) Transfer Pricing Adjustment of Rs.8,98,683/- on account of alleged transaction for notional interest on receivables.

(c) Disallowance u/s 10A of the Act

2.3 The first issue in dispute arising out of grounds 2 to 6 of appeal pertains to Transfer Pricing Adjustment on account of excessive AMP expenditure of Rs.114.89 crores. Briefly stated, the relevant facts in this regard are that the assessee M/s Amadeus India Pvt. Ltd. is an Indian Company whose share holding is as under:-



2.4 As per the deeming provisions of section 92A (2)(g) of the Act, the Associated Enterprise (AE) of the assessee i.e., M/s Amadeus IT Group SA {also known as "Amadeus Spain"} has developed a fully automated reservation and distribution system i.e., Computerized Reservation System (CRS) with an ability to perform comprehensive information, communications, reservations, ticketing and related function on world-wide basis. Undisputedly, the deemed AE has no ownership, control or any share-holding in the assessee company and neither does it participate in management of the assessee. The AE relationship is owing to the deeming provisions of section 92A(2)(g). The said CRS system is used by airlines, hotels, tour operators, car rental companies and others to market or distribute their service products for other information.

2.5 The assessee entered into an agreement with M/s Amadeus Spain on 1st October, 2004. The main activity of the assessee is to provide connectivity to the subscribers in India to the host the CRS system by creation/modification/up-gradation of computer programmes online. The assessee has a data processing centre, which provides the above services to the deemed AE. In the Transfer Pricing (TP) Study, the assessee has declared the following international transactions with its deemed AE:

Nature of Transaction	*Method*	*Value (Rs)*
Provision of Information Technology Enabled Services (ITeS)	*TNMM*	*231,71,32,514*
Receipt of Data Processing Services		*9,40,17,116*

2.6 In the Transfer Pricing study, the assessee had followed the Transaction Net Margin Method (TNMM) to substantiate the Arm's Length Price (ALP) of above disclosed international transaction/s pertaining to provision of ITES Services with its deemed AE and accordingly it compared the net operating profit/total cost (OP/TC) earned by it with the mean OP/TC of the comparable companies selected by it and concluded that since the OP/TC of the assessee is higher than the mean OP/TC of comparable companies, the disclosed international transaction are at Arms' Length Price. In order to verify this, the AO made a reference to the Transfer Pricing Officer (TPO). The TPO has accepted the benchmarking of the above declared international transactions. In this regard after a detailed benchmarking of the disclosed international transaction/s, the TPO has, at page 69 of order dated 20th January, 2015, held that "*from above it can be seen that the international transaction of taxpayer in respect of ITES is within + / - 5% of arms length price".*

2.7 The TPO, however, observed that the assessee had incurred more than normal AMP expenses to build *"Amadeus"* brand in India which is legally owned by M/s Amadeus Spain. The TPO held that the assessee should have been reimbursed with appropriate mark-up on such excessive AMP expenditure identified by him by applying the Bright Line Test (BLT). In his order, the TPO has identified the said abnormal AMP expenses by applying the bright line method i.e., by comparing the AMP as a percentage to sales of the assessee with average AMP as a percentage of the comparable companies finally selected by him for benchmarking the main functions of the assessee. Thereafter, by applying a mark-up of 11.69%, the TPO has computed the final adjustment for the alleged transaction of brand promotion as under:-

	TPO Order dated 20-01-2015	TPO order dated 28.02.2016 giving effect to DRP
Value of Gross Sales	Rs 231,73,07,014	Rs 231,73,07,014
AMP/Sales of the Comparables	1.48%	1.48%
Amount that represent bright line	Rs 3,42,96,144	Rs 3,42,96,144
Expenditure on AMP by assessee	Rs 94,31,24,844	Rs 94,31,24,844
Expenditure in excess of bright line	Rs 90,88,28,700	Rs 90,88,28,700
PLI	11.69 %	26.42%
Markup	Rs 10,62,42,075	Rs 24,01,12,542
Cumulative addition	Rs 101,50,70,775	Rs 114,89,41,243

2.8 Being aggrieved by the above proposed transfer pricing adjustment, the assessee filed detailed objections before the Ld. DRP. The Ld. DRP, while referring to decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications reported in 374 ITR 118(Del), has examined the contentions put forth by the assessee before it as under:-

Sub Grounds of Appeal summarized as per issue from Form 35A	*Sony Ericsson High Court order dt.16 March, 2015*
Re-characterization of expenses incurred for own business as a service to AE is not justified	*Upheld at Para 64 page 48 of 142 and para 147, page 111* *The burden is on the assessed to select and justify the method adopted and the arm's length price declared under sub-section (3) to section 92C, the Assessing Officer can proceed to determine the arm's length price in accordance with Section 92C(1) and (2) on the basis of material,* *Information or documents in his possession, if any of the circumstances mentioned in clauses (a) to (d) are satisfied -*
The AMP expenses incurred by the assessee, qua independent parties, are domestic transaction and not international transaction as defined in section 92B of the Act.	*AMP expense is an international transaction. (Paras 52 & 53 of the judgment) :* *The TPO has jurisdiction to determine the ALP of the international transaction of AMP expenses (para 50 of the judgment);* *Discussion under the heading C para 51-57, the substantial question of law answered in favor of Revenue.*

	AO/TPO can segregate AMP expenses as an independent international transaction, but only after elucidating the grounds and reasons for not accepting the bunching adopted by the assessed and examining and giving benefit of set off under 92(3).
Assessee is already remunerated for the activities performed by it.	*Para 134 Page 103* *Owner of the marketing intangible should adequately compensate the domestic AE incurring costs towards marketing activities by reimbursement of expenses or by sufficient and appropriate return.*
Bright Line Test, applied by the Ld. TPO/LD. AO, is not permitted by the transfer pricing regulations	*Para 194, sno X, page 139* *Bright Line Test has no statutory mandate.* *Bright Line test cannot be applied to work out non-routine AMP expenses for benchmarking [Para 194 (x)];*
The AMP expenses incurred by the assessee already benchmarked by applying TNMM so separate benchmarking not required	*Page 140* *AO for good and sufficient reasons can de-bundle interconnected transactions, is segregated distribution, marketing or AMP transactions when bundled transactions cannot be adequately compared on an aggregate basis.* *ALP of AMP expenses should be determined preferably in a bundled manner with the distribution activity (Paras 91,121 & others);*
Value of alleged international transaction has been determined incorrectly	*Page. 137* *The assessed, i.e., the domestic AE must be compensated for the AMP expenses by the foreign AE. Such compensation may be included or subsumed in low purchase price or by*

	not charging or charging lower royalty. Direct compensation can also be paid. The method selected and comparability analysis should be appropriate and reliable so as to include the AMP functions and costs.
The Ld.AO/Ld.TPO has selected inappropriate comparables	*AMP is a separate function. An external comparable should perform similar AMP functions. [Paras 165 & 166];* *For determining the ALP of these transactions in a bundled manner, suitable comparables having undertaken similar activities of distribution of the products and also incurring of AMP expenses, should be chosen (Paras 194(i), (ii), (viii) & others);* *The AO/TPO can reject a method selected by the assessed for several reasons including want of reliability in the factual matrix or lack / non-availability of comparables (see Section 92C(3) of the Act). Page 138* *When the AO/TPO rejects method adopted by assessed, he is entitled to select MAM, and undertake comparability analysis. Selection of method and comparables should be as per the command and directive of the Act and Rules and justified by giving reasons.* *The choice of comparables cannot be restricted only to domestic companies using any foreign brand (para 120);* *If no comparables having performed both the functions in a similar manner are available, then, suitable adjustment should be made to bring international transactions and comparable transactions at par [para*

	194(iii)]; *If adjustment is not possible or comparable is not available, then, the TNMM on entity level should not be applied [Paras 100, 121, 194(iii) & (vi)]* *For determining the ALP of these transactions in a bundled manner, suitable comparables having undertaken similar activities of distribution of the products and also incurring of AMP expenses, should be chosen [Paras 194(i), (ii), (viii) & others]; The choice of comparables cannot be restricted only to domestic companies using any foreign brand [Para 120];*
Arbitrary Mark up	*PLR cannot be the basis for computing markup on AMP expenses as an international transaction. Mark-up as per sub-clause (ii) to rule 10B(1)© would be comparable gross profit on the cost or expenses incurred as AMP. The mark-up has to be benchmarked with comparable uncontrolled transactions or transactions for providing similar service/product. The Revenue's stand in some cases applying the prime lending rate fixed by the Reserve Bank of India with a further mark-up, is mistaken and unfounded. Interest rate mark-up would apply to international transactions granting/availing loans, advances, etc.*

2.9 The Ld. DRP has, however, upheld the transfer pricing adjustment proposed by the TPO. In this regard it is noted by the Ld DRP that tax department has filed an SLP before the Hon'ble Apex

Court and, thereafter, to the extent the decision of the Hon'ble Delhi High Court in case of Sony Mobile *(supra)* is prejudicial to the interest of the revenue, relief cannot be granted to the assessee at this stage. Thus, even on issues decided in favor of the assessee by the Hon'ble High Court in Sony Mobile *(supra),* relief has been withheld by the Ld DRP.

2.10 . Being aggrieved, the assessee is now in appeal before us.

3.0 In this regard, the Ld. AR Sh. Tarandeep Singh, at the outset, submitted that in absence of a "transaction" between the assessee and its deemed AE for incurring AMP expenditure on behalf of the AE, the impugned adjustment deserved to be deleted. It is submitted that this is a jurisdictional issue which merits adjudication at the outset. It was submitted by the Ld. AR that lower authorities have held that there exists an international transaction for brand promotion premised following facts/material:

(a) Distribution Agreement dated 01st October 2004;

(b) Loyalty Agreement with various subscribers;

(c) Findings recorded by the ITAT in case of AE {reported in 113 TTJ 767 (Del)} wherein it is held that the assessee constitutes a Dependent Agency Permanent Establishment of the AE;

(d) Amendments made to provisions of section 92B by Finance Act 2012;

(e) Decision given by the Special Bench of ITAT in case of LG Electronics reported in 140 ITD 41 (Del) (Trib);

(f) Decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile (supra).

3.1 In this regard, the Ld. AR, in his written synopsis, has submitted as under:-

"1. At the outset it is relevant to note that a detailed analysis was conducted by the TPO vis a vis benchmarking analysis adopted by the 'A' for reported International Transactions of Provision of ITeS Services and Receipt of Data Processing Services. TPO accepts that the margins disclosed are within Arm's Length....conclusion at @ pages 309 to 313, para 10 and 10.1

2. Issue as to whether there exists a "transaction" for brand promotion in the instant case is now settled by appellate orders passed in case of 'A' for earlier assessment years. Kind reference in this regard is invited to the decision of Hon'ble ITAT in for AY 09-10 reported in 52 ITR(T) 83 {copy enclosed at pages 409 to 447 of PB filled in Stay Nos 475 & 476/Del/2018}. Hon'ble ITAT after considering the facts of the case has held that in absence of a "transaction" for brand promotion between 'A' and its AE no TP adjustment for alleged AMP expenses can be made. Kind reference is invited to following extracts of Hon'ble ITAT decision:

(a) TPO accepts that "International Transaction" for Provision of ITeS Services are at ALP applying TNMM....page 421, para 8

(b) Jurisdictional Issue questioning existence of "transaction" for brand promotion merely premised benefit to AE taken up for consideration…..page 421-422, para 8

(c) Argument of DR praying for remand rejected. Held, that all necessary facts are on record – effect is to be given to decisions of Jurisdictional High Court which are direct on this issue….page 422, para 8.1

(d) Jurisdictional High Court decisions in case of Maruti Suzuki India Ltd. reported in 381 ITR 117(Del), Whirlpool of India Ltd. reported in 381 ITR 154(Del) and Bausch & Lomb Eyecare (India) (P.) Ltd. reported in 381 ITR 227(Del) followed …. pages 422 to 425, para 8.1

(e) TPO's reliance on Distribution Agreement for construing existence of "transaction" rejected …page 425-426, para 8.2

(f) At page 426, para 8.3 Hon'ble ITAT rejected following findings / observations made by lower authorities:

- *Special Bench decision in case of LG Electronics (supra) no more a good law*

- *Amendments made to section 92B by Finance Act 2012 do not support the case of revenue*

- *The fact that 'A' has been held to be a DAPE in assessment of its AE is irrelevant to determination of issue under consideration*

Premised above factual findings it has been held (refer page 427, para 8.4) by Hon'ble ITAT in AY 09-10 that "Considering the material facts like the absence of an agreement, arrangement or understanding between the appellant and its associated

enterprise for sharing the advertisement, marketing and promotion expenses or for incurring the advertisement, marketing and promotion expenses for the sole benefit of the associated enterprise, payments made by the appellant under the head "advertisement, marketing and promotion" to the domestic parties cannot be termed as an "international transaction" specifically when the learned Transfer Pricing Officer has not been able to prove that the expenses incurred were not for the business carried out by the appellant in India."

Since the jurisdictional issue was decided in favour of 'A' it was held that other grounds of appeal have become infructuous.

3. Decision rendered by Hon'ble ITAT in AY 09-10 has been upheld by Hon'ble High Court vide order dated 26.04.2017 in ITA No. 154/2017....copy enclosed at pages 515-516.

4. The above decisions have thereafter also been followed by Hon'ble ITAT in case of 'A' for AY 2010-11 in ITA No. 1835/Del/2015 vide order dated 23.10.2017.....copy enclosed at pages 448 to 492 – conclusions on this issue are at pages 463 to 475, para 4.4 to 4.7.

5. In AY 2011-12 TPO has also relied upon Loyalty Agreement with various Subscribers. Payment of Loyalty incentive to Subscribers has been held to be a Selling Expense by Hon'ble ITAT in AY 2008-09 vide order dated 06.03.2014 reported in 149 ITD 496(Del) copy enclosed at pages 405 to 408, relevant conclusions at page 408, paras 7 and 8."

4. On the other hand, the Ld. CIT (DR) vehemently opposed the submissions made by the Ld. AR. By relying on the orders passed by the TPO and the Ld. DRP it was submitted by him that the lower authorities have, for fair reasons, concluded that there exists an international transaction between the assessee and its AE for brand promotion.

5.0 We have carefully considered the submissions made by both the sides and have also perused the material available on record. It is seen that the issue in dispute has been decided in favour of the assessee by the coordinate Bench of this Court in earlier assessment years and the order passed by the coordinate Bench for A.Y.2009-10 has also been upheld by the Hon'ble Jurisdictional High Court. In earlier years the issue in dispute has been decided in favour of the assessee by the coordinate Bench by taking into consideration the following decisions of the Hon'ble Jurisdictional High Court:-

(i) Maruti Suzuki India Ltd. vs. CIT reported in 381 ITR 117 (Delhi);

(ii) CIT vs. Whirlpool of India Ltd. reported in 381 ITR 154 (Delhi);

(iii) Honda Siel Power Products Ltd. vs. Dy. CIT reported in 237 Taxman 304 (Delhi);

(iv) Bausch and Lomb Eyecare (India) Pvt. Ltd. v. Addl. reported in CIT 381 ITR 227 (Delhi);

5.1 In the year under consideration there is no change in the facts and circumstances of the case as compared to A.Y. 2009-10 and even the agreements between assessee and the AE continue to be operational for the year under consideration. We, therefore, concur with the reasoning given by the coordinate Bench for A.Y. 2009-10,wherein, it is held as under:-

"8. We have considered the submissions made by the parties and have also perused the material available on record. Undisputedly, the main data processing and subsidiary distribution activities of the appellant have been held to be at the arm's length price applying the transactional net margin method. Provision of the information technology enabled services to associated enterprise under the agreement has been thoroughly benchmarked by the Transfer Pricing Officer. Most appropriate method being the transactional net margin method has not been doubted and after an in-depth analysis of comparable companies selected by the appellant and by tinkering with the same the learned Transfer Pricing Officer has given a finding that OP/OC of the assessee is 20.27 per cent and OP/OC of revised comparable set is 23.94 per cent. No adjustment made on this account has been made as the difference is within + five per cent range. The learned Transfer Pricing Officer, however, has segregated the advertisement, marketing and promotion expenses and held that being an independent transaction it requires to be benchmarked independently. In these circumstances, in our opinion, the fundamental question to be answered is to decide as to whether in

the absence of any agreement, arrangement or understanding for either incurring the advertisement, marketing and promotion expenses on behalf or for the benefit of the associated enterprise or for payment of the advertisement, marketing and promotion expenses by the associated enterprise can it be held that there was an "international transaction" only on the basis that the advertisement, marketing and promotion expenditure, incurred by the appellant, would have benefited the associated enterprise, who owned the brands used by the appellant. The learned authorised representative has rightly submitted that this is a jurisdictional issue, which requires a foremost adjudication and only if the answer to this issue is against the appellant that the matter then required a de novo adjudication in the light of the jurisdictional High Court decision in the case of Sony Ericsson Mobile Communications (supra). The above line of adjudication is also supported by the decision of the honourable jurisdictional High Court in the case of Diakin Airconditioning India (P.) Ltd. (supra) wherein it is held as under:

> *"Accordingly, the court directs as under:*
>
> *(a) The impugned order dated October 8, 2015, passed by the Income-tax Appellate Tribunal in I. T. A. No. 5090/DEL/2010 for the assessment year 2006-07 is set aside and the said appeal is restored to the file of the Income-tax Appellate Tribunal ;*
>
> *(b) The Income-tax Appellate Tribunal will first decide the question regarding the existence of an international transaction involving AMP expenses between the assessee and its associated enterprise.*
>
> *This question will not be remanded by the Income-tax Appellate Tribunal to any other authority for decision. If the said question is answered in favour of the assessee, then no*

other question would arise. If answered against the assessee, then the Income-tax Appellate Tribunal will decide the further issues that arise in the appeal in accordance with law."

8.1 The case records further show that both the lower authorities have categorically given a finding that there existed a "transaction" for brand promotion between appellant and its associated enterprise. This is also under challenge before us. Hence, it cannot be said that necessary facts are not on record. With regard to the submissions of the learned Departmental representative that the issue of advertisement, marketing and promotion expenses be restored back to the file of the learned Transfer Pricing Officer, we would like to state that since facts necessary to determination are on record the law laid down by the honourable jurisdictional High Court has to be given effect to. It is not even the argument of the learned Commissioner of Income-tax (Departmental representative) that any fresh fact is required for such a determination. Under the circumstances, a direction for remand is not called for. The honourable jurisdictional High Court in various cases have highlighted the tests to be applied for ascertaining whether there exists a transaction for brand promotion in a particular case. The learned authorised representative has impartially summarised the relevant propositions from these decisions in his note, which we have reproduced above. We find that in the cases of Maruti Suzuki India Ltd. v. CIT [2015] 64 taxmann.com 150/[2016] 237 Taxman 256/381 ITR 117, CIT v. Whirlpool of India Ltd. [2015] 64 taxmann.com 324/[2016] 237 Taxman 49/381 ITR 154 (Delhi), Bausch & Lomb Eyecare (India) (P.) Ltd. [2016] 65 taxmann.com 141/237 Taxman 24/381 ITR 227 (Delhi) the honourable High Court on the issue of the advertisement,

marketing and promotion expenses has deliberated upon extensively on each and every argument raised by the Transfer Pricing Officer/Dispute Resolution Panel and has analysed the same threadbare. We would like to reproduce the relevant portion of the judgment of Bausch & Lomb Eyecare (India) (P.) Ltd.'s case (supra) as under (page 251):

> *"A reading of the heading of Chapter X ('Special provisions relating to avoidance of tax') and section 92(1) which states that any income arising from an international transaction shall be computed having regard to the arm's length price and section 92C(1) which sets out the different methods of determining the arm's length price, makes it clear that the transfer pricing adjustment is made by substituting the arm's length price for the price of the transaction. To begin with there has to be an international transaction with a certain disclosed price. The transfer pricing adjustment envisages the substitution of the price of such international transaction with the arm's length price.*
>
> *Under sections 92B to 92F, the pre-requisite for commencing the transfer pricing 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 arm's length price 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 arm's length price and make the transfer pricing adjustment by substituting the arm's length price for the contract price.*
>
> *Section 92B defines 'international transaction' as under:*
>
> *'92B. Meaning of international transaction.—(1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of*

tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit service or facility provided or to be provided to anyone or more of such enterprises.

(2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise; or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise.'

Thus, under section 92B (1) an 'international transaction' means—

'(a) a transaction between two or more associated enterprises, either or both of whom are non-resident,

(b) the transaction is in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, incomes or losses of such enterprises, and

(c) shall include a mutual agreement or arrangement between two or more associated enterprises for allocation or apportionment or contribution to the any cost or expenses incurred or to be incurred in connection with the benefit, service or facility provided or to be provided to one or more of such enterprises.'

Clauses (b) and (c) above cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of BLI 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 BLI and B&L, USA whereby BLI is obliged to spend excessively on AMP in order to promote the brand of B&L, USA. 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 an 'international transaction'. This might be only an illustrative list, but significantly it does not list advertisement, marketing and promotion spending as one such transaction.

In Maruti Suzuki India Ltd. [2016] 381 ITR 117 (Delhi), one of the submissions of the Revenue was (page 144) : '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'. This was negatived by the court by pointing out (page 144):

> *'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 advertisement, marketing and promotion 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.'*

In Whirlpool of India Ltd. [2016] 381 ITR 154 (Delhi), the court interpreted the expression 'acted in concert' and in that context referred to the decision of the Supreme Court in Daiichi Sankyo Co. Ltd. v. Jayaram Chigurupati [2010] 157 Comp Cas 380 (SC) ; [2010] 6 MANU/SC/0454/2010, which arose in the context of acquisition of shares of Zenotech Laboratory Ltd. by the Ranbaxy group. The question that was examined was whether at the relevant time the appellant, i.e., 'Daiichi Sankyo Company and Ranbaxy' were 'acting in concert' within the meaning of regulation 20(4)(b) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. In paragraph 44, it was observed as under (page 408 of 157 Comp Cas):

> *'The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares, etc., of a certain target company. There can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares, etc., of the target company. For, dehors the element of the shared common objective or purpose the idea of "person acting in concert" is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition of substantial acquisition of shares, etc., of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal ; the acquisition of shares, etc., may be direct or indirect or the persons acting in concert may co-operate in actual acquisition of shares, etc., or they may agree to co-operate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sine qua non for the*

relationship of "persons acting in concert" to come into being.'

The transfer pricing adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the assessee and the advertisement, marketing and promotion expenditure of a comparable entity that an international transaction exists and then proceeding to make the adjustment of the difference in order to determine the value of such advertisement, marketing and promotion expenditure incurred, for the associated enterprise. In any event, after the decision in Sony Ericsson [2015] 374 ITR 118 (Delhi), the question of applying the bright line test to determine the existence of an international transaction involving the advertisement, marketing and promotion expenditure does not arise.

There is merit in the contention of the assessee that a distinction is required to be drawn between a 'function' and a 'transaction' and that every expenditure forming part of the function, cannot be construed as a 'transaction'. Further, the Revenue's attempt at recharacterising the advertisement, marketing and promotion expenditure incurred as a transaction by itself when it has neither been identified as such by the assessee or legislatively recognised in the Explanation to section 92B runs counter to the legal position explained in CIT v. EKL Appliances Ltd. [2012] 345 ITR 241 (Delhi) which required a Transfer Pricing Officer 'to examine the "international transaction" as he actually finds the same'.

In the present case, the mere fact that B&L, USA through B&L, South Asia, Inc. holds 99.9 per cent. of the share of the assessee will not ipso facto lead to the conclusion that the mere increasing of the advertisement, marketing and promotion expenditure by the assessee involves an international transaction in that regard with B&L, USA. A similar contention by the Revenue, namely that even if there is no explicit arrangement, the fact that the benefit of such advertisement, marketing and promotion expenses would

also enure to the associated enterprise is itself sufficient to infer the existence of an international transaction has been negatived by the court in Maruti Suzuki India Ltd. [2016]381 ITR 117(Delhi) as under (page 146):

> *'The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a "mirage". First of all, there has to be a clear statutory mandate for such an exercise. The court is unable to find one. To the question whether there is any "machinery" provision for determining the existence of an international transaction involving advertisement, marketing and promotion expenses, Mr. Srivastava only referred to section 92F(ii) which defines arm's length price to mean a price "which is applied or proposed to be applied in a transaction between persons other than associated enterprise in uncontrolled conditions". Since the reference is to "price" and to "uncontrolled conditions" it implicitly brings into play the bright line test. 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 arm's length price. The court does not see this as a machinery provision particularly in light of the fact that the bright line test has been expressly negatived by the court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established dehors the bright line test. . . .*
>
> *What is clear is that it is the "price" of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an arm's length price, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed "price" of such transaction and thereafter ask whether it is an arm's length price. If the answer to that is in the negative the transfer pricing adjustment should follow.*

The objective of Chapter X is to make adjustments to the price of an international transaction which the associated enterprises involved may seek to shift from one jurisdiction to another. An "assumed" price cannot form the reason for making an arm's length price adjustment.

Since a quantitative adjustment is not permissible for the purposes of a transfer pricing adjustment under Chapter X, equally it cannot be permitted in respect of advertisement, marketing and promotion expenses either. As already noticed hereinbefore, what the Revenue has sought to do in the present case is to resort to a quantitative adjustment by first determining whether the advertisement, marketing and promotion spend of the assessee on application of the bright line test, is excessive, thereby evidencing the existence of an international transaction involving the associated enterprise. The quantitative determination forms the very basis for the entire transfer pricing exercise in the present case. . . .

The problem with the Revenue's approach is that it wants every instance of an advertisement, marketing and promotion spend by an Indian entity which happens to use the brand of a foreign associated enterprise to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to section 92B of the Act. The problem does not stop here. Even if a transaction involving an advertisement, marketing and promotion spend for a foreign associated enterprise is able to be located in some agreement, written, (for e.g., the sample agreements produced before the court by the Revenue) or otherwise, how should a Transfer Pricing Officer proceed to benchmark the portion of such, advertisement, marketing and promotion spend that the Indian entity should be compensated for?'

Further, in Maruti Suzuki India Ltd. [2016] 381 ITR 117 (Delhi) the court further explained the absence of a machinery provision qua the advertisement, marketing and promotion expenses by the following analogy (page 149):

'As an analogy, and for no other purpose, in the context of a domestic transaction involving two or more related parties, reference may be made to section 40A(2)(a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the Assessing Officer "is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods". In such event, "so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction". The Assessing Officer in such an instance deploys the "best judgment" assessment as a device to disallow what he considers to be an excessive expenditure. There is no corresponding "machinery" provision in Chapter X which enables an Assessing Officer to determine what should be the fair "compensation" an Indian entity would be entitled to if it is found that there is an international transaction in that regard. In practical terms, absent a clear statutory guidance, this may encounter further difficulties. The strength of a brand, which could be product specific, may be impacted by numerous other imponderables not limited to the nature of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on. A simplistic approach using one of the modes similar to the ones contemplated by section 92C may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance.'

In the absence of any machinery provision, bringing an imagined transaction to tax is not possible. The decisions in CIT v. B. C. Srinivasa Setty [1981] 128 ITR 294 (SC) ; [2002-TIOL-587-SC-IT-LB] and PNB Finance Ltd. v. CIT [2008] 307 ITR 75 (SC) make this position explicit. Therefore, where the existence of an international transaction involving AMP expense with an ascertainable price is unable to be shown to exist, even if such price is nil,

Chapter X provisions cannot be invoked to undertake a transfer pricing adjustment exercise.

As already mentioned, merely because there is an incidental benefit to the foreign associated enterprise, it cannot be said that the advertisement, marketing and promotion expenses incurred by the Indian entity was for promoting the brand of the foreign associated enterprise. As mentioned in Sassoon J. David [1979] 118 ITR 261, 276 (SC) 'the fact that somebody other than the assessee is also benefitted by the expenditure should not come in the way of an expenditure being allowed by way of a deduction under section 10(2)(xv) of the Act (Indian Income-tax Act, 1922) if it satisfies otherwise the tests laid down by the law'."

8.2 On a careful consideration of the facts on record we are of the opinion that there is nothing on record to show that the appellant by incurring the advertisement, marketing and promotion expenses wanted to promote its associated enterprise. The learned Transfer Pricing Officer has failed to prove that the appellant by incurring the advertisement, marketing and promotion expenses wanted to benefit the associated enterprise and not to promote its own business. The submission of the learned Transfer Pricing Officer that clauses 10.02, 10.05, 11.01 and article XVI of the agreement indicate the existence of a "transaction" for brand promotion is not supported by contents of those clauses. The appellant's objections before the learned Dispute Resolution Panel, which we have quoted above, are acceptable. These clauses nowhere provide that the appellant will be incurring brand promotion expenses for and on behalf of its associated enterprise or solely for its business purposes and interests. The agreement dated October 1, 2004, between the appellant and its associated enterprise is based upon the revenue sharing model in which 46 per cent revenue is being

shared by Amadeus Spain with the appellant and, hence, it is difficult to visualise that the appellant will not be incurring routine advertisement expenses in its entrepreneur capacity. Excluding the payment of incentives, which in the earlier years have been held, to be pure selling expenses the ratio of the AMP/sales of the appellant is mere 2.29 per cent. The learned authorised representative is also right in relying upon the decision of the honourable jurisdictional High Court in the case of Sony Ericsson Mobile Communications (supra) for submitting that events which would transpire on termination of distribution require a transfer pricing adjustment at that stage but the same will be immaterial to presume the existence of an agreement, arrangement or understanding in the year under consideration. In this regard the honourable High Court at paragraph 153 of its reported judgment has been pleased to be hold as under (page 217):

> *"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."*

8.3 As held above, the appellant has raised objections before the learned Dispute Resolution Panel that none of the above clauses of the agreement make it mandatory for the appellant to incur the brand promotion expenses for and on behalf of the associated enterprise. The learned Dispute Resolution Panel has not disturbed

these objections but has upheld the case of the learned Transfer Pricing Officer on some other grounds, i.e., (i) by relying upon the Special Bench decision in the case of L. G. Electronics India (P.) Ltd. v. Asstt. CIT [2013] 29 taxmann.com 300/ 140 ITD 41 (Delhi - Trib.) [SB] ; (ii) by holding that since the appellant is a dependent agency permanent establishment of its associated enterprise hence all the expenses on advertisement, marketing and promotion are being incurred by it for the benefit of the associated enterprise, and (iii) by relying upon the amended provisions of section 92B. We do not find any substance in the above approach of the learned Dispute Resolution Panel. The decision of the Special Bench in L.G. Electronics (P.) Ltd. (Supra) is no more good law post above decisions of the jurisdictional High Court. We have already reproduced the above findings of the jurisdictional High Court in the case of Bausch & Lomb Eyecare (India) (P.) Ltd. (supra) wherein it is held that (page 253) ". . . 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 an 'international transaction'. This might be only an illustrative list but significantly it does not list advertisement, marketing and promotion spending as one such transaction . . ." hence the amendments to section 92B by the Finance Act, 2012, also do not support the case of the Revenue lastly on the observations made by the learned Dispute Resolution Panel that since the appellant is a dependent agency permanent establishment of its associated enterprise, hence, all its expenses on advertisement, marketing and promotion are being incurred by it for the benefit of associated enterprise we would like to state that this is also entirely irrelevant. While alleging as the above the learned Dispute Resolution Panel

has not appreciated that the appellant has been held to be a dependent agent permanent establishment of Amadeus Spain for determination of Amadeus Spain's income, which is taxable in India. Moreover, we may refer here the decision of the honourable jurisdictional High Court in the case of Whirlpool of India Ltd. (supra) wherein it is held by the honourable High Court as under (pages 175, 179 of 381 ITR):

> *"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 the advertisement, marketing and promotion 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 the advertisement, marketing and promotion expenses . . . .*
>
> *As already mentioned, merely because there is an incidental benefit to Whirlpool, USA, it cannot be said that the advertisement, marketing and promotion expenses incurred by WOIL was for promoting the brand of Whirlpool, USA. As mentioned in Sassoon J. David [1979] 118 ITR 261 (SC) 'the fact that somebody other than the assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of a deduction under section 10(2)(xv) of the Act (Indian Income-tax Act, 1922) if it satisfies otherwise the tests laid down by the law."*

8.4 Considering the material facts like the absence of an agreement, arrangement or understanding between the appellant and its associated enterprise for sharing the advertisement,

marketing and promotion expenses or for incurring the advertisement, marketing and promotion expenses for the sole benefit of the associated enterprise, payments made by the appellant under the head "advertisement, marketing and promotion" to the domestic parties cannot be termed as an "international transaction" specifically when the learned Transfer Pricing Officer has not been able to prove that the expenses incurred were not for the business carried out by the appellant in India. We are thus of the opinion that the Transfer Pricing Officer had wrongly invoked the provisions of Chapter X of the Act for the said advertisement, marketing and promotion spent. The addition of Rs. 75,40,09,515 is, therefore, directed to be deleted. Ground Nos. 4 to 4.4 are therefore allowed. Considering our conclusions above ground Nos. 5 and 5.1 do not require any adjudication."

5.2 The order passed by the coordinate Bench for A.Y. 2009-10 has also been followed by the Tribunal vide order dated 23rd October, 2017 in ITA No.1835/Del/2015 for A.Y. 2010-11. Moreover, the decision of the coordinate Bench for A.Y.2010-11 has also been upheld by the Hon'ble Jurisdictional High Court in ITA No. 154/2017 vide order dated 26th April, 2017 as under:-

"3. *The first issue concerns the deletion of the transfer pricing adjustment of Rs.75,40,09,515/- on account of Advertising, Marketing and Sales Promotion Expenses (AMP Expenses) relying upon the decisions of this Court including the decision in Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. Additional Commissioner of Income Tax (2016) 381 ITR 227 (Del).*

4. As far as the above issue is concerned, it is covered by the earlier decisions of this Court against the Revenue. This Court is not inclined to frame any substantial question of law on this issue."

5.3 Respectfully following the above binding precedents, it is concluded that the TPO has wrongly invoked the provisions of Chapter X of the Act. The addition of Rs.114.89 crores, is therefore, directed to be deleted. Ground Nos. 3 & 3.1 are, therefore, allowed. Considering our conclusions, other grounds challenging various other facets of the impugned addition do not require any adjudication as having become *in fructuous.*

6.0 The next issue in dispute arising out of grounds 7, 7.1 & 8 of the Appeal pertains to the Transfer Pricing Adjustment of Rs.8,98,683/- on account of alleged transaction for Notional Interest attributable to delayed payments receivable from the AE. In this regard, the TPO records that at year-end, the assessee had receivables from its AEs. An inference is drawn by the TPO that the payment for invoices raised by the assessee were not been realized within the stipulated time as provided in the invoice/ agreement. The TPO, therefore, holds that this is also a separate international transaction which requires a separate bench marking. The TPO has further recorded that, as per the market practice, such receivables

ought to have been realized within a span of 30 days of the invoice and any excess period of credit would require a suitable compensation for delay with interest @ 11.69% (i.e., SBI Base Rate). Concluding as such, the TPO has proposed an adjustment of Rs.8,98,683/-. Being aggrieved, the assessee filed objection before the Ld. DRP. The Ld. DRP has held that overdue receivables would construe a separate international transaction and has upheld the action of the TPO in separately bench marking the same. Further, the Ld. DRP has also rejected the contention raised by the assessee that the working capital adjustment would subsume adjustment on account of overdue receivables. Being aggrieved, the assessee is now in appeal before us.

7.0 The Ld. AR opposed the impugned addition and in this regard it is submitted by the Ld. AR as under:-

> *"Issue decided in favour of 'A' by Hon'ble ITAT in AYs 2009-10 and 2010-11. References:*
>
> - *AY 2009-10 ITAT order reported in 52 ITR(T) 83 {copy enclosed at pages 409 to 447 of PB filed in Stay Nos 475 & 476/Del/2018} relevant issue discussed at page 427, para 9 onwards and conclusions are at pages 428 to 430, para 11*
> - *ITAT order for AY 09-10 accepted by revenue on this issue no further appeal to High Court.*

AY 2010-11 ITAT order dated 23.10.2017 in ITA No. 1835/Del/2015 {copy enclosed at pages 448 to 492 of PB filed in Stay Nos 475 & 476/Del/2018} relevant issue discussed at page 475, para 5 onwards and conclusions are at pages 475 to 479 at paras 5.3 to 5.5."

7.2 The Ld. AR also referred to the orders passed by the TPO for Assessment Years 2012-13 and 2013-14 wherein, after issuing show cause proposing an adjustment on account of outstanding receivables, the issue has, thereafter, been dropped and no further adjustment is proposed by the TPO for those years. In support, the Ld. AR also relied on the decision of Hon'ble Jurisdictional High Court in the case of Pr. CIT vs. Kusum Healthcare Pvt. Ltd. reported in 2017-TII-28-HC-DEL-TP.

8.0 On the other hand, the Ld. CIT (DR) opposed the arguments and contentions taken by the Ld. AR. Relying on orders passed by the lower authorities, it was submitted by him that the reasoning given by the Ld. DRP requires no interference. However, on query being raised by the Bench, the Ld. CIT (DR) was fair enough to admit that in earlier assessment years, identical issue has been decided in favour of the assessee and that the department has accepted the order passed by the coordinate Bench for A.Y. 2009-10 on this issue.

9.0 We have carefully considered the submissions made and perused the material available on record. It is observed that the coordinate Bench in A.Y. 2009-10 had adjudicated upon the identical issue in favour of the assessee as under:-

> *"11. We have considered the arguments advanced by the parties and perused the material available on record. Undisputedly, in the present case the benchmarking of the main international transactions applying the transactional net margin method has been accepted by the Transfer Pricing Officer. Considering this, we find that the ratio laid down by the Mumbai Income-tax Appellate Tribunal in Rusabh Diamonds' case (supra) is clearly applicable to the facts of instant case. In the said judgment, it has been held by a co-ordinate Bench of the Tribunal as under (head note from Rusabh Diamonds):*
>
> > *"The interest income is an integral part of the PBIT inasmuch as interest income, in cases other than finance companies, is required to be included in the 'other income' and thus affects the profit before interest and taxes. While profit before interest and taxes does not take into account 'interest expenditure', it does take into account 'interest income' because the interest income is part of the 'other income', under pre-amended as well as post-amended Schedule VI to the Companies Act, which is duly taken into account into computation of PBIT. In a way PBIT is a misnomer, as while PBIT does not take into account interest expenditure, it does take into account interest income appearing in the other income. Once the profitability, as per PBIT, is found to be comparable, there cannot be a separate adjustment for*

interest income on delayed realisation, which is an integral part of the PBIT figure. (paragraph 12)

As for the Revenue's suggestion that it is to be verified whether the comparables include interest income, if any, all one can say is that the statutory provisions require the interest income, unless it is an interest income of the finance and banking companies, to be included in the other income which is taken into account for computing PBIT. The presumption, therefore, is that the accounts are drawn up as per the statutory requirements, and the exclusions from 'other income' are specifically discussed on the facts of each case, and as such constitute integral part of the transfer pricing documentation. There is nothing on record to show these exclusions. (paragraph 15)

As regards the contention that normally all interest incomes are excluded in the computation of PBIT as such incomes rarely constitute operational income, there is no need to be guided by such hypothesis and generalities. There is nothing on the records, to show such exclusions on the facts of this case. In any event, setting off of interest expenditure with interest on account of delay in realisation of debts, even if so, is not too common an occurrence and more of exceptions than the rule. The apprehensions of the Revenue are purely hypothetical and, therefore, devoid of legally sustainable merits. (paragraph 16)

In view of these discussions, as also bearing in mind entirety of the case, no arm's length price adjustments can be made, in respect of delay in relation of sale proceeds. Such being conclusion, there is no need to address the specific factual arguments advanced by the assessee. In effect thus the grievance of the assessee, is upheld and direct the Assessing Officer to delete the impugned arm's length price adjustment. (paragraph 17)

Explanation to section 92B

There is, however, one more aspect of the matter for which the impugned arm's length price adjustment must be deleted. (paragraph 19)

It is noted that everything hinges on application of the Explanation to section 92B, vide Finance Act, 2012, though with retrospective effect from April 1, 2002. (paragraph 20)

The amendment so made by the Finance Act, 2012, stated to be with retrospective effect April 1, 2002, inserts an Explanation to section 92B. In plain words, this amendment, inter alia, implies that capital financing of any type, including by way of 'deferred payment or receivable or any other debt arising during the course of business' will constitute an international transaction under section 92B. Going by this definition 'any debts arising during the course of business' will constitute an international transaction. A trade debt is, accordingly, covered by this definition. However, since the assessment year that one is dealing with is prior to the assessment year 2012-13, the next important question is whether this amendment could be held to be applicable in the assessment year before as well. Undoubtedly, the amendment is said to be retrospective but then the question really is whether just stating the law to be retrospective will make it retrospective in effect. (paragraph 29)

It is very important to bear in mind the fact that right now one is dealing with amendment of a transfer pricing related provision which is in the nature of a SAAR (specific anti-abuse rule), and that every anti-abuse legislation, whether SAAR (specific anti-abuse rule) or GAAR (general anti-abuse rule), is a legislation seeking the taxpayers to organise their affairs in a manner compliant with the norms set out in such anti-abuse legislation. An anti-abuse legislation does not trigger the levy of taxes; it only tells you what behaviour is acceptable or what is not acceptable.

What triggers levy of taxes is non-compliance with the manner in which the anti-abuse regulations require the taxpayers to conduct their affairs. In that sense, all anti-abuse legislations seek a certain degree of compliance with the norms set out therein. It is, therefore, only elementary that amendments in the anti-abuse legislations can only be prospective. It does not make sense that someone tells you today as to how you should have behaved yesterday, and then goes on to levy a tax because you did not behave in that manner yesterday. (paragraph 36)

When this is put to the Department, his stock reply is that the amendment only clarifies the law, it does not expand the law. (paragraph 37)

Well, if the 2012 amendment does not add anything or expand the scope of international transaction defined under section 92B, assuming that it indeed does not this provision has already been judicially interpreted, and the matter rests there unless it is reversed by a higher judicial forum. However, if the 2012 amendment does increase the scope of international transaction under section 92B, there is no way it could be implemented for the period prior to this law coming on the statute, i.e., May 28, 2012. The law is well settled. It does not expect anyone to perform an impossibility. (paragraph 38)

It is for this reason that the Explanation to section 92B, though stated to be clarificatory and stated to be effective from April 1, 2002, has to be necessarily treated as effective from at best the assessment year 2013-14. In addition to this reason, in the light of the Delhi High Court's guidance in the case of DIT v. New Skies Satellite BV [2016] 382 ITR 114 (Delhi) ; 68 taxmann.com 8 ; [2016-TII-6-HC-DEL-INTL] also, the amendment in the definition of international transaction under section 92B, to the extent it pertains to the issuance of corporate guarantee being outside the scope of 'international transaction', cannot be said to be retrospective in effect. The fact that it is stated to be retrospective, in the light of the

aforesaid guidance of the Delhi High Court would not alter the situation, and it can only be treated as prospective in effect, i.e., with effect from April 1, 2012, onwards. (paragraph 39)

For the detailed reasons set out above, the amendment in section 92B, at least to the extent it dealt with the question of issuance of corporate guarantees, is effective from April 1, 2012. The assessment year being an assessment year prior to that date, the amended provisions of section 92B have no application in the matter. (paragraph 43)."

Respectfully following the above, ground Nos. 7 and 8 of the appeal are allowed and the Assessing Officer is directed to delete the addition"

9.1 It is not disputed that the revenue has not filed any appeal before the Hon'ble High Court against the above decision of the Tribunal on the issue in dispute in A.Y. 2009-10. Moreover, following the decision of A.Y. 2009-10, the coordinate Bench, in A.Y. 2010-11, has again decided the issue in favour of the assessee. It will also be relevant to note that there is no adjustment proposed on this issue by the TPO in A.Ys.2011-12 & 2013-14. The contention of the Ld. DRP that working capital adjustment would not subsume adjustment on account of overdue receivables is no more good law. Support, in this regard is found from the Hon'ble jurisdictional High Court's decision in case of Kusum Healthcare (supra) wherein Hon'ble High Court has held as under:-

"10. The Court is unable to agree with the above submissions. The inclusion in the Explanation to Section 92B of the Act of the expression 'receivables' does not mean that de hors the context every item of 'receivables' appearing in the accounts of an entity, which may have dealings with foreign AEs would automatically be characterised as an international transaction. There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which will have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the Assessee will have to be studied. In other words, there has to be a proper inquiry by the TPO by analysing the statistics over a period of time to discern a pattern which would indicate that vis-à-vis the receivables for the supplies made to an AE, the arrangement reflects an international transaction intended to benefit the AE in some way.

11. The Court finds that the entire focus of the AO was on just one AY and the figure of receivables in relation to that AY can hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-à-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by this Court in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi)"

9.2 Respectfully following the above binding precedents, grounds 7 & 7.1 are allowed and the AO is directed to delete the addition of Rs.8,98,683/-.

10.0 The next issue which requires our deliberations pertains to disallowance of deduction u/s 10A of the Act. This issue is raised in Ground Nos. 9, 9.1, 9.2 & 9.3 of the appeal. The relevant facts in this regard are that in the computation of income, deduction u/s 10A of the Act amounting to Rs.17,70,80,624/- has been claimed by the assessee. During the course of assessment, unit-wise computation of total income was filed by the assessee and on perusal of that, the AO records that the following revenue has been earned by the assessee from Units 1 and 2:

Sl. No.	***Income***	***Unit-I***	***Unit-II***	***Total***
1.	*Data Processing Receipts / Software Export Services*	*Rs.188,21,57,319/-*	*Rs.22,91,81,909/-*	*Rs.211,13,39,228/-*
2.	*IT Support Services*	*Rs.19,74,96,375/-*	*Rs.84,71,411/-*	*Rs.20,59,67,787/-*
3.	*Other Income*	*Rs.11,74,97,153/-*	*Rs.1,18,61,127/-*	*Rs.12,93,58,281/-*
4.	*Total*	*Rs.219,71,50,847/-*	*Rs.24,95,14,447/-*	*Rs.244,66,65,295/-*

10.1 The AO further notes that in A.Y.2009-10, the Ld. DRP had made an enhancement to the total income by disallowing the claim for deduction u/s 10A of the Act. In this regard, the AO has extensively

quoted and relied on the order passed by the Ld. DRP for A.Y. 2009-10 wherein it is held that Data Processing Receipts derived by the assessee from Units 1 and 2 would not be eligible for deduction u/s 10A of the Act. In nutshell, it is held by the AO (following the order of the Ld. DRP for A.Y. 2009-10 & 2010-11) that there is no export activity carried on by the assessee and as such it is not eligible for claiming deduction u/s 10A of the Act. However, it is accepted that IT Support services and call center receipts would be eligible for benefit u/s 10A of the Act. The AO has, therefore, restricted the claim for deduction u/s 10A to Rs.59,39,683/- and the difference of Rs.17,11,40,951/- (Rs.17,70,80,634/- - Rs.59,39,683/-) has been disallowed.

10.2 Being aggrieved, the assessee filed objections before the Ld. DRP. The Ld. DRP has upheld the disallowance by observing as under:-

> *"This is a legacy issue. The fact pattern remains the same this year as in AY 2010-11. We are in agreement with the views of the DRP on this issue. The taxpayer has not been able to controvert the arguments of the AO discussed comprehensively at assessment order. Thus following the Rule of Consistency, the DRP following the decision of DRP in AY 2010-11 approves the AO's order and the action of the AO in the proposed draft assessment order for not allowing*

deduction u/s 10A on the alleged "Data Processing Fee" which is held to be of the nature of commission on rendering of distribution and marketing activities."

10.3 Being aggrieved, the assessee/appellant is now in appeal before us.

11.0 In this regard, the Ld. AR has submitted as under:-

"Issue decided in favour of 'A' by Hon'ble ITAT in AYs 2009-10 and 2010-11. References:

- *AY 2009-10 ITAT order reported in 52 ITR(T) 83 {copy enclosed at pages 409 to 447 of PB filled in Stay Nos 475 & 476/Del/2018} relevant issue discussed at page 430, para 12 onwards and conclusions are at pages 437 to 447, para 15 to 16.*

- *ITAT order for AY 09-10 on this issue has been upheld by Hon'ble Delhi High Court vide order dated 22.05.2017 in ITA 154/2017 {copy enclosed at pages 493 to 514 relevant conclusions at page 507, para 32} .*

AY 2010-11 ITAT order dated 23.10.2017 in ITA No. 1835/Del/2015 {copy enclosed at pages 448 to 492 of PB filled in Stay Nos 475 & 476/Del/2018} relevant issue discussed at page 479, para 6 onwards and conclusions are at pages 480 to 491 at paras 6.4 to 6.6."

12.0 On the other hand, the Ld. DR was unable to controvert the above arguments. The Ld. DR relied upon orders passed by the lower authorities.

13.0 We have heard the rival submissions and also perused the material available on record. It is seen that the coordinate Bench of Tribunal, while adjudicating upon the issue of deduction u/s 10A of the Act in A.Y. 2009-10, has relied upon the decision in the assessee/appellant's own case for A.Ys.1996-97 & 1997-98 reported in 79 ITD 407(Del) and also the decision of the Tribunal in the case of M/s Interglobe Technology Contents Private Limited for Assessment Years 2007-08 to 2010-11 in ITA Nos.419/Del/2011, 5830/Del/2011, 1463/Del/2011 and 6144/Del/2013. The Coordinate Bench, for A.Y. 2009-10, has held as under:-

> *"15.1 Above conclusions of coordinate bench clearly highlight the nature of data processing activities carried on by the appellant. We find no reason for not following the above binding precedent. Moreover tax department has also accepted the above decision. Ld DRP has vehemently harped upon the fact that nature of activities carried on by the appellant is solely distribution and marketing and not export oriented. We are unable to convince ourselves in this regard. Similar allegations were raised by the AO in his order of assessment for AYs 1997-98 and 1998-99. On further appeal ITAT in AY 1997-98 and the learned CIT(A) in 1998-99 following ratio propounded in 79 ITD 407(Del) has allowed appellant's claim for*

deduction u/s 10A in those years. Even these orders have been accepted by the tax department and there is no further challenge thereto. Ld DRP's action in enhancing the total income in AY 2009-10 and disallowing the claim for deduction u/s 10A in the instant case is contrary to the decision of Hon'ble Jurisdictional High Court of Delhi in case of Neo Poly Pack (P) Limited reported in 245 ITR 492(Del) wherein the Hon'ble Court has held as under:

".....we are of the view that no fault can be found with the order of the Tribunal declining to make reference on the proposed question. It is true that each assessment year being independent of each other, the doctrine of res judicata does not strictly apply to the income-tax proceedings, but where an issue has been considered and decided consistently in a number of earlier assessment years in a particular manner, for the sake of consistency, the same view should continue to prevail in the subsequent years unless there is some material change in facts. In the present case, the learned counsel for the revenue has not been able to point out even a single distinguishing feature in respect of the assessment year in question which could have prompted the Assessing Officer to take a view different from the earlier assessment years in which the same income was brought to tax as income from business."

15.2 Even otherwise on merits we are unable to sustain the view adopted by Ld DRP. Ld AR is justified in submitting that the learned DRP has written factually incorrect findings in its order. Moreover the details ,filed by the appellant have also been partially taken into consideration. Ld DRP takes note of top 25 employees but omits to take into consideration crucial fact that director of appellate company Shri Ankur Bhatia is a Software Engineer with

16 years of experience. Moreover division wise break up of total employee strength has also partially been reproduced by Ld DRP in its order. Appellant vide submissions dated 29th November 2011 has submitted following details:

…. ……

Above details clearly show that appellant did possess requisite technical staff for carrying out data processing activities. We further observe that Ld DRP has erroneously been influenced by the fact that appellant is having branches in various locations. Facts on record clearly show that those branches belong to Unit I and not to Unit II. As regards Unit II the STPI registration has been granted to the appellant only for one location i.e Vasant Vihar, New Delhi. Ld AR has also drawn our attention towards application seeking STPI registration wherein it is stated that applicant will not have any STP unit in any other location (refer page 447 of paper book). Annual return to STPI authorities also clarify that Unit II was operating only from one location. Registration granted by STPI Authorities to UNIT II is solely for manufacture of "Computer Software / IT Enabled Services". Once STPI authorities do not doubt the factum of export activities of Unit II, we failed to apprehend how learned DRP can take a contrary view. We may refer here to the decision of Special Bench of Tribunal in case of Mitsui & Co. reported in 39 ITD 59(Del)(SB), wherein it is held as under:

"One is not to be led away by the enormity of the expenditure incurred in running an office in India. That would depend upon the level of the country to which the office belongs. We have to judge the expenditure incurred from that angle and not from our angle. It

is not the case of the Revenue that the expenditure incurred was so camouflaged as to cover the expenditure incurred in a trading activity to show it as expenditure incurred on liaison activity. Nor is it the case of the Revenue that the work carried on by the assessee in India which according to them amounted to trading activity produced income in India or anywhere else. Ibis expenditure incurred in India was met out of the remittances received by the Indian Branches again through the Reserve Bank of India. There was no evidence brought on record at any stage that the Indian Branches had exceeded the limits prescribed for it by the Reserve Bank of India. As long as the Indian Officers were conducting the operations within the restricted area and so long as those activities were not considered by the Reserve Bank of India, which is the concerned authority as amounting to anything other than carrying on of liaison work no inference adverse to the assessee can be drawn or is possible to draw. To repeat what all that was done by the assessee fell within the parameters of supplying of information which is preparatory to and auxiliary to the formation of the final contracts."

Appellant has clarified above that like earlier years in the year under consideration also the sole activity carried on by it was that of providing the travel agents an access to the Amadeus CRS System by rendering ITeS data processing services. Facts on record also show that the appellant has not carried on any "distribution" functions though the agreement provided for same DRP's action in the present case is motivated by the "distribution" part of agreement which was not actually carried on by the appellant. Since fee to be paid to appellant as per Annexure A of the

agreement was defined in aconsolidated manner probably that has lead to the present confusion in Ld DRP's action of making disallowance of deduction u/s 10A. As held by the Tribunal in appellant's own case for AY 1996-97 (supra) it merely provides ITeS services to Amadeus Spain. Appellant renders no services to the travel agents but does render data processing services only to Amadeus Spain and for this it is being remunerated on a profit sharing basis. The meaning ascribed to term "distribution" by Ld DRP in this year has formed part of appellant's agreements % with Amadeus Spain since inception from AY 1996-97. Hence it does not wipe out the past history of the case. It is admitted by learned DRP that facts are common and there is no change in modus operandi. Hence action of learned DRP in now doubting the claim made when after a detailed technical examination of appellant's activities, eligibility of its sole data processing activity for claiming deduction u/s 10A has already been settled by the Tribunal in AY 1996-97 and accepted by tax department is unsustainable.

15.3 The view adopted by Ld DRP has further been influenced by the fact that Amadeus Spain has a PE in India in form of Amadeus India Private Limited (i.e the appellant). We find that this fact is totally irrelevant in adjudication of appellant's claim for deduction u/s 10A. Foreign company's DAPE and DA are two separate taxable entities as per law. DAPE is a creation of Article 5 of the relevant DTAA, wherein the object is to tax profits of foreign company in the source state. This distinction has efficiently been highlighted by a Coordinate Bench of tribunal in case of Set Satellite (Singapore) (supra) as under:

"11. The particular difficulty in the case of a dependent agent permanent establishment is that DAPE itself is hypothetical because there is no establishment-permanent or transient of the GE in the PE state. The hypothetical PE, therefore, must be visualized on the basis of presence of the GE as projected through the PE, which in turn depends on functions performed, assets used and risks assumed by the GE in respect of the business carried on through the PE. The DAPE and DA has to be, therefore, be treated as two distinct taxable units. The former is a hypothetical establishment, taxability of which is on the basis of revenues of the activities of the GE attributable to the PE, in turn based on the FAR analysis of the DAPE, minus the payments attributable in respect of such activities. In simple words, whatever are the revenues generated on account of functional analysis of the DAPE are to be taken into account as hypothetical income of the said DAPE, and deduction is to be provided in respect of all the expenses incurred by the GE to earn such revenues, including, of course, the remuneration paid to the DA. The second taxable unit in this transaction is the DA itself, but this taxability is in respect of the remuneration of the DA. The provisions of the tax treaty are silent on this issue, and rightly so, because the taxability of the DA is quite distinct of the taxability of the enterprise of the contracting state which is in respect of PE of such an enterprise. At the cost of repetition, it is not the DA who constitutes PE of the GE, but it is by the virtue of a DA that the GE is deemed to have a PE, a DAPE though, in the other contracting state. We are of the considered view that in addition of the taxability of the DA in respect of remuneration earned by him, which is in accordance with the domestic law and which has nothing to do with the taxability of the

foreign enterprise of which he is dependent agent, the foreign enterprise is also taxable in India, in terms of the provisions of Article 7 of the tax treaty, in respect of the profits attributable to the dependent agent permanent establishment. As we have elaborated earlier in this order, a dependent agent permanent establishment is distinct from the dependent agent. While computing the profits of this dependent agent permanent establishment, a deduction is to be allowed for the remuneration paid to the dependent agent as that is cost of operation of the dependent agent permanent establishment and as it has been incurred for generating the revenues attributable to such hypothetical permanent establishment"

Tribunal has also maintained the above distinction while deciding the case of Amadeus Spain. A deduction has been allowed to Amadeus Spain for 46% revenue it has passed on to the appellant, as it is a legitimate business expense of Amadeus Spain and income taxable in hands of the appellant. It will be relevant here to refer to the decision of Amadeus Spain (supra) wherein Tribunal has held as under:

" .....Thus where the entire activity of an enterprise are not carried out in a Contracting State where the PE is situated, than only so much of the profit as is attributable to the functions carried through the PE can be taxable in such source State. While dealing with the question as to what is such part of income as is reasonably attributable to the operations carried out in India, we have held that only 15% of the revenue generated from the bookings made within India is taxable in India. The same proportion has to be adopted here while computing profit

attributable to the PE. We have also held that since the payment to the agent in India is more than what is the income attributable to the PE in India, it extinguish the assessment as no further income is taxable in India. It is to be noted that even in the first assessment framed by the Assessing Officer, the entire expenses in the form of remuneration paid to AIPL was held as allowable deduction and was reduced while computing the income of appellant If that be the case, the income attributable to PE in India being less than the remuneration paid to the dependent agent, it extinguishes the assessment and requires no further exercise for computation of income. We accordingly hold so and in view of the same the income of the appellant for assessment years 1997-98 and 1998-99 will be 'Nil'."

15.4 Before concluding we would like to mention over here that identical issue had also came up for the consideration of the Tribunal in case of M/s Interglobe Technology Quotient Private Limited for AYs 2007-08 to 2010-11 in ITA Nos. 419/Del/2011, 5830/Del/2011, 1463/Del/2013 and 6144/Del/2013. Vide order dated 26th July 2016 division bench of this Tribunal allowed the claim for deduction u/s 10A of the Act by M/s Interglobe Quotient, which is a competitor of the appellant. Both the assessees have similar business model and are rendering data processing activity. Factual allegations levied by the authorities below are also same. In the said order, after following Tribunal's decision of appellant for AY 1996-97 (supra), the Tribunal has opined as under:

"We find that the learned CIT(Appeals) while dealing with the issue has basically followed the decision of the IT AT in the case of Amadeus India (supra). He has elaborately discussed the terms of

distribution agreement between the assessee and Galileo and has compared the activities of the assessee with that of Amadeus India before coming to the conclusion that the assessee before us is very much eligible for claiming deduction under section 10AA of the Act with this finding that the Assessing Officer was not justified in denying the claimed deduction under section 10AA of the Act in the present case. In para No.5.2, the Learned CIT(Appeals) firstly has discussed the terms of distribution agreement and on the basis of those description of services, he has come to the conclusion that the assessee had undertaken export of software /data processing services at the rate of % of GDP as part of the distribution services provided to Galileo and the consideration paid by Galileo for such services qualified for deduction under section 10AA of the Act. The Learned CIT (Appeals) has met out the objections raised by the Assessing Officer to justify his denial of the claimed deduction. The services rendered by the assessee to Galileo have been compared by the Learned CIT(Appeals) with the services rendered by Amadeus India to Amadeus Group of Companies. If we compare the working of the assessee with Amadeus India undisputedly was in the same line of business. In the case of Amadeus India (supra), the ITAT has held that the Amadeus India was performing the functions of a program exporter. They do not add more entries to the data base as done by the travel agent. In fact, it has no direct interest in adding to, or drawing extracts from the data base built into the computers like the several operators all the world over but what it does actually is to supplement the function of the Amadeus Group by preparing and transmitting programs to the latter for the incorporation into the portion or "partition" in its mega - computers at Erding in Germany, so as to enable the travel agent in marketing

reason drawn on the available information for their benefit. Its activities are to issue instructions to the master computer to recognize the operators, identify them and provide them excess to specific portion of the data base. There can be no doubt whatever, for the reasons discussed above that the assessee manufactures, produces and export software within the meaning of the three specified sections of the Act. It is open to it to claim exemption under any of these sections and as is well established by pertaining to interpretation of taxing statute it is entitled to choose that one which is most favourable to it in any particular assessment year, held the IT AT. The IT AT in that case also noted some material facts that assessee company submits their monthly returns for export to the competent authority which has accepted the same in discharge of export obligation. The ITAT noted further that the export of software as per the statutory requirement are also declared on exporters declaration form SOFTES (specimen of SOFTES Form has been filed). The competent authority Le., Department of Electronics authorized official also certified that the software described in the SOFTES form was actually transmitted and the export value declared by the exporter has been found to be in order and accepted by the authorized officer. Similar are the functions of the assessee in the present case before us and similar types of certificates have been issued to the assessee about the transmission of software and the export value declared by the exporter has been found to be in order and accepted by the authorized officer. We are thus of the view that the Learned CIT(Appeals) was justified in equating the facts of the present case with that of the Amadeus India, also in the same line of business and following the decision of the IT AT on an identical issue, in the

case of Amadeus India, in para No. 5.2 of the first appellate order reproduced hereinabove, the Learned CIT(Appeals) has summarized the fulfillment of all the requirements of the eligibility of the deduction claimed under sec. 10AA of the Act in the case of the assessee, which we are not reiterating here for the sale of brevity. Besides, Software export dealer action form shows the assessee in the data entry jobs and conversion software, data processing, the profit and loss account show data processing software export, software development services income, auditor's report has certified that the assessee has been engaged in the development of computer software and information technology enabled product and services. The auditor's report also talks about the Revenue depicted under data processing software" has been / is being certified by the Office of Development Commissioner, Noida, Noida Special Economic Zone. Export as per the Special Economic Zones Act, 2005" in relation to the "Special Economic Zones" means taking goods, or providing services out of India from a Special Economic Zones" means taking goods, or providing services out of India from a Special Economic zone by land, sea air or by any other mode whether physical or otherwise. And above all, as per section 51 of the SEZ, Act, notwithstanding anything inconsistent therewith contained in any other law for the time being in force, the provisions of SEZ Act will prevail. We thus do not find infirmity in the first appellate order in coming to the conclusion that the assessee is very much eligible for the claimed deduction under sec. 10AA of the Act in view of the of decision of the ITAT in the case of Amadeus India (surpa). The Learned CIT(Appeals) was thus right in deleting the disallowance made by the Assessing Officer in this regard.

7.6 The above view that the assessee is eligible for claimed deduction under sec. 10AA of the Act is also strengthened by the decision of CESTAT, New Delhi Bench in the case of Acquire Service (P) Ltd. vs. Commissioner of Service tax (supra). In that case like the present assessee before us, the assessee were 100% EOUs registered with software technology park and were granted exemption under income-tax for export of computer software. The assessee therein were parts of a group of companies i.e., Amadeus or Galileo. These groups had evolved and were maintaining a computer reservation system (CRS), the requisite software and a huge database comprising a variety of information relating to several airlines and other travel services provides, for providing international travel related facilities. The core computer system/server were established at overseas locations at US, Germany or Spain as the case may be. The travel agent, with a computer, merely accesses or utilizes travel information drawn from the data base of the computers. The travel agent also adds to, and alters the data available on the computer when he books a ticket (or other travel facilities like cab services, accommodation at hotels/resorts etc.) for a customer by feeding in the data regarding the customer such as airlines, hotel, local travel fare, tickets, the several intermediary and eventual destination; and the nature of services to be provided etc. This data enters the composite data based stream and becomes available to other operators via computers operating on Amadeus or Galileo system, all over the world, whenever a fulfilling transactions occurs at the travel agents end. The assessee's role like the present assessee before us, was occupying the position of hyphen between the overseas Amadeus and Galileo which have conceived, evolved, maintained and

operates the CRS (Computer Reservation System) facility on the one hand; and travel agent on the other. What the to assessee do, is to supplement functions, of the overseas entities (Amadeus or Galileo) by preparing and transmitting the locally generated travel related data to them for incorporation and synthesis into the core data base, maintained in the mega computers overseas, so as to enable travel agents (operating within the assessee's marketing region) to draw on the available and updated information, for their benefit. The assessees issued instructions to the respective master computer (of Amadeus or Galileo) to enable recognition that identification of tour operators and facilitate access to them of specific portion (segment) of the composite data basis. CRS is a system connected with a data base carrying various kinds of information pertaining to several airlines and other travel services provides is used for booking airlines tickets, cabs hotels and like travel facilities across the globe. Airlines hotels, cabs agencies and other services providers pay fee to the overseas entities (Amadeus or Galileo) for bookings made by employing the CRS. The assessee process the data generated by their accredited travel agent in India, at their respective STP unit and align and interface such information as per protocols of the CRS systems of the overseas entitles-Amadeus or Galileo. On successful booking of a ticket or others travels related facilities by accredited travel agents, the relevant data is processed by the assessees and fed into the data overseas, employing internet facilities and activities amounting to computer data processing. For providing this service, assessees received data processing fees from the overseas entities in convertible foreing exchange, assessees however receive no fee/consideration from either the airlines, the travel agents or from

hotels etc. the CESTAT has thus come to the conclusion that assessees promote/market CRS services provide by the Overseas entities (Amadeus/ Galileo) but do so through computers date processing, amounting to information technology services.

7.7 The functions of assessee have also been discussed by the ITAT in the case of Galileo International Inc. vs. DCIT (supra) deciding the issue of holding of any permanent establishment of Galileo International Inc. in India to examine its income to be taxable in India. This decision of the IT AT has been upheld by the Hon'ble High Court.

7.8 The Hon'ble Delhi High Court in the case of CIT vs. M.L. Outsourcing Services (P) Ltd. (supra) in the para No. 9 of the decision has been pleased to make observation on the CBDT Notification No. S0890(E) dated 26.09.2000 in relation to deduction under sec. 10A, reproduced as under:

"9. A perusal of the said notification would indicate that the Board has included several distinct types of services under the expression, "product or services" in the fifteen clauses. The Board, in the notification has understood that product or services, to be included within clause (b) of Explanation 2 to Section 10A, need not be computer software as understood in the common parlance of even customized electronic data, as generally understood. Any product or service of similar nature would include in its ambit, product and services which were enabled by, i.e. would rely upon, or are driven by information technology. This becomes clear when we refer to the wide ambit of the divergent and varied services covered in the different clauses like, "(ii) call centres...(viii) human resources services...(viii) insurance claim processing... (xii) remote

maintenance" and "(XIV) support centres". These services would not necessarily and primarily involve customized data processing, but nevertheless, these are information technology enables services. In case of call entres, queries and questions from a customer of a third company are answered by an employee of the assessee based in India. The said task is performed with the aid and help of information technology but it would not be a case of customized electronic data service or export thereof. Similar exercise may be undertaken in case of remote maintenance or support centers, which answer queries and gives suggestions by e-mails or through voice and/or video communications. These services would not normally involve processing or sending customized electronic data abroad yet these are information technology enabled services and specifically covered under the Notification".

7.9 In view of the above discussion, we find that the Learned CIT(Appeals) has rightly held that the assessee is eligible for the claimed deduction under sec. 10AA of the Income-tax Act, 1961."

16. Following the above view, we direct the Assessing Officer to allow the claimed deduction u/s 10A of the Income-tax Act, 1961 on Unit II of the appellant."

13.1 The order of the coordinate Bench for A.Y.2009-10 has been followed in A.Y. 2010-11 in ITA No.1835/Del/2015 vide order dated 23rd October, 2017. Moreover, the Hon'ble Jurisdictional High Court in ITA No.154/2017, vide order dated 22nd May, 2017, has upheld the findings of the Tribunal for A.Y. 2009-10 by observing as under:-

"Conclusion of ITA 154 of 2017 (AIPL)

32. The Court finds that the impugned order of the ITAT in the case of AIPL for AY 2009-10 on the issue of allowing the deduction under Section 10A of the Act suffers from no legal infirmity either in its analysis of the legal provisions or in its conclusions. The Court is not inclined to frame any question of law on the issue concerning a Section 10A deduction in the appeal of the Revenue against AIPL for AY 2009-10."

13.2 Respectfully following the above binding precedents, the AO is directed to allow deduction u/s 10A of the Act as claimed by the Assessee/Appellant in the return of income. Grounds 9, 9.1, 9.2. & 9.3 are, therefore, allowed.

13.3 Ground Nos.1 & 11 are general and, therefore, do not require specific adjudication.

13.4 In Ground No.10, the assessee/appellant has challenged charging of interest u/s 234A, 234B and 234C of the Act. The AO is directed to consequential relief in this regard.

14.0 In the result, ITA No.1662/Del/2016 for AY 2011-12 stands allowed.

15.0 We shall now take up for consideration appeal for A.Y. 2012-13 bearing ITA No. 1811/Del/2017. In this appeal, the following grounds have been raised by the Assessee/Appellant:

"1. That on facts and in law the orders passed by the Assessing Officer (hereinafter referred as the "AO") / Dispute Resolution Panel (hereinafter referred as the "DRP) / Transfer Pricing Officer (hereinafter referred as the "TPO") are bad in law and void ab-initio.

2. That on facts and in law the TPO/DRP erred in not appreciating that in absence of a "transaction" as envisaged under section 92F of the Act between appellant and its AE for brand promotion or for establishing a marketing intangible, the TPO had no jurisdiction to propose an adjustment on account of AMP expenses.

3. That the Transfer Pricing adjustment of Rs.200,12,15,476/- on account of Advertisement, Marketing and Sales Promotion (AMP) expenses being the aggregate of :

(i) Protective Adjustment Rs. 96,63,03,610/-

(ii) Substantive Adjustment Rs.103,39,11,866/-

is bad in law, illegal and uncalled or both on facts and in law.

3.1 That on facts and in law the DRP erred in :

(a) Enhancing the TP adjustment vis-à-vis protective/substantive basis without issuing any show cause notice.

(b) Observing that the appellant has not furnished complete / adequate details in reply to the investigation directed to be conducted vide letter dated 19th October, 2016.

(c) Issuing directions contrary to provisions of section 144C(8) of the Act.

3.2 That on facts and in law the TPO/DRP erred in ignoring and not following the orders of Hon'ble ITAT and High Court in the appellant's own case for the AYs 2007-08, 2008-09 and 2009-10 duly placed on record.

3.3 That on facts and in law the TPO/DRP erred in disproving the benchmarking analysis adopted by the appellant without following the methodology and approach recognized under section 92C(3) of the Act.

4. That on facts and in law the TPO erred in holding and the DRP inter alia erred in upholding / observing that :

(i) Appellant had incurred AMP expenditure totaling to Rs.70,83,04,354/- on promotion of proprietary marks and for development of marketing intangible for the benefit of AE.

(ii) AMP expenditure of Rs.70,83,04,354/- incurred by the assessee is an "International Transaction" u/s 92B of the Act.

(iii) Expenditure of Rs.66,66,86,509/- incurred by the assessee on payment of incentives to subscribers is in the nature of AMP.

(iv) By incurring excess / extraordinary AMP expense the appellant had rendered intra group services to its AE.

(v) AE is directly benefited by any expenditure incurred by assessee on AMP.

(vi) AE directs the AMP strategy and the expenditure incurred by appellant in India.

(vii) Legal ownership of the marketing intangible would get transferred to the AE without any consideration on termination of the Distribution Agreement.

(viii) Appellant has failed to furnish any material to demonstrate that it enjoyed economic ownership of brand.

(ix) Appellant has failed to show that for excessive AMP expenditure it was compensated by the AE through a set-off.

(x) Margins earned by the appellant (applying TNMM) is not significantly more that the margins of the comparable companies.

5. Without prejudice, that on facts and in law the AO/TPO/DRP erred in not appreciating that the alleged transactions of AMP were "closely linked" with the main activity carried on by the appellant and hence it cannot be segregated and benchmarked on a stand-alone basis.

5.1 That on facts and in law the AO/TPO.DRP erred in holding that there is no suitable comparable available for benchmarking the alleged "international transaction" of incurring excessive AMP expense by applying the aggregated approach.

6. That on facts and in law the AO/TPO/DRP erred in making / upholding Protective TP Adjustment on account of AMP expenses invoking "Bright Line Method".

6.1 That on facts and in law the DRP erred in holding that use of "Bright Line Method" is supported by Rule 10AB of Income Tax Rules.

7. That on facts and in law the TPO/AO/DRP erred in making/upholding substantive TP adjustment on account of AMP expenses invoking "Cost Plus Method".

7.1 That Without prejudice, on facts and in law the TPO/DRP erred in making/upholding the applicability of a markup of 45.97% on the alleged excessive AMP expenses incurred by the appellant on behalf of the Associated Enterprise.

8. That without prejudice on facts and in law the TPO/DRP erred in making/upholding the applicability of a markup of 45.97% on the alleged excessive AMP expenses incurred by the appellant on behalf of the Associated Enterprise.

9. That on facts and in law the AO/DRP erred in making / upholding disallowance of Rs.27,01,152/- u/s 14A of the Act.

9.1 That on facts and in law the AO/DRP erred in not appreciating that provisions of section 14A are not applicable as no exempt income was earned by the appellant during the year under consideration.

10. That on facts and in law the AO erred in levying interest u/s 234B & 234C of the Act."

15.1 As is apparent, the following two issues are involved in this appeal:-

(i) Transfer Pricing Adjustment on account of excessive AMP spend i.e., protective adjustment of Rs.96,73,03,610/- and substantive adjustment of Rs.103,39,11,866/-.

(ii) Disallowance u/s 14A of Rs.27,01,152/-

15.2 Ground No.1 is general in nature and requires no specific adjudication.

15.3 In grounds 2 to 8, the assessee/appellant challenges the transfer pricing adjustment on account of alleged excessive AMP expenditure. A perusal of order passed by the TPO for A.Y. 2012-13 depicts that the facts and circumstances of the case are akin to that in A.Y. 2011-12. The only distinction we could gather is that the TPO has proposed a substantive addition and a protective addition. Protective addition has been made applying the bright line test to the alleged entire AMP expenditure of the assessee including incentives paid to the travel agents and the substantive addition has been made applying cost-plus method to AMP expenditure incurred excluding payment of incentives to the travel agents. The reason we could gather for such an action is the decision of the Hon'ble Delhi High Court in the case of Sony Mobile *(supra)* wherein the following two issues have been adjudicated by Hon'ble High Court against the tax department i.e.:

(i) The Hon'ble Jurisdictional High Court has held that bright line test cannot be used as a method; and

(ii) Selling expenses are to be excluded from the ambit of AMP.

15.4 In this regard, it will be relevant to note that incentives paid to travel agents in the instant case are selling expenses and they ought to have been excluded from the ambit of AMP {refer ITAT decision in the case of the assessee/appellant for A.Y. 2007-08 reported in 149 ITD 496(Del)}. The TPO records that since on both the above issues, the tax department has approached the Hon'ble Apex Court, to keep these issues alive, Protective and Substantive AMP adjustments have been made in the year under consideration. It will be relevant to note that the Ld. DRP for AY 2012-13 has also specifically considered the jurisdictional issue i.e. as to whether AMP is an international transaction or not and in this regard it has been held by the Ld. DRP as under:-

> "*Amendment regarding filing of appeals by the Department against DRP's directions*
>
> 1. *The Income Tax Act has recently been amended w.e.f., 1.4.2016, to provide that the directions of the DRP cannot be appealed against by the Department. The Hon'ble High Court in the case of Vodafone India Services Pvt. Ltd. have held that proceedings before the DRP are continuation of assessment proceedings, and the final assessment order is passed only after the directions of the DRP. A similar view has been taken in several decisions of the Hon'ble ITAT. The recent amendment in the Income Tax Act only strengthens the view*

that the DRP is an administrative, rather than an appellate body.,

2. In certain case, the Hon'ble Delhi High Court has decided the issue against the Revenue. As discussed above, the Department has filed SLP in the Hon'ble Supreme Court against these decisions and the decision of the Hon'ble Supreme Court is awaited. In Sony Ericsson, the Department's SLP in the Hon'ble Supreme Court on this issue has been admitted and the decision of the Hon'ble Supreme Court is awaited. With the highest respect to the Hon'ble High Court's decision in these cases, we are constrained to observe that if the AO's decision on this issue is not approved by the DRP following the Hon'ble High Court's decision in these cases, this would result in a fait accompli, because after the amendment w.e.f. 1.6.2016, the AO cannot file appeal against the directions of the DRP. This would be inconsistent with the view taken by the AO in earlier years and should not be misconstrued as the Department having accepted the assessee's view, even when SLP has been filed/admitted against the decision of the Hon'ble High Court on this issue, in these cases. Considering the facts, it would be premature at present, for the DRP to decide this issue against the AO/TPO, when the Department's SLP in the Hon'ble supreme Court on this issue has been admitted and the decision of the Hon'ble Supreme Court is awaited."

15.5 Both the lower authorities, therefore, accept that subject to the final outcome in SLP before the Hon'ble Apex Court, the current legal position, as clarified by the Hon'ble Delhi High Court in case of

Maruti Suzuki (supra), Whirlpool of India (supra) and Bausch & Lomb Eyecare (supra), supports the claim made by the assessee/ appellant. We have already held above that on facts and circumstances of the case there is no transaction for incurrence of AMP to promote the brand of AE. Conclusions drawn in appeal for AY 2011-12 will therefore apply *mutatis mutandis* to the present appeal. It is, accordingly, held that in absence of a transaction for brand promotion between the assessee/appellant and its AE, the TPO and the Ld DRP were, therefore, not justified in proposing either protective adjustment or the substantive adjustment. As a result Ground Nos. 2, 3 and 3.2 is allowed. Since the jurisdictional aspect is decided in favour of the assessee/appellant, other grounds challenging various other facets of impugned addition do not require any adjudication as having become *in fructuous.*

15.6 Before finally concluding on this issue, we would like to state that the Ld. AR has fairly invited our attention towards the findings recorded by the Ld. DRP at pages 62 to 80 of the order wherein the Ld. DRP has directed that in the alternative an AMP intensity adjustment be made. In this regard, it has been held by the Ld. DRP as under:-

> *"It may be mentioned that this adjustment is not dependent on whether there is an international transaction. As discussed in*

para 4, there is clearly an international transaction in this case however, if this view is not accepted by higher judicial authorities, the AMP intensity adjustment would still stand."

15.7 Thereafter, at page 79 -Para 2, the Ld. DRP has laid down a methodology for making an adjustment on account of AMP intensity and has issued directions to the TPO accordingly. Highlighting the above background, it was submitted by the Ld. AR that post issuance of directions by the Ld DRP, vide letter dated 10th January, 2017, the assessee/appellant submitted the necessary details for AMP Intensity Adjustment before the TPO as under:-

"In continuation to our letter dated 5th January, 2017 on the above mentioned subject and as instructed by you to provide AMP intensity adjustment calculations as per formula provided by DRP in its directions dated 20th December, 2016.

Please find enclosed herewith Calculation of AMP intensity Adjustment as per DRP Directions for AY 2012-13 – marked as Annexure A.

As is evident from the attached calculation, difference in intensity of amp is negative so no adjustment is required to be done for Assessee since its AMP expenses are loss than the comparables. Further, just to bring on record, for ALP purpose prescribed formula is OP/OC and not NP/Sales, even so Assessee's NP/Sales is much higher than the comparables."

15.8 It is submitted by the Ld AR that the above submissions have been accepted by the the TPO and in his order dated 10th

January, 2017 {i.e order giving effect to directions issued by the Ld. DRP} no adjustment on account of AMP intensity has been made. We have mentioned the above facts to clarify that premised present facts, we need not dwell upon this issue on merits in the present appeal.

15.9 Ground Nos. 9 & 9.1 challenge disallowance of Rs.27,01,152/- u/s 14A of the Act. It is undisputed that during year under consideration there is no exempt income derived by the assessee/appellant. Elaborating upon this, it was submitted by the Ld. AR that in absence of exempt income, disallowance u/s 14A cannot be made. In support, he relied on the decision of the Hon'ble Jurisdictional High Court in the case of McDonald's India Pvt. Ltd. reported in (2019) 101 Taxmann.com 86 (Del).

15.10 On the other hand, the Ld. DR invited our attention towards opinion express by the CBDT in Circular dated 11th February, 2014.

15.11 We have carefully considered the rival submissions. The claim made by the assessee/appellant had been rejected by the Ld. DRP by observing as under:-

> *"1. The assessee has challenged the disallowance under section 14A. The assessee has reiterated the contentions raised before the AO and argued that no disallowance should be made as no exempt income has been received during the*

year. The submissions of the assessee and the facts have been carefully considered. In his order, the AO has discussed the issue in detail. This discussion is not being repeated here for the sake of brevity. In his order, the AO has given valid reasons for his decision. The decision of the AO is supported by the CBDT circular and judicial decisions. The assessee has failed to controvert the findings of the AO.

2. The assessee has contended that in AY 2011-12, the DRP have deleted the disallowance following the decision of the Hon'ble Delhi High Court in Cheminvest. It is not clear whether the DRP's decision on this issue was accepted by the Department on merits, or whether an appeal was filed on this issue. If the Department has not accepted the DRP's decision on this issue in AY 2011-12, and if the DRP was to direct deletion of the disallowance in the present year also, this would result in a fait accompli, because after the amendment w.e.f. 1.6.2016, the AO cannot file appeal against the directions of the DRP. This would be inconsistent with the view taken by the Department in earlier year and should not be misconstrued as the Department having accepted the exclusion of this comparable, even when this is actually not the case.

3. In view of the above discussion, this issue is decided as follows:

(i) If the Department has accepted the decision of the DRP on this issue in AY 2011-12, and has also accepted the decisions of the Hon'ble Delhi High Court in Cheminvest and Holcim, the disallowance under section 14A shall be deleted following the

decision of the DRP in AY 2011-12 and these decisions of the Hon'ble High Court.

(ii) If the Department has not accepted the decision of the DRP on the issue in AY 2011-12, or has not accepted the decision of the Hon'ble Delhi High Court in Cheminvest and Holcim, the disallowance under section 14A is upheld. It is possible that the DRP's decision and these decisions of the Hon'ble High Court have not been accepted on merits however, no appeal is filed because of low tax effect. In such a case, as the DRP's decision on this issue has not been accepted on merits, the disallowance shall be upheld."

15.12 Since undisputedly, there is no exempt income derived by assessee/appellant in the instant case, in our considered opinion, the issue merits to be decided in favour of the assessee/appellant following the Hon'ble jurisdictional High Court's decision in the case of Mc Donald India Pvt. Ltd*(supra)* and M/s Cheminvest Ltd. reported in 378 ITR 33(Del). Respectfully following the above binding precedents of the Hon'ble Jurisdictional High Court we direct the AO to delete disallowance u/s 14A. As a result, grounds 9 & 9.1 are allowed.

16.0 In the result ITA No. 1811/Del/2017 stands allowed.

17.0 Now we take up the appeal for AY 2013-14 in ITA NO. 7691/Del/2017. In this appeal, following grounds have been raised by the assessee/appellant.

"1. That on facts and in law the orders passed by the Assessing Officer (hereinafter referred as the "AO") / Dispute Resolution Panel (hereinafter referred as the "DRP) / Transfer Pricing Officer (hereinafter referred as the "TPO") are bad in law and void ab-initio.

2. That on facts and in law the TPO/DRP erred in not appreciating that in absence of a "transaction" as envisaged under section 92F of the Act between appellant and its AE for brand promotion or for establishing a marketing intangible, the TPO had no jurisdiction to propose an adjustment on account of AMP expenses.

3. That the Transfer Pricing adjustment of Rs.24,04,09,550/- on account of Advertisement, Marketing and Sales Promotion (AMP) expenses being the aggregate of :

(i) Protective Adjustment Rs. 21,18,92,792/-

(ii) Substantive Adjustment Rs. 2,85,16,758/-

Is bad in law, illegal and uncalled or both on facts and in law.

3.1 That on facts and in law the DRP erred in :

(a) Observing that the appellant has not furnished complete / adequate details before TPO / DRP.

(b) Observing that the TPO has carried out an AMP Intensity Adjustment, and this adjustment not dependent upon existence of an "international transaction" for AMP.

(c) Issuing directions contrary to provisions of section 144C(8) of the Act.

3.2 That on facts and in law the TPO/DRP erred in ignoring and not following the orders of Hon'ble ITAT and High Court in the appellant's own case for the AYs 2007-08, 2008-09, 2009-10 and 2010-11, duly placed on record.

3.3 That on facts and in law the TPO/DRP erred in disproving the benchmarking analysis adopted by the appellant without following the methodology and approach recognized under section 92C(3) of the Act.

4. That on facts and in law the TPO erred in holding and the DRP inter alia erred in upholding / observing that :

(i) Appellant had incurred AMP expenditure totaling to Rs.20,21,41,620/- on promotion of proprietary marks and for development of marketing intangible for the benefit of AE.

(ii) AMP expenditure of Rs. 20,21,41,620/- incurred by the assessee is an "International Transaction" u/s 92B of the Act.

(iii) Expenditure of Rs.18,19,16,969/- incurred by the assessee on payment of incentives to subscribers is in the nature of AMP.

(iv) By incurring excess / extraordinary AMP expense the appellant had rendered intra group services to its AE.

(v) AE is directly benefited by any expenditure incurred by assessee on AMP.

(vi) AE directs the AMP strategy and the expenditure incurred by appellant in India.

(vii) Legal ownership of the marketing intangible would get transferred to the AE without any consideration on termination of the Distribution Agreement.

(viii) Appellant has failed to furnish any material to demonstrate that it enjoyed economic ownership of brand.

(ix) Appellant has failed to show that for excessive AMP expenditure it was compensated by the AE through a set-off.

(x) Margins earned by the appellant (applying TNMM) is not significantly more that the margins of the comparable companies.

5. Without prejudice, that on facts and in law the AO/TPO/DRP erred in not appreciating that the alleged transactions of AMP were "closely linked" with the main activity carried on by the appellant and hence it cannot be segregated and benchmarked on a stand-alone basis.

5.1 That on facts and in law the AO/TPO/DRP erred in holding that there is no suitable comparable available for benchmarking the alleged "international transaction" of incurring excessive AMP expense by applying the aggregated approach.

5.2 That on facts and in law the DRP erred in holding that appellant has not been able to substantiate benchmarking of alleged AMP "transaction" following an aggregate approach.

6. That on facts and in law the TPO/AO/DRP erred in making/upholding Protective TP adjustment on account of AMP expenses invoking "Bright Line Method".

6.1 That on facts and in law the DRP erred in holding that use of "Bright Line Method" is supported by Rule 10AB of Income Tax Rules.

7. That on facts and in law the AO/DRP erred in making / upholding Substantive Adjustment on account of AMP expenses invoking "Cost Plus Method".

8. That without prejudice, while benchmarking alleged AMP as a separate "transaction" TPO has erred in :

(a) applying a mark-up of 41% while computing adjustment on a substantive basis, and

(b) applying a mark-up of 12.87% (upheld by DRP as an AMP intensity Adjustment) while computing adjustment on a protective basis.

9. That on facts and in law the AO/DRP erred in making / upholding disallowance of Rs.37,74,997/- u/s 14A of the Act.

9.1 That on facts and in law the AO/DRP erred in not appreciating that provisions of section 14A are not applicable as no exempt income was earned by the appellant during the year under consideration.

10. That on facts and in law the AO erred in levying interest u/s 234B of the Act."

18.0 From perusal of record, it is observed that relevant facts and issue involved in this appeal for A.Y. 2013-14 are similar to those involved in the appeal for A.Y. 2012-13. This is also accepted by both the parties before us. As such, it is directed that the findings recorded

and conclusions drawn by us for A.Y. 2012-13 would apply *mutatis mutandis* to the appeal for AY 2013-14 as well. We direct accordingly.

19.0 In the result, ITA NO. 7691/Del/2017 stands allowed.

20.0 In the final result, the three appeals filed by assessee/appellant are allowed.

21.0 Since we have disposed off the appeals, Stay Petitions for AYs 2012-13 and 2013-14 in Stay Nos. 475-476/Del/2018 are dismissed.

Order pronounced in the open court on 27.02.2019.

Sd/-	**Sd/-**
(N.S.SAINI)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 27.02.2019

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

TRUE COPY

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	Dictated on dragon
Date on which the typed draft is placed before the dictating Member	27.02.2019
Date on which the typed draft is placed before the Other Member	27.02.2019
Date on which the approved draft comes to the Sr. PS/PS	27.02.2019
Date on which the fair order is placed before the Dictating Member for pronouncement	27.02.2019
Date on which the fair order comes back to the Sr. PS/PS	27.02.2019
Date on which the final order is uploaded on the website of ITAT	27.02.2019
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	