IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: Bench I-2 NEW DELHI

BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA No. 996/Del/2016
A.Y. 2011-12

Yakult Danone India P Ltd. 16, 1st Floor Community Centre Okhla Industrial Area, Phase I New Delhi PAN: AAACY2585R	**vs**.	D.C.I.T. Circle 27(1) New Delhi
(Appellant)		**(Respondent)**

Assessee by	Sh. Himanshu Sinha, Adv. & Ms.Vrinda, Adv.
Revenue by	Sh. HK Choudhary, CIT, D.R.
Date of Hearing	20/02/2019
Date of Pronouncement	29/03/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against final assessment order dated 29/12/15, passed by Ld.AO under section 143 (3) read with section 144C (4) of the act on following grounds of appeal:

" Grounds
The following grounds of appeal are mutually exclusive of and without prejudice to each other.

General Ground of Appeal

1. *That Ld. Assessing Officer ("AO") /Hon'ble Dispute Resolution Panel ("DRP")/ Ld. Transfer Pricing Officer ("TPO") erred in assessing the loss of the Appellant at INR. 267,771,897/- as against returned loss of INR 337,317,454 under normal provisions of the Act.*

Transfer Pricing Ground of appeals

2. *The Ld.TPO/AO/DRP have erred in making an adjustment under section 92CA (3) of the Act without returning a finding about existence of any of the circumstances specified in clauses (a) to (d) of sub-section (3) of section 92C of the Act.*

3. *The Ld. TPO/AO/ Hon'ble DRP have erred in computing an adjustment of INR 6,95,45,557/- to the total income of the Appellant on account of adjustment in arm's length price ("ALP") of the alleged international transaction pertaining to Advertisement, Marketing and Promotional ("AMP") expenditure entered into by the Appellant with its Associated Enterprise ("AE").*

4. *The Ld. TPO/ AO/ DRP have erred in holding AMP expenditure as a separate international transaction under section 92B of the Act and assuming jurisdiction to determine the ALP thereof, when such expenditure represents only domestic transactions with unrelated parties and does not satisfy the requisites of being an international transaction under section 92B read with section 92F(v) of the Act.*

5. *The Ld. TPO/ AO has erred in treating expenses incurred by the Appellant on account of AMP as an 'international transaction', without considering the fact that the Appellant is a full risk bearing licensed manufacturer.*

6. *The Hon'ble DRP/Ld. TPO/ Ld. AO erred in not considering that the Gross Profit ("GP") rate of the Appellant is very high vis-a-vis comparable companies and "remuneration/compensation" for AMP expenses (if warranted) may be considered to subsumed in the GP earned from its manufacturing activities.*

7. *The Hon'ble DRP/ Ld.TPO/Ld. AO have grossly erred in applying the ratio of AMP/GP to determine the Arm's Length Price ('ALP") of the alleged transaction of AMP for computing adjustment*

when the same is not a prescribed method under the purview of section 92C of the Act, thereby rendering analysis based thereon as illegal, null and void.

8. *The learned TPO/AO/DRP have erred in applying AMP/GP ratio, given the fallacies and deficiencies associated therewith, and inferring that AMP expenses incurred by the Appellant are "excessive" on that basis by considering a set of inappropriate companies as comparable to the Appellant.*

9. *Without prejudice to the contention that AMP expenses were incurred for the purpose of enhancing sales in India, the learned TPO/AO/Hon'ble DRP have grossly erred in considering direct sales expenses like sales promotion and selling expenditure as a part of AMP expenses while computing the adjustment in relation to the alleged international transaction, as they do not lead to brand building.*

10. *That the learned TPO/AO/DRP have erred in :*

a. *Not appreciating the functional profile of the Appellant (according to which, incurrence of AMP expenses is an integral part of its roles and responsibilities);*

b. *Re-characterizing the Appellant as a limited risk distributor and requiring the Appellant to earn its remuneration in accordance with such re-characterized business model;*

c. *Ignoring the fact that AMP expenses incurred by the Appellant were in respect of its own business considerations, were incurred to penetrate the market (since the Appellant launched a new unique product i.e.probiotic fermented milk)) and any benefits resulting from such expenditure accrue to the Appellant and benefit, if any to the AE is purely incidental in nature;*

d. *Erroneously assuming that the Appellant had rendered services to its AE by incurring AMP expenses and holding that it should earn a mark-up on the allegedly incurred excessive AMP expenditure.; and*

e. *Applying GP/AMP ratio as the mark-up percentage for the alleged services provided by the Appellant to the AE towards AMP activities.*

11. *The learned TPO/ AO/DRP have erred, on facts and circumstances of the case.*

in:

a. *Holding that advertising is done for brand promotion and not for product promotion; and*

b. *Computing adjustment thereon, without appreciating that no expenditure attributable to brand promotion can be separately identified.*

Corporate tax Ground of Appeals

12. *That on facts and in laws, the Ld. AO erred in holding that the appellant has furnished inaccurate particulars of income in respect of each item of disallowance/ additions and in initiating penalty proceedings under section 274 read with section 271 (1) (c) of the Act. The appellant craves leave to submit such further grounds at or before the hearing of the appeal, so as to enable your Honour to decide the appeal according to law."*

2. Brief facts of the case are as under:

Assessee filed its return of income on 29/11/11 declaring loss of Rs.33,73,17,454/-, which was processed under section 143 (1) of the Income Tax Act, 1961 (the Act). The case was selected for scrutiny and statutory notices under section 143(2) of the Act was issued. In response to statutory notices, representative of assessee appeared before Ld. AO and filed requisite details as called for.

2.1. Ld.AO observed that during year under consideration assessee was engaged in business of manufacturing dairy products. From records it was further observed that assessee has entered into international transactions with associated enterprises

during year. Ld. AO called for details of international transaction and a reference was made under section 92 CE to Transfer Pricing Officer (TPO) for determining arm's length price of international transaction entered into by assessee with its associated concerns.

2.2. Ld.TPO observed that assessee is a joint venture between Yakult Honsha of Japan and Group Pay Denon of France with 50:50 shareholding. He observed that assessee has been set up to manufacture and sell probiotics milk in India. It has also been observed by Ld. TPO that assessee has set up its manufacturing facility at Rai, Sonepat (Haryana). It has also been observed that assessee commenced its commercial production from 18/12/07.

2.3. Ld.TPO records that assessee is a sole manufacturer of Yakult's group products in India and performs all business functions relating to sale of such products such as identifying customers, negotiating purchase terms, arranging the necessary resources, undertaking sales promotion activities etc.

2.4. It has also been observed by Ld.TPO that during year assessee entered into following international transactions disclosed in form 3 CEB:

No.	Nature of transaction	Most Appropriate Method as per TP study	Profit Level Indicator (PLI) as per TP Study	Value of transaction: Rs.
1.	Purchase of raw and packing material	TNMM	OP/OC	1,21,02,574
2.	Purchase of stores and spares	TNMM		12,30,252

3.	Payment of Royalty	TNMM		13,55,782
4.	Reimbursement of expenses to AE (in the nature of travelling & other expenses)paid	No bench marking required		5,75,745
5.	Reimbursement of expenses by AE (in the nature of travelling & other expenses)paid	No bench marking required		90,66,471

2.5. Ld.TPO,after calling for various details/explanations/evidences and on consideration of same proposed adjustment with respect to AMP expenses incurred by assessee as he was of view that assessee has carried out brand building activities, for benefit of its AE's, for which assessee has been adequately compensated. Ld. AO was of the opinion that assessee do not have any right on trademarks and brands/trade name or any other marketing intangibles in India and such brands are owned by its AEs outside India and therefore expenditure incurred on AMP activities was for advantage of AEs. Ld.TPO accordingly applied bright line approach and computed adjustment as under:

Particulars	Amount (Rs.)
Total expenditure on AMP	6,45,14,654
Sale of assessee	10,19,46,703
AMP as a % of sales of assessee	63.28%
Arm's length level of AMP % (as per the 'bright line')	0.75%
Arm's length level of AMP expenses	7,64,600
Amount spent in excess of 'bright line' and on creation of marketing intangible	6,37,50,054
Mark-up (PLR of SBI)	12.25%
Amount by which the assessee should have been reimbursed by AE	**7,15,65,810**

2.6. Aggrieved by proposed AMP adjustment, assessee raised objections before DRP, who upheld stand of Ld.TPO regarding AMP being an international transaction. However following decision of *Hon'ble Delhi High Court* in case of *Sony Ericson Mobile Communication India (P) Ltd vs. CIT* reported in *(2015) 55 Taxmann.com 240*, DRP directed for exclusion of routine selling and distribution expenses while computing AMP of comparables. DRP also directed that only comparables where similar expenses have been incurred should be considered while matching with assessee, as per direction of *Hon'ble Delhi High Court* in case of *Sony Ericson Mobile Communication India (P) Ltd vs. CIT (supra).* DRP also directed to use Cost Plus method, to calculate markup on excessive AMP expenses as per Rule 10(1)(c)(ii) of IT Rules 1963 which is GP/sales of comparable companies selected.

Subsequently *Hon'ble Delhi High Court* in case of *Maruti Suzuki India Ltd*., Reported in *(2015) 64 Taxmann.com 150* in which *Hon'ble Court* held that AMP expenses incurred by Maruti Suzuki India cannot be treated and categorised as an international transaction based upon which assessee in present facts of case filed application for rectification before DRP. DRP however relied upon decision of *Sony Ericson (supra)* passed by *Hon'ble Delhi High Court*.

2.7. Finally pursuant to DRP directions, Ld. AO passed impugned assessment order incorporating the transfer pricing adjustment proposed by Ld. TPO vide order dated 29/12/15 and reduced adjustment to Rs. 6,95,45,557/-.

2.8. Aggrieved by adjustment made by Ld. AO, assessee is in appeal before us now.

3. It has been submitted that **Ground No. 1** is general in nature and therefore do not require adjudication.

4. Ld.Counsel submitted that **Ground No. 2-11** are regarding adjustment of Rs. 6.95 crores made on account of AMP expenses.

He submitted that Ld.TPO applied bright line test, which was originally sanctioned by Special Bench of this Tribunal in case of *LG Electronics vs ACIT* reported in *(2013) 29 Taxmann.com 300*. He submitted that said approach has been overruled by *Hon'ble Delhi High Court* in case of *Sony Ericson Mobile Communications India Pvt. Ltd., (supra)* and *Maruti Suzuki India Ltd (supra)*. Ld.Counsel argued that, bright line test method is not the prescribed method under Indian Income Tax laws.

4.1. Ld.Counsel submitted that, assessee incurred AMP expenditure where payments have been made to unrelated parties, in respect of its business operation in India, to boost its sales in India. It has been submitted that, these expenses are incurred to penetrate into market, and to educate consumers in India about its novel and niche product. Ld.Counsel placing reliance upon chart, submitted that, OP/sales of assessee reduced from -302.45% in financial year 2010-11 to -22.67% in financial year 2017-18. It has been submitted that assessee is on its way to achieve break-even in the next couple of years.

4.2. It is submitted that, adjustment made by Ld.TPO is not sustainable for various reasons. Ld.Counsel submitted following prepositions:

(i) No "international transaction" involved:

Placing reliance upon Section 92B(1) of the Act, Ld.Counsel submitted that *'international transaction*' has been defined to mean '*transaction*' between two or more '*associated enterprises'*, either or both of whom are non-residents, for purchase, sale or lease of tangible or intangible property, or provisions of services, etc. He submitted that, said section provides that, term '*international transaction*' would include '*mutual agreement*' or '*arrangement*' between two or more associated enterprises for allocation or apportionment of, or contribution to any cost incurred in connection with any benefit or service provided to any such enterprise.

(ii) He submitted that section 92B, for a transaction to be termed as *International transaction*, it has to fit into either of two limbs, viz;

- There must be a *transaction* and such transaction must be between *associated enterprises*.

or

- There should be *mutual agreement* or *arrangement* between two or more associated enterprises for allocation or apportionment of or contribution to any cost or expense incurred in connection with benefit, service or facility provided to one or more of the associated enterprises.

4.3. Ld.Counsel submitted that, it is neither the case of Revenue that, there existed a *mutual agreement* or *arrangement* for allocation or apportionment of, nor, any contribution by AEs to any cost or expense incurred by assessee towards advertisement, marketing and promotion in India. Ld.Counsel submitted that, Ld.TPO can assume jurisdiction to undertake benchmarking of AMP expenses, incurred by assessee, under section 92(2) of the Act, only if it gives give rise to an *international transaction* in terms of section 92B. He submitted that, facts of case in hand are specific and jurisdiction assumed by Ld.TPO to undertake benchmarking of AMP expenses incurred by assessee in course of carrying on of its business, cannot be sustained.

4.4. He vehemently submitted that expenditure unilaterally incurred by assessee for purposes of its business, cannot give rise to a t*ransaction* or *international transaction*, between associated enterprises, so as to be covered under section 92B of the Act. He placed reference to Clause (v) of section 92F of Act defines term transaction is as under:

"(v) "transaction " includes an arrangement, understanding or action in concert. -

(a) Whether or not such arrangement, understanding or action is formal or in writing; or

(b)Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding".

(c)It is the case of the applicant that unilateral incurring of AMP expenses by the applicant in India does not result in any

"transaction", much less an "international transaction", between the applicant, on the one hand, and the foreign AE, on the other, so as to invoke the transfer pricing regulations

4.5. From a conjoint reading of section 92B read with section 92F(v) of the Act, it would kindly be appreciated that transfer pricing regulations would be applicable to any transaction", being an arrangement, understanding or action in concert, whether formal or writing or whether enforceable or not by legal proceedings. He submitted that *transaction*, per se, involves bilateral *arrangement* or *agreement* between parties. A unilateral action by one of the parties, without any binding obligation, in the absence an *arrangement*, *understanding*, or *action in concert* (e.g. pre-arranged plan, or design agreed by parties), between parties, cannot be termed as a *transaction*.

4.6. He thus submitted that, in order to construe a *transaction*, there has to be an *express arrangement*, *understanding* or *action in concert* between parties which cannot be inferred or implied.

4.7. Ld.Counsel submitted that, in present case, AMP expenses had been incurred by assessee unilaterally, at its own discretion through unrelated Indian parties, for purpose of its own business, in order to cater to local market needs. Such AMP expenditure was not incurred at instance of overseas AEs.

4.8. He further submitted that, no material brought on record by Ld.TPO, to establish existence an *arrangement*, *understanding* or *action in concert* with AEs. He submitted that Ld.TPO held such AMP expenditure unilaterally incurred by assessee locally, for and

on behalf of it, to be amounting to "international transaction" in terms of section 92B, warranting invocation of transfer pricing provisions.

4.9. Ld.Counsel placing reliance on decision of *Hon'ble Delhi High Court* in the case of *Moser Baer vs. ACIT* reported in *(2009) 176 Taxmann 473* submitted that Ld.TPO therein, placed certain evidence/material on record to show that, there existed a *mutual arrangement* or *understanding* between parties therein or *acted in concert*, so as to constitute an international transaction. Ld.Counsel thus submitted that Ld.TPO in facts of present case, cannot, on basis of presumption/surmises, reach to a conclusion that parties herein has been *acting in concert,* or there is *an understanding* or *arrangement* between them, so as to construe a *transaction*. He therefore, submitted that in order to constitute an *international transaction* in terms of section 92B of the Act, an a*rrangement*, *understanding* or *action in concert* must be shown to exist between assessee and it's associated enterprises who are non-residents.

4.10. Ld.Counsel placed reliance upon decision of *Hon'ble Delhi High Court* in case of *Maruti Suzuki India Ltd.,(supra)* on the issue of existence of international transaction for purpose of making transfer pricing adjustment in relation to AMP expense incurred by assessee, wherein *Hon'ble High Court* observed and held as under:

"Step wise analysis of statutory provisions

62. If a step by step analysis is undertaken of Sections 92B to 92F, the sine qua non 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 ALP by applying one of the five price discovery methods specified in Section 92C. The fourth step would be to compare the price of the transaction that is shown to exist with the ALP and make the transfer pricing adjustment by substituting the ALP for the contract price.

63. A reading of the heading of Chapter X ["Computation of income from international transactions having regard to arm's length price"] and Section 92 (1) which states that any income arising from an international transaction shall be computed having regard to the ALP. Section 92C (1) which sets out the different methods of determining the ALP, makes it clear that the transfer pricing adjustment is made by substituting the ALP 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 ALP.

64. The transfer pricing adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Applicant and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE. And, yet, that is what appears to have been done by the Revenue in the present case. It first arrived at the 'bright line' by comparing the AMP expenses incurred by MSIL with the average percentage of the AMP expenses incurred by the comparable entities. Since on applying

the BLT, the AMP spend of MSIL was found 'excessive' the Revenue deduced the existence of an international transaction. It then added back the excess expenditure as the transfer pricing 'adjustment'. This runs counter to legal position explained in] CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Del) which required a TPO "to examine the 'international transaction' as he actually finds the same." In other words the very existence of an international transaction cannot be a matter for inference or surmise.

65. As already noticed, the decision in Sony Ericsson has done away with the BLT as means for determining the ALP of an international transaction involving AMP expenses.

Revenue's contentions

66. It is contended by the Revenue that the mere fact that the Indian entity is engaged in the activity of creation, promotion or maintenance of certain brands of its foreign AE or for the creation/promotion of new/existing markets for the AE, is by itself enough to demonstrate that there is an arrangement with the parent company for this activity. It is urged that merely because MSIL and SMC do not have an explicit arrangement/agreement on this aspect cannot lead to the inference that there is no such arrangement or the entire AMP activity of the Indian entity is unilateral and only for its own benefit. According to the Revenue, "the only credible test in the context of TP provisions to determine whether the Indian subsidiary is incurring AMP expenses unilaterally on its own or at the instance of the AE is to find out whether an independent party would have also done the same." It is asserted: "An independent party with a short term

agreement with the MNC will not incur costs which give long term benefits of brand & market development to the other entity. An independent party will, in such circumstances, carry out the function of development of markets only when it is adequately remunerated for the same.

67. Reference is made by Mr. Srivastava to some sample agreements between Reebok (UK) and Reebok (South Africa) and 1C Issacs & Co and BHPC Marketing to urge that the level of AMP spend is a matter of negotiation between the parties together with the rate of royalty. It is further suggested that it might be necessary to examine whether in other jurisdictions the foreign AE i.e., SMC is engaged in AMP/brand promotion through independent entities or their subsidiaries without any compensation to them either directly or through an adjustment of royalty payments.

Absence of a machinery provision

68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a 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 AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions". Since the reference is to 'price' and to 'uncontrolled

conditions' it implicitly brings into play the BLT. In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negatived by the Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT.

69. There is nothing in the Act which indicates how, in the absence of the BLT, one can discern the existence of an international transaction as far as AMP expenditure is concerned. The Court finds considerable merit in the contention of the Applicant that the only TP adjustment authorised and permitted by Chapter X is the substitution of the ALP for the transaction price or the contract price. It bears repetition that each of the methods specified in S.92C(I) is a price discovery method. S.92C (I) thus is explicit that the only manner of effecting a TP adjustment is to substitute the transaction price with the ALP so determined. The second proviso to Section 92C(2) provides a 'gateway' by stipulating that if the variation between the ALP and the transaction price does not exceed the specified percentage, no TP adjustment can at all be made. Both Section 92CA, which provides for making a reference to the TPO for computation of the ALP and the manner of the determination of the ALP by the TPO, and Section 92CB which provides for the "safe harbor" rules for determination of the ALP, can be applied only if the TP adjustment involves substitution of the transaction price with the ALP. Rules IOB. IOC and

the new Rule 10AB only deal with the determination of the ALP. Thus for the purposes of Chapter X of the Act, what is envisaged is not a quantitative adjustment but only a substitution of the transaction price with the ALP.

70. What is clear is that it is the 'price' of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment."

4.11. Ld.Counsel placing reliance on specific observations by *Hon'ble High Court*, reproduced herein above, submitted that, provisions under Chapter X envisage *separate entity concept,* and there cannot be a presumption that since assessee is a subsidiary of associated enterprise, all activities of assessee are dictated by such associated enterprises. Merely because associated enterprise has financial interest, it cannot be presumed that AMP expense incurred by assessee are at the instance, or on behalf of associated

enterprises. Placing reliance upon view by *Hon'ble Delhi High Court,* Ld.Counsel submitted that initial onus is on Revenue to demonstrate through some tangible material that assessee and associated enterprise *acted in concert* and further that there was an *agreement* to enter into an *international transaction* concerning AMP expenses.

4.12. It was vehemently submitted that Ld.TPO erroneously held that performance of Development, Enhancement, Maintenance, Protection and Enhancement ('DEMPE') functions by assessee lead to international transaction between assessee and associated enterprise, without appreciating that such functions are performed by assessee independently, unilaterally and without any influence of associated enterprises. It was submitted by Ld.Counsel that since DEMPE functions relating to AMP expenses are performed by assessee and returns attributed to such functions are also enjoyed by assessee in the form of higher sales and profitability, no compensation for AMP expenses incurred by assessee is warranted. He placed reliance upon a chart forecasting profits in future years. Ld.Counsel at this juncture admitted that, expenses incurred by assessee toward advertisement are 60% of the turnover and since its inception assessee has been showing losses, which is expected to continue till 2020. He submitted that assessee is slowly making place in market of pro-biotic products, for which expenses has to be incurred towards advertisements for long lasting existence.

4.13. Accordingly, he submitted that AMP expenses cannot be regarded as having been incurred at the behest of or in concert with the Associated Enterprises.

4.14. It is submitted that Ld.TPO applied Bright Line Test, which has been rejected by *Hon'ble Delhi High Court* in case of *Sony Ericsson Mobile Communications (supra)*.

4.15. He thus submitted that, Bright Line Test has no mandate under the Act and accordingly same cannot be resorted to for purposes of ascertaining, if there exists an international transaction of brand promotion services between assessee and associated enterprises.

4.16. He submitted that *Hon'ble Delhi High Court* in case of *Maruti Suzuki India Ltd. (supra)* held that existence of an international transaction needs to be established *de hors* Bright Line Test. He placed reliance upon following decisions of *Hon'ble Delhi High Court,* which has followed aforestated view:

Honda Seil Power Products Ltd. Vs. DCIT reported in (2016) 237 Taxmann 304

Bausch and Lomb Eyecare India Pvt.Ltd. vs. Addl.CIT reported in (2016) 237 Taxmann 24;

Valvoline Cummins P Ltd. Vs. DCIT (ITA No.527/Del/2016)

CIT vs Whirlpool of India Ltd reported in (2015) 64 Taxmann.com 324;

Pepsico India Holdings P Ltd. Vs. ACIT (2018) 100 Taxmann.com 159 (Delhi-Trib)

LOreal India P Ltd. Vs. DCIT (TA No.7714/Mum/2012)

Goodyear India Ltd. Vs. DCIT (ITA No.5650/Del/2011)

4.17. Ld.Counsel submitted that it has been reiterated by *Hon'ble Court* that, Revenue needs to establish on basis of some tangible material or evidence that there exists an international transaction of provision of brand building service between assessee and associated enterprise and in absence of any transaction, there is no question of undertaking any bench marking analysis with respect to AMP expenses.

4.18. He thus submitted that, unilateral incurring of AMP expenses by assessee in present facts of case, neither gave rise to an *international transaction* in terms of section 92B, nor are covered in section 92(2) of the Act, so as to be subjected to arm's length test under Transfer Pricing provisions.

4.19. Economic vs. legal ownership of intellectual property.

Ld.Counsel submitted that, assessee is a joint-venture between Yakult Japan and Danone Singapore. He submitted that there is no economic sense in joint-venture incurring huge expenditure in India for benefit of only one party of joint-venture. It has been submitted that, both Yakult Japan and Danone Singapore are 50:50 shareholders of joint-venture, and any expenditure incurred in India would be for the benefit of both parties involved and Danone Singapore, would not have allowed assessee to incur excessive AMP spent only for benefit for Yakult Japan, as it would lower the share profits which Danone Singapore is entitled for.

4.20. It has thus been submitted by Ld.Counsel that all decisions made in context of AMP functions within India are undertaken by

assessee and any benefit arising out of same, directly accrues to assessee. It has also been submitted that if any benefit are accrued to AEs is indirect, and purely incidental. Ld.Counsel submitted that assessee is operating in India since 2007 and has been exclusively manufacturing and selling pro-biotic products within the territory.

4.21. Ld.Counsel argued that AMP expenditure were unilaterally incurred by assessee for exploiting brand name 'Yakult' in course of carrying on of its business, such expenses cannot be said to be attributed to legal ownership of brand, which admittedly vests with overseas AE. He submitted that, the term *economic ownership of benefits*, is characterization of parties upon FAR analysis, which is a cardinal principle, for undertaking transfer pricing analysis. He submitted that in Transfer Pricing parlance, term 'economic ownership' refers to ownership as to economic benefit, pursuant to functions performed, assets utilized and risks assumed by respective parties and is to be taken into consideration for purpose of transfer pricing analysis.

4.22. He placed reliance upon decision of *Hon'ble Delhi High Court* in case of *Sony Ericsson Mobile Communications India P Ltd(supra)*, in relation to aforesaid aspect of economic ownership held, wherein *Hon'ble Court* observed and held as under.

"133. Transfer Pricing Officers have referred to paragraphs 6.36 to 6.39. For the sake of completeness, we would quote the said paragraphs from the OECD Transfer Pricing Guidelines, which read:

6.36. Difficult transfer pricing problems can arise when marketing activities are undertaken by enterprises that do not own the trademarks or trade names that they are promoting (such as a distributor of branded goods). In such a case, it is necessary to determine how the marketer should be compensated for those activities. The issue is whether the marketer should be compensated as a service provider, i.e. for providing promotional services, or whether there are any cases in which the marketer should share in any additional return attributable to the marketing intangibles. A related question is how the return attributable to the marketing intangibles can be identified.

6.37. As regards the first issue- whether the marketer is entitled to a return on the marketing intangibles above a normal return on marketing activities- the analysis requires an assessment of the obligations and rights implied by the agreement between the parties. It will often be the case that the return on marketing activities will be sufficient and appropriate. One relatively clear case is where a distributor acts merely as an agent, being reimbursed for its promotional expenditures by the owner of the marketing intangible. In that case, the distributor would be entitled to compensation appropriate to its agency activities alone and would not be entitled to share in any return attributable to the marketing intangible.

6.38. Where the distributor actually bears the cost of its marketing activities (i.e. there is no arrangement for the owner

to reimburse the expenditures), the issue is the extent to which the distributor is able to share in the potential benefits from those activities. In general, in arm's length transactions the ability of a party that is not the legal owner of a marketing intangible to obtain the future benefits of marketing activities that increase the value of that intangible will depend principally on the substance of the rights of that party. For example, a distributor may have the ability to obtain benefits from its investments in developing the value of a trademark from its turnover and market share where it has a long-term contract of sole distribution rights for the trademarked product. In such cases, the distributor share of benefits should be determined based on what an independent distributor would obtain in comparable circumstances. In some cases, a distributor may bear extraordinary marketing expenditures beyond what an independent distributor with similar rights might incur for the benefit of its own distribution activities.

An independent distributor in such a case might obtain an additional return from the owner of the trademark, perhaps through a decrease in the purchase price of the product or a reduction in royalty rate.

6.39 The other question is how the return attributable to marketing activities can be identified. A marketing intangible may obtain value as a consequence of advertising and other promotional expenditures, which can be important to maintain the value of the trademark. However, it can be difficult to

determine what these expenditures have contributed to the success of a product. For instance, it can be difficult to determine what advertising and marketing expenditures have contributed to the production or revenue, and to what degree. It is also possible that a new trademark or one newly introduced into a particular market may have no value or little value in that market and its value may change over the years as it makes an impression on the market (or perhaps loses its impact). A dominant market share may to some extent be attributable to marketing efforts of a distributor. The value and any changes will depend to an extent on how effectively the trademark is promoted in the particular market. More fundamentally, in many cases higher returns derived from the sale of trademarked products may be due as much to the unique characteristics of the product or its high quality as to the success of advertising and other promotional expenditures. The actual conduct of the parties over a period of years should be given significant weight in evaluating the return attributable to marketing activities.

See paragraphs 3.75-3.79 (multiple year data).

134. The aforesaid paragraphs do not support the Revenue's submission, but stipulate the requirement that the 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. Where the domestic AE is entitled to compensation as a pure distributor, it would not be

entitled to share in any return attributable to the marketing intangible, not being the legal owner. The position may be different where there is a long term contract of sole distribution rights of the trademarked products, thereby acquiring economic ownership benefit. In some cases, where the distributor bears extraordinary> marketing expenses, he would be entitled to additional or higher return, through decreased price or reduction of royalty rate. The difficulty in attributing advertisement and other promotional expenditures towards trademark valuation or towards marketing activities, i.e. contributing to manufacture and current income and the impracticability of division in the case of such attribution is highlighted in paragraph 6.39."

4.23. Ld.Counsel thus submitted that economic ownership of brand 'Yakult' rests with assessee and accordingly, assessee cannot be expected to seek compensation for expenditure incurred on asset economically owned by it.

4.24. In view of aforesaid, it is respectfully submitted that adjustment on account of AMP expenses made by Ld.TPO is not permissible.

5. On the contrary, Ld.CIT DR submitted that huge spending of AMP expenses amounts to brand building and trademark of AEs, and therefore gives benefit to AE by enhancing its brand value, which helps AE in achieving sales in other territories or otherwise. He submitted that, concept of brand building and whether such brand building can be attributed to advertisement and sale promotion, thereby benefiting AE, has been discussed in detail by

Hon'ble Delhi High Court in case of *Sony Ericson Mobile Communication (P) Ltd (supra)*. He submitted that assessee is paying trademark at 1% of Transfer License Agreement, which is placed at page 62 of paper book, apart from Royalty @1% to Yakult Japan. He submitted following chart being the rates of royalty payable by assessee:

Year	*Rate*
1st year	*1.0%*
2nd year	*1.0%*
3rd year	*1.0%*
4th year	*2.0%*
5th year	*2.0%*
6th year and subsequent years (but subject to the proviso to paragraph (a) of Article 5)	*3.0%*

5.1. Referring to Transfer Pricing order, Ld.CIT DR submitted that, apart from trademark fee and royalty fee, assessee is purchasing major raw materials for its manufacturing activity, from its AEs, which is reported as international transaction. He submitted that AE apart from trademark fee and royalty is also deriving benefits by way of selling its products in India. Referring to chart of estimated profits filed by assessee, Ld.CIT DR submitted that assessee has a gross profit of 70.54% during year and operating loss at 309% at net level. He submitted that, main reason for such a huge loss is sales and distribution expenses and administrative and sales promotion expenses incurred by assessee amounting to Rs.3,73,11,582/- and Rs.6,45,14,654/- respectively. Ld. CIT DR thus submitted that assessee is substantially engaged in business

of brand building/trademark for AEs during year. It has been submitted that total consumption of raw materials during year amounts to Rs.2.59 crores *vis-a-vis* advertisement expenses amounting to Rs.6.45 crore which is 250% of consumption of raw materials. It was thus submitted by Ld.CIT DR that there are sufficient materials to hold that there is international transaction of AMP functions of assessee under section 92F(v) of the Act, as assessee is acting in concert with its AEs for developing its brand and popularising its products in India.

6. We have perused submissions advanced by both sides in light of records placed before us.

6.1. Before adverting to main issue, it is *sine qua non* to understand functions performed by assessee, risks assumed and assets used by assessee to the transaction.

4.2.2 Functions performed by Yakult Danone India
The functions performed by Yakult Danone India are:

a) *Procurement of raw materials and packing materials: Yakult Danone India is primarily engaged in the manufacture and sale of dairy products i.e. probiotic milk. The manufacturing plant of the company is located in Sonepat. Hence, it is involved in the procurement of raw materials and packaging materials in respect of its operations. These materials are procured by Yakult Danone India based on sales forecasts and consumption estimates.*

b) *Production of milk: Yakult Danone India is engaged in preparation of probiotic milk from skimmed milk. The main ingredients of the product are skimmed milk powder, sugar, glucose, friendly bacteria and water. The bacteria is cultured and mixed with other ingredients to prepare the probiotic milk. The company is engaged in routine functions of inventory scheduling, production scheduling and monitoring as a part of its production operations.*

Yakult Danone India purchases capital equipment from its Group Companies for production of milk. These equipments purchased are in the nature of dairy machines, machines connected with preparation of milk bottles, lab equipments for quality checks, etc.

AEs provide technical assistance to the company in connection with the construction and operation of Yakult Danone India's plants and for the production and sale of probiotic products. Yakult Danone India also receives technical assistance from its AEs in form of personnel visiting, on a need basis. In consideration of the receipt of such assistance, Yakult Danone India in FY 2007-08 paid a royalty to its AEs amounting to 1% of its net sales. Apart from the above, for use of the Yakult trademark, Yakult Danone India also paid an additional royalty amounting to 1% of its net sales to its Group Companies.

c) *Sales Promotion: Yakult Danone India deals in the FMCG sector which is typically characterized by heavy expenditure on planning and execution of sales promotion. Toward this end Yakult Danone India engages in domestic sales promotion activities. In line with the global sales strategy, Yakult Danone India primarily sells its products through 'Yakult Ladies'. This strategy was adopted by Yakult Danone India to help customers fully understand the benefits of lactobacilli and bring Yakult products to them every day. Yakult Ladies are particularly well-suited for serving housewives in this way as the great majority of them are housewives themselves. Delivery of Yakult products is performed by Yakult Ladies working through regional marketing companies. These Yakult Ladies are provided the required training for sale of the products at these centres itself. At the same time, however, these centres also serve as places where Yakult Ladies can form strong bonds with co-workers and foster new enthusiasm for the important work they do. Apart from this, Yakult products are also sold via convenience stores, on the Street or in an office, schools, hospitals, and elderly care facilities.*

For the sale of the Yakult milk produced, Yakult Danone India's marketing activities are concentrated towards periodic advertisement in newspapers, conferences, key opinion leaders for recommending the production.

d) *Quality Control: Yakult Danone India is responsible for ensuring that the products adhere to the quality standards laid down by the Group. These quality standards are applicable for both input materials as well as for finished goods. Every bottle is tested in Yakult Danone India after production.*

e) *General Management Functions: Apart from the above, Yakult Danone India also undertakes certain general management functions that are carried out by any business irrespective of its size and type. These functions (mentioned below) are drivers of every business and are indispensable in the economic environment:*

- *Corporate Strategy Determination: All policies relating to various processes and issues within Yakult Danone India are determined by its own management which continuously monitors the economic environment surrounding the Indian entity, assesses their strategic position within the industry and targets to comply with the overall longterm corporate goals.*
- *Finance, Accounting, Treasury, HR and Legal Function: Yakult Danone India is responsible for managing its finance, treasury and accounting*

functions. Yakult Danone India is also responsible for compliance with all legal/ statutory requirements applicable to the Indian entity. It also undertakes its routine administration and HR functions.

4.3 *Assets*

Tangible Assets

Yakult Danone India utilized routine tangible assets for its manufacturing operation like plant and machinery, factory building, office equipments, furniture and fixtures, computers etc. These assets form a significant part of Yakult Danone India's fixed cost base.

Intangible Assets

Yakult Danone India does not own any non-routine intangibles and accordingly does not own trade secrets or undertake research and development activities on its account that would lead to the development of non-routine intangibles.

4.4 *Risk Analysis*

Risks are those business factors that may expose a company to the possibility of loss or damage. In other words, Risk is the probability that a particular adverse event may occur during a stated period of time, or may result from a particular challenge. The following section discusses the risk borne by Company vis-à-vis Group Companies.

Market Risk

Market risk arises when a company is subject to adverse sales conditions due to either increased competition in the marketplace, adverse demand conditions within the market, or the inability to develop markets or position products to service targeted customers.

Yakult Danone India is exposed to this risk as it is dependent on market patterns and trends, while the Group Companies have relatively lower risk relating to Indian operations.

Customer Credit Risk

When a company supplies products or services to a customer in advance of customer payment, the company runs the risk that the customer will fail to make payment. This risk is known as customer credit risk.

Yakult Danone India is exposed to the risk of non-payment from the customers to whom they have sold the products. Group Companies are not exposed to this risk with respect to the Indian operations.

Foreign Exchange Risk

Exchange rate risk relates to the potential variability of profits that can arise because of changes in foreign exchange rates. Such risks arise when doing business in any market that is affected by international trade and can arise even if a company does not conduct actual transactions in a foreign currency.

Yakult Danone India deals with its Associate Enterprises in foreign currency. It therefore bears the risk of adverse movements of the Indian Rupee vis-a-vis the foreign currencies. Since the Associated Enterprises receive their payments in their local currency, they are not exposed to the risk on this account.

Capacity utilisation risk

Capacity Utilisation Risk refers to the risk that relates to the under-utilisation of the existing capacity of the organisation in terms of manufacturing facility/ service capacity etc.

Yakult Danone India is exposed to the risk of under utilisation of its capacity. As Yakult Danone India was engaged in commercial operations only from December 2007, during the year, it operated at a capacity of only 8% of its installed capacity.

The AEs do not bear the capacity utilisation risk with respect to the Indian operations.

Manpower risk

Manpower is one of the most valuable resources employed by an organisation for carrying out its day-to-day operations. The increasing competition in the market place combined with other uncontrolled variables result in exposure to manpower risk.

Yakult Danone India bears this risk in respect of the India personnel.

Yakult Danone Group does not bear any risk associated with manpower of Indian operations.

Price Risk

This risk arises on account of fluctuations of prices in the market.

As Yakult Danone India competes in the open market it is exposed to this risk. Yakult Danone India initiated commercial production of milk in December 2007 only. Accordingly to penetrate the market it underpriced its bottles by approximately 90%. Thus, in Financial Year 2007-08, the company had a high exposure to this risk.

Yakult Danone Group is not directly affected by the competition faced by Yakult Danone India, but since it is a major supplier to Yakult Danone India, it indirectly bears this risk.

Research and Development Risk

It represents the risk that the research performed by an enterprise may not be successful.

As Yakult Danone India does not undertake any R&D on its own account, it is not exposed to this risk.

R&D is primarily the responsibility of Yakult Danone Group and hence it bears all the risks associated with this activity.

Technology Risk

This risk arises if the market in which an enterprise operates is sensitive to the introduction of new products and variants. In such a case, the enterprise may lose potential revenues arising from obsolete infrastructure, tools and manufacturing process.

Yakult Danone India does not own the manufacturing technology and relies on AEs for constant up-gradation of technology. Accordingly, the Indian entity is relatively less exposed to this risk.

As AEs have (over the years) spent considerable amount in developing the technology and are also responsible for constant up-gradation of technology, they bear significant risk on this account.

Inventory Risk

Inventory risk relates to the potential for losses associated with carrying finished product inventory. Losses include obsolescence, shrinkage, or market collapse such that products are only saleable at prices that are inadequate to cover the company's product costs.

All risks associated with inventory management vest with Yakult Danone India. AEs are relatively less exposed to this risk.

4.5. Summary of Contribution

This section presents a summary of the economically relevant contributions of Yakult Danone India and its Group Companies participating in inter-company transactions.

The marks in the table denote the contributions made by each enterprise as follows.:

Mark	*Explanation*
-	*No or insignificant contribution*
√	*Positive or significant contribution*

Contribution	*Yakult Danone India*	*Group Companies*
FUNCTIONS PERFORMED:		
1. New Product Conceptualisation and Development	-	√
2. Global manufacturing	-	√
3. Core Global Marketing	-	√
4. Global Quality Assurance	-	√
5. Research & Development	-	√
6. Procurement of Raw Material and Packing Material	√	-
7. Local production of Milk	√	-
8. Local Sales Promotion	√	-

9. Local Quality Control	√	-
10. General Management Functions	√	-
RISKS BORNE		
11. Market Risk	√	-
12.Customer Credit Risk	√	-
13. Foreign Exchange Risk	√	-
14. Capacity Utilisation Risk	√	-
15. Man Power Risk	√	-
16. Price Risk	√	-
17. Research and Development Risk	-	√
18. Technology Risk	-	√
19. Inventory Risk	√	-
ASSETS USED		
20. Tangible Assets	√	-
21. Intangible Assets	-	√

6.2. Admittedly, assessee is a joint venture between Yakult Honsha of Japan and Groupe Danone of France with 50:50 shareholdings. There is no dispute that this company has been set up to manufacture and sell Probiotic milk in India. In TP study, assessee categorised itself to be a manufacturer of Probiotic milk. Admittedly, assessee started its commercial sale in financial year 2007-08 and made significant losses at operating level during year. It is also observed that assessee has entered into *Trademark License Agreement* and *Technical Service Assistance Agreement* with Yakult Honsha of Japan. Assessee is to pay 1% royalty under *Trademark License Agreement* and 1% under *Technical Service Assistance*

Agreement. Assessee has placed agreements at page 61-87 of paper book.

6.3. From FAR analysis reproduced herein above, assessee has categorised itself to be a full-fledged manufacturer, exposed to all kinds of risks associated with carrying out manufacturing activities in India. It is submitted that, it does not own any significant intangibles and neither does it undertake research and development on this account. It is observed that assessee has been importing raw materials, packing materials and capital equipments from AEs in respect of production, based upon forecast and consumption estimates. The chart relied upon by Ld.Counsel is reproduced hereunder:

Particulars	FY 2010-11	FY 2011-12	FY 2012-13	FY 2013-14	FY 2014-15	FY 2015-16	FY 2016-17	FY 2017-18
Turnover (INR)	101,946,703	168,655,834	249,886,433	340,447,002	447,583,394	539,755,838	567,576,484	712,533,646
Advt. & Sales Promotion (INR)	58,677,227	92,979,979	109,965,657	106,072,714	126,091,403	120,140,826	136,003,003	152,093,103
Advt. & Sales Promotion (%)	57.56%	55.13%	44.01%	31.16%	28.17%	22.26%	23.96%	21.35%
Operating ' profit	-308,336,160	-287,644,781	-312,736,237	-258,409,919	-244,742,375	-207,468,986	-217,047,723	-161,505,861
OP/ Sales	-302.45%	-170.55%	-125.15%	-75.90%	-54.68%	-38.44%	-38.24%	-22.67%

6.4. Assessee benchmarked purchase of raw materials as international transaction, which is duly reported in Form 3CEB and

also filed transfer pricing documentation on which no adverse inference has been drawn by revenue.

6.5. It is observed that assessee engages itself into domestic sales promotion activities in line with global sales strategy. Assessee sells its products through 'Yakult Ladies' that help customers fully understand benefits of lactobacilli, and bring Yakult products to them everyday. It has been submitted in transfer pricing study that, these Yakult Ladies are provided with required training for sale of product, at these centres itself, where these ladies form strong bond with co-workers and foster new enthusiasm for important work they do. It has also been submitted that the products are sold via convenience stores, on the street or in office, schools, hospitals and elderly care facilities. It is also observed that assessee is exposed to market risk, customer credit risk, foreign exchange risk, capacity utilisation risk, manpower risk and inventory risk.

6.6. From the above, it is clear that all necessary functions of strategizing, advertising and marketing activities, its implementation and controlling across country is conducted by assessee for market penetration in India. Thus, in a way assessee is economic owner of brand, though not the legal owner. As a full-fledged manufacturer, assessee has been assuming all risks for promoting its sales, and thereby entire profitability is subject to tax in India, and no residual profits are enjoyed by AE. It is observed that AE is only paid royalty and technical service fee at 1% each of net turnover.

6.7. Ld.TPO concluded that assessee created marketing intangibles only for promotion of brand and products of AE. Ld.TPO was of opinion that, as AE recovering AMP expenditure incurred by it from assessee, and that AE is controlling AMP activity of assessee, indicates that, there was some arrangement between assessee and its AE, regarding incurring of AMP expenditure. Ld.TPO, adopted bright line test for.

6.8. From Trademark License Agreement and Royalty Agreement, it is observed that there is nothing in agreement to suggest any sort of arrangement or agreement between assessee and AE towards spending of AMP. In our view this is a case where Ld.TPO failed to establish international transaction vis-a-vis AMP expenses amounting to brand building and trademarking of AE which helps AE in achieving sales in other territories or otherwise.

6.9. The contentions raised by Ld.Counsel as well as Ld.CIT DR has been dealt with by Coordinate Bench of this Tribunal in case of *PepsiCo India Holdings (P) Ltd., VS ACIT* reported in *(2018) 100 Taxmann.com 159(Del-Trib)* as under:

"57. *The TPO has also referred to the decision of Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India (P.) ltd. to contend that mere incurrence of AMP expenditure in respect of brand not owned by the assessee has to be treated as international transaction. Such an inference by the learned TPO is not tenable in view of the Hon'ble Delhi High Court in the judgment in the case of Maruti Suzuki India (P.) Ltd. case (Supra) wherein the ratio of*

Sony Ericsson judgement has been explained in the following manner: —

> *"41. Having considered the above submissions, the Court proceeds to analyse the decision in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) to determine if it conclusively answers the issue concerning the existence of an international transaction as a result of incurring of AMP expenditures by an Assessee.*
>
> *42. As already noticed, the judgment in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) does not seek to cover all the cases which may have been argued before the Division Bench. In particular, as far as the present appeal ITA No. 110 of 2014 is concerned, although it was heard along with the batch of appeals, including those disposed of by the Sony Ericsson Mobile Communications India (P.) Ltd. (supra) judgment, at one stage of the proceedings on 30th October 2014 the appeal was delinked to be heard separately.*
>
> *43.* ***Secondly, the cases which were disposed of by the Sony Ericsson Mobile Communications India (P.) Ltd. (supra) judgment, i.e. of the three Assessees Canon, Reebok and Sony Ericsson were all of distributors of products manufactured by foreign AEs. The said Assessees were themselves not manufacturers. In any event, none of them appeared to have questioned the existence of an international transaction involving the concerned foreign AE. It was also not disputed that the said international transaction of incurring of AMP expenses could be made subject matter of transfer pricing adjustment in terms of Section 92 of the Act****.*
>
> *44. However, in the present appeals, the very existence of an international transaction is in issue. The specific case of MSIL is that the Revenue has failed to show the existence of any agreement, understanding or arrangement between MSIL and SMC regarding the AMP spend of MSIL. It is pointed out that the BLT has been applied to the AMP spend by MSIL to (a) deduce the existence of an international transaction involving SMC and (b) to*

make a quantitative 'adjustment' to the ALP to the extent that the expenditure exceeds the expenditure by comparable entities. It is submitted that with the decision in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) having disapproved of BLT as a legitimate means of determining the ALP of an international transaction involving AMP expenses, the very basis of the Revenue's case is negated."

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

69. There is nothing in the Act which indicates how, in the absence of the BLT, one can discern the existence of an international transaction as far as AMP expenditure is concerned*. The Court finds considerable merit in the contention of the Assessee that the only TP adjustment authorised and permitted by Chapter X is the substitution of the ALP for the transaction price or the contract price. It bears repetition that each of the methods specified in S.92C (1) is a price discovery method. S.92C (1) thus is explicit that the only manner of effecting a TP adjustment is to substitute the transaction price with the ALP so*

determined. The second proviso to Section 92C (2) provides a 'gateway' by stipulating that if the variation between the ALP and the transaction price does not exceed the specified percentage, no TP adjustment can at all be made. Both Section 92CA, which provides for making a reference to the TPO for computation of the ALP and the manner of the determination of the ALP by the TPO, and Section 92CB which provides for the "safe harbour" rules for determination of the ALP, can be applied only if the TP adjustment involves substitution of the transaction price with the ALP. Rules 10B, 10C and the new Rule 10AB only deal with the determination of the ALP. Thus, for the purposes of Chapter X of the Act, what is envisaged is not a quantitative adjustment but only a substitution of the transaction price with the ALP.

70. What is clear is that it is the 'price' of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment.

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

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

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

74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding

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

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

76. As explained by the Supreme Court in CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294 and PNB Finance Ltd. v. CIT [2008] 307

ITR 75 in the absence of any machinery provision, bringing an imagined international transaction to tax is fraught with the danger of invalidation. In the present case, in the absence of there being an international transaction involving AMP spend with an ascertainable price, neither the substantive nor the machinery provision of Chapter X are applicable to the transfer pricing adjustment exercise."

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

"120. Notwithstanding the above position, the argument of the Revenue goes beyond adequate and fair compensation and the ratio of the majority decision mandates that in each case where an Indian subsidiary of a foreign AE incurs AMP expenditure should be subjected to the 'bright line test' on the basis of comparables mentioned in paragraph 17.4. Any excess expenditure beyond the bright line should be regarded as a separate international transaction of brand building. ***Such a broadbrush universal approach is unwarranted and would amount to judicial legislation. During the course of arguments, it was accepted by the Revenue that the TPOs/Assessing Officers have universally applied 'bright line test' to decipher and compute value of international transaction and thereafter applied 'Cost Plus Method' or 'Cost Method' to compute the arm's length price. The said approach is not mandated and stipulated in the Act or the Rules. The list of parameters for ascertaining the comparables for applying bright line test in paragraph 17.4 and, thereafter, the assertion in paragraph 17.6 that comparison can be only made by choosing comparable of domestic cases not using any foreign brand, is contrary to the Rules. It amounts to writing and prescribing a***

mandatory procedure or test which is not stipulated in the Act or the Rules. This is beyond what the statute in Chapter X postulates. Rules also do not so stipulate. The argument and reasoning in paragraph 17.6 in a way loses focus on the main issue and controversy; whether the arm's length price fixed between the two AEs is adequate and justified and would have been paid if the transaction was between two independent enterprises. The two independent enterprises must be two unrelated parties having no connection*. It does not matter whether the comparables are domestic enterprises or not. However, and it is manifest that the comparable should have similar rights, if any, as the tested party in the brand name, trademark, etc.*

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

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

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

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

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

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

(iv) Revenue cannot resort to a quantify the adjustment by determining the AMP expenses spent by the assessee after applying BLT to hold it to be excessive and thereby evidencing the existence of the international transaction involving the AE.

59. *Here in this case also, the TPO has tried to prove the international transaction, vis-à-vis, AMP after applying the BLT which now in view of settled law by the Hon'ble Jurisdictional High Court, such an approach has to be rejected. Hence at the very threshold the*

spending of AMP expenditure by the assessee cannot be held to be an international transaction between the assessee and its AE.

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

> *"Brand and brand building*
>
> *102. We begin our discussion with reference to elucidation on the concept of brand and brand building in the minority decision in the case of L. G. Electronics India Pvt Ltd. (supra). The term "brand", it holds, refers to name, term, design, symbol or any other feature that identifies one seller's goods or services as distinct from those of others. The word "brand" is derived from the word "brand" of Old Norse language and represented an identification mark on the products by burning a part. Brand has been described as a duster of functional and emotional 103 It is a matter of perception and reputation as it reflects customers' experience and faith. Brand value is not generated overnight but is created ever a period of time, when there is recognition that the logo or the name guarantees a consistent level of quality and expertise. Leslie de Chematony and McDonald have described "a successful brand is an identifiable product, service, person or place, augmented in such a way that the buyer or user perceives relevant, unique, sustainable added values which match their needs most closely". The words of the Supreme Court in Civil Appeal No. 1201 of 1966 decided on February 12, 1970, in Khushal Khenger Shah v. Khorshedbann Dabida Boatwala, to describe "goodwill", can be adopted to describe a brand as an intangible asset being the whole advantage of the reputation and connections formed with the customer together with circumstances which make the connection durable. The definition*

given by Lord MacNaghten in Commissioner of Inland Revenue v. Midler and Co. Margarine Ltd. [1901] AC 217 (223) can also be applied with marginal changes to understand the concept of brand. In the context of "goodwill" it was observed:

"It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired.

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

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

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

There is a line of demarcation between development and exploitation. Development of a trade mark or goodwill takes place over a passage of time and is a slow ongoing process. In cases of well recognised or known trade marks, the said trade mark is already recognised. Expenditures incurred for promoting product(s) with a trade mark is for exploitation of the trade mark rather than development of its value. A trade mark is a market place device by which the consumers identify the goods arid services and their source. In the context of trade mark, the said mark symbolises the goodwill or the likelihood that the consumers will make future purchases of the same goods or services. Value of the brand also would depend upon and is attributable to intangibles other than trade mark. It refers to infra-structure, know-how, ability to compete with the established market leaders. Brand value, therefore, does not represent trade mark as

a standalone asset and is difficult and complex to determine and segregate its value. Brand value depends upon the nature and quality of goods and services sold or dealt with'. Quality control being the most important element, which can mar or enhance the value.

Therefore, to assert and profess that brand building as equivalent or substantial attribute of advertisement and' sale promotion would be largely incorrect. It represents a coordinated synergetic impact created by assort- merit largely representing reputation and quality. There are a good number of examples where brands have been built without incurring substantial advertisement or promotion expenses and also cases where in spite of extensive and large scale advertisements, brand values have not been created. Therefore, it would be erroneous and fallacious to treat brand building as counterpart or to commensurate brand with advertisement expenses. Brand building or creation is a vexed and complexed issue, surely not just related to advertisement. Advertisements may be the quickest and effective way to tell a brand story to a large audience but just that is not enough to create or build a brand. Market value of a brand would depend upon how many customers you have, which has reference to brand goodwill, compared to a baseline of an unknown brand. It is in this manner that the value of the brand or brand equity is calculated. Such calculations would be relevant when there is an attempt to sell or transfer the brand name. Reputed brands do not go in for advertisement with the intention to increase the brand value but to increase the sales and thereby earn larger and greater profits. It is not the case of the Revenue that the foreign associated enterprises are in the business of sale/transfer of brands.

Accounting Standard 26 exemplifies distinction between expenditure HJ7 incurred to develop or acquire an intangible asset and internally generated goodwill. An intangible asset should be recognised as an asset, if and only if, it is probable that future economic benefits attributable to the said asset will flow to the enterprise and the cost of the asset can be measured reliably. The estimate would represent the set off of economic conditions that will exist over the useful life of the intangible asset. At the

initial stage, intangible asset should be measured at cost. The above proposition would not apply to internally generated goodwill or brand. Paragraph 35 specifically elucidates that internally generated goodwill should not be recognised as an asset. In some cases expenditure is incurred to generate future economic benefits but it may not insult in creation of an intangible asset in the form of goodwill or brand, which meets the recognition criteria under AS-26. Internally generated goodwill or brand is not treated as an asset in AS-26 because it is not an identifiable resource controlled by an enterprise, which can be reliably measured at cost. Its value can change due to a range of factors. Such uncertain and unpredictable differences, which would occur in future, are indeterminate. In subsequent paragraphs, AS-26 records that expenditure on materials and services used or consumed, salary, wages and employment related costs, overheads, etc., contribute in generating internal intangible asset. Thus, it is possible to compute good- will or brand equity/value at a point of time but its future valuation would be perilous and an iffy exercise.

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

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

"4. . . . Advertisement expenses when incurred to increase sales of products are usually treated as a revenue expenditure, since the memory of purchasers or customers is short. Advertisement are issued from time to time and the expenditure is incurred periodically, so that the customers remain attracted and do not forget the product and its qualities. The advertisements published/displayed may not be of relevance or significance after lapse of time in a highly competitive market, wherein the products of different companies compete and are available in abundance. Advertisements and sales promotion are conducted to increase sale and their impact is limited and felt for a short duration. No permanent character or advantage is achieved and is palpable, unless special or specific factors are brought on record. Expenses for advertising consumer products generally are a part of the process of profit earning and not in the nature of capital outlay. The expenses in the present case were not incurred once and for all, but were a periodical expenses which had to be incurred continuously in view of the nature of the business. It was an on-going expense. Given the factual matrix, it is difficult to hold that

the expenses were incurred for setting the profit earning machinery in motion or not for earning profits.".

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

Accepting the parameters of the "bright line test" and if the said para meters and tests are applied to Indian companies with reputed brands and substantial AMP expenses would lead to difficulty and unforeseen tax implications and complications. Tata, Hero, Mahindra, TVS, Baja], Godrej, Videocon group and several others are both manufacturers and owners of intangible property in the form of brand names. They incur substantial AMP expenditure. If we apply the "bright line test" with reference to indicators mentioned in paragraph 17.4 as well as the ratio expounded by the majority judgment in L. G. Electronics India Pvt Ltd.'s case (supra) in paragraph 17.6 to bifurcate and segregate the AMP expenses towards brand building and creation, the results would be startling and unacceptable. The same is the situation in case we apply the parameters and the "bright line test" in terms of paragraph 17.4 or as per the contention of the Revenue, i.e., AMP expenses incurred by a distributor who does not have any right in the intangible brand value and the product being marketed by him. This would be unrealistic and impracticable, if not delusive and misleading (aforesaid reputed Indian companies, it is patent, are not to be treated as comparables with the assessee, i.e., the tested parties in these appeals, for the latter are not the legal owners of the brand name/trade mark).

112. Branded products and brand image is a result of consumerism and a commercial reality, as branded products "own" and have a reputation of intrinsic believability and acceptance which results in higher price and margins. Trans-border brand reputation is recognised judicially and in the commercial world. Well known and renowned brands had extensive goodwill and image, even before they became freely and readily available in India through the subsidiary associated

enterprises, who are assessees before us. It cannot be denied that the reputed and established brands had value and goodwill. But a new brand/trade mark/trade-name would be relatively unknown. We have referred to the said position not to make a comparison between different brands but to highlight that these are relevant factors and could affect the function undertaken which must be duly taken into consideration in selection of the comparables or when making subjective adjustment and, thus, for computing the arm's length price. The aforesaid discussion substantially negates and rejects the Revenue's case. But there are aspects and contentions in favour of the Revenue which requires elucidation."

60.1 *Thus, the Hon'ble High Court after describing the concept of the "brand" had made a clear cut demarcation between development and exploitation of brand which is either in the form of trademark or goodwill which takes place over a passage of time by which its value depends upon and is attributable to intangibles other than trademark like, infrastructure, knowhow, ability to compete in the established market, lease, etc. Brand value does not represent trademark as asset and it is quite difficult to determine and segregate its value. Brand value largely depends upon the nature of goods and services sold, after sales services, robust distributorship, quality control, customer satisfaction and catena of other factors. The advertisement is more telling about the brand story, penetrating the mind of the customers and constantly reminding about the brand, but it is not enough to create brand, because market value of a brand would depend upon how many customers you have, which has reference to a brand goodwill. There are instances where reputed brand does not go for advertisement with the intention to increase the brand value but to only increase the sale and thereby earning greater profits. It is*

also not the case here that foreign AE is in the business of sale/transfer of brands. Their Lordships have also referred to Accounting Standard 26 which provides for computation of goodwill and brand equal value at a point of time but not its future valuation or how such an intangible asset will generate probable future benefit. Because, the value fluctuates from one moment to other depending upon reputation and other factors. Reputation of a brand only enhances the sale and profitability and here in this case is only benefitting the assessee company when marketing its products using the trade mark and the brand of AE. Even otherwise also, the value of the brand which has been created in India by the assessee company will only be relevant when at some point of time the foreign AE decides to sell the brand, then perhaps that would be the time when brand value will have some significance and relevance. But to make any transfer pricing adjustment simply on the ground that assessee has spent advertisement, marketing expenditure which is benefitting the brand/trademark of the AE would not be correct approach. Thus, this line of reasoning given by the TPO is rejected.

6.10. Respectfully following the same, we also reject Bright line Test applied by Ld.TPO and further hold that, AMP expenditure cannot be considered as International transaction in the facts and circumstances of present case.

6.11. Accordingly we allow ground nos. 1- 11 raised by assessee.

7. Ground no.12 is in respect of penalty levied by Ld.AO. This ground being consequential in nature, do not call for any adjudication.

8. In the result appeal filed by assessee stands allowed.

Order pronounced in open court on 29th March,2019.

Sd/-	Sd/-
(R.K.PANDA)	**(BEENA A PILLAI)**
Accountant Member	**Judicial Member**

Dated: 29th March, 2019.

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

Asst. Registrar
ITAT, Delhi Benches, New Delhi

	Date
Draft dictated on	18.03.19
Draft placed before author	22.03.19 26/03/19
Draft proposed & placed before the second member	
Draft discussed/approved by Second Member.	
Approved Draft comes to the Sr.PS/PS	
Kept for pronouncement on & Order uploaded on :	
File sent to the Bench Clerk	
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	