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

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

I.T.A. No.1764/DEL/2015
Assessment Year: 2010-11

CASIO India Co. Pvt. Ltd., 210, First Floor, Okhla Industrial Estate, Phase-III, New Delhi.	v.	DCIT, Circle-5(2), New Delhi.
TAN/PAN: AAACC 3448H		
(Appellant)		(Respondent)

I.T.A. No.2276/DEL/2015
Assessment Year: 2010-11

DCIT, Circle-5(2), New Delhi.	v.	CASIO India Co. Pvt. Ltd., 210, First Floor, Okhla Industrial Estate, Phase-III, New Delhi.
TAN/PAN: AAACC 3448H		
(Appellant)		(Respondent)

Appellant by:	Shri Nageshwar Rao & Sandeep Karhail, Advocates.		
Respondent by:	Shri H. K. Choudhary CIT DR & Robin Rawal, Sr. D.R.		
Date of hearing:	08	02	2019
Date of pronouncement:	22	04	2019

O R D E R

PER AMIT SHUKLA JM:

The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against the directions dated 30.12.2014 given by the Ld. Dispute Resolution Panel-I,

New Delhi (DRP), u/s.144C (5) for the Assessment Year 2010-11. We will first take up the assessee's appeal wherein the assessee has challenged; *firstly*, transfer pricing adjustment of Rs.9,96,08,173/- on account of advertisement, marketing and promotion (AMP expenses); and *secondly*, addition of Rs.3,86,63,023/- on account of bad debts.

2. The facts in brief are that the assessee, CASIO India Ltd. is a wholly owned subsidiary of CASIO Japan and undertakes marketing of CASIO products in India manufactured by its parent company and is acting as an independent distributor of CASIO products. During the year, assessee has undertaken the following international transactions as reported in TP study report: -

Sl. No	*Type of International Transaction*	*Total value of Transaction (INR)*	*Method Selected*
1.	*Purchase of finished goods*	*82,17,04,260/-*	*TNMM using operating Profit/Operating Revenue as a PLI.*
2.	*Purchase of spare parts*	*29,04,040/-*	
3.	*Receipt of product guarantee fee*	*85,01,083*	
4.	*Receipt of Global SMS Modification Fee*	*28,54,895/-*	
5.	*Provision of customer support services*	*50,65,985/-*	*TNMM using operating Profit/Operating cost as a PLI*
6.	*Reimbursement of Expenses*	*31,79,549/-*	*No Benchmarking required.*

3. Ld. TPO noted that the assessee has incurred AMP expenditure of Rs.7,49,01,076/- which has not been separately benchmarked. According to him, such an AMP expenses has led to building of the brand value "CASIO" which has benefitted the parent company who owns the brand. He further noted that in the past assessment years, the assessee used to receive 'Special Promotional Subsidy' on the basis of agreements with its AE for outsourcing of advertisement, whereas in this year no such subsidy to support the promotional activities in India has been received. The assessee has given no reason for the discontinuance of the said agreements. The TPO issued a detailed show cause notice for making transfer pricing adjustment on AMP expenditure of Rs.7,49,01,076/-. In the show cause notice, TPO has also incorporated the terms of agreement of the earlier year. In response, the assessee relied upon the order of the ld. CIT(A) in the case of the assessee for the Assessment Year 2007-08, wherein it was held that AMP expenses were found to be at Arm's Length and no adjustment has been made on account of AMP. It was further submitted that AMP expenses is a purely domestic transaction undertaken with a third party and it is not an 'international transaction' within the purview of Section 92B. Apart from that, it was also stated that commission on sale could not be added in AMP expenses. By incurring AMP expenditure, the actual beneficiary is the assessee-company only, because it helps in promoting and increasing the sales of the assessee in India and profit from

such sales is of assessee only and no economic benefit whatsoever has arisen to the AE.

4. Ld. TPO rejected the assessee's contention and strongly relied upon the decision of **ITAT Special Bench in the case of LG Electronics India Ltd. vs. ACIT, Circle-3,** Noida, ITA No.5140/Del/2011 to conclude that AMP expenditure is an international transaction which needs to be bench marked separately. He also rejected the assessee's contention that commission on sales should be excluded from AMP expenses on the ground that commission on sales is an expense that is critical for pushing and promoting the brand and there is a direct link between the dealer and distributor and the effort to promote a certain product. He noted that AMP/sales ratio in the case of assessee is 7.5% and hence AMP expenditure needs to be benchmarked separately. He held that though appropriate method to benchmark AMP would be CUP, however, the same is incapable of determining the ALP, since comparables having similar circumstances could not be found. He held that such benchmarking can only be done through Bright Line Test (BLT). The relevant observation of the TPO in this regard reads as under: -

> *"The bright line concept applies regardless of the functional profile of the assessee. The rationale underlying the concept is simply to determine what is the excessive marketing spend over and above the comparable who are not promoting any brand. The excessive marketing spend leads to creation of a marketing intangible for the overseas AE for which the assessee should also be remunerated on an arm's length basis, regardless of its functional profile. This*

requires the reimbursement of the AMP spend with an appropriate mark-up to the assessee since the assessee has created marketing intangible for the overseas AE. Hence, whether the assessee is a low risk distributor or a full risk bearing entity, it does not matter inasmuch as regardless of the same, the assessee needs to be compensated for its marketing efforts.

The assessee has argued that application of the bright line concept would result in a compensation for non-performance where the sales do not increase but high AMP expenditure is incurred (thereby leading to a high AMP/ sales ratio). Here, I wish to highlight that the assessee has not correctly appreciated the concept of bright line test. For any marketing effort there are two related aspects/ issues to be considered. One is the effort and the other is the outcome. The bright line limit measured as a ratio of AMP to sales merely indicates in relative terms the marketing effort of the assessee and does not seek to measure the outcome of the effort which is a separate matter altogether and may be measured in innumerable other ways (moreover, the impact of marketing effort in the form of increased sales may be spread over a period of time, so even if the sales in the immediate period do not increase, it cannot be said that there has been no impact). While applying the bright line concept, our focus is only on the marketing effort undertaken by the assessee which is compared with the marketing effort of similarly situated uncontrolled comparables. To the extent assessee's marketing effort is greater than the routine effort (as indicated by a comparison with the average AMP expenditure incurred by comparables), it needs to be compensated for the excessive marketing effort."

5. TPO further rejected the assessee's contention that incurring of such AMP expenditure has resulted in increase in sales by bringing more customers into the net of the company

or to retain old customers and held that consistently incurring higher AMP though results in increase in sales but also directly benefits the overseas AE from whom CASIO products are imported for resale in Indian market. He further held that AMP expenses are not domestic transactions, because earlier assessee had an agreement with AE for support of its AMP activities, and therefore, it falls under the ambit of international transaction. The assessee had also tried to demonstrate by way of an alternate argument to point out that even in the cases of comparables, the average AMP expenditure was around assessee's ratio, i.e., 5.75% and the list of such various comparables have been given at pages 16 to 19 of the TPO's order. TPO also noted that the assessee has filed copies of advertisement as had appeared in the print media and also took note of the decision heavily relied upon by the assessee in the case of **Maruti Suzuki India Ltd. vs. CIT, reported in (2015) 381 ITR 117 (Del)**. He further rejected the assessee's contention that AMP is covered by over all TNMM; and since assessee has a much higher profit margin as compared to the other comparables, therefore, no separate benchmarking is not required as such an higher expenditure is subsumed in the higher profit margin. After detailed discussion, TPO held that AMP has to be determined in accordance with Bright Line Test and after analysing the various comparable companies, he applied Bright Line margin of 3.62% based on certain comparables and made following adjustment:-

Particulars	*Value (Rs.)*
Value of gross sales of Casio India	*130,16,28,045*
Arithmetic mean of AMP/Sales of comparables	*3.62%*
Amount that represents 'Bright Line'	*4,71,18,935/-*
Expenditure incurred by Casio India on AMP	*7,49,01,076/-*
Expenditure in excess of 'Bright Line' that ought to have been received by Casio India as a compensation	*2,77,82,141/-*

6. Thereafter, he also applied further mark up of 14.88% of 41,33,983/- and finally made adjustment of Rs.3,19,16,124/.

7. The DRP has also taken note of the finding and observation of the TPO that there was an agreement between the assessee and M/s. CASIO Computer Ltd., Japan (AE) in the earlier years whereby AE was outsourcing the advertisement function to the assessee and for this purpose AE was paying special promotion subsidy to the assessee. The DRP further upheld that the decision of Special Bench in the case of **LG Electronics India (supra)** is squarely applicable on the facts of the assessee. It further observed that due to AMP expenditure there is a development of various intangibles like customer list, concepts, designs, creative thinking, music, graphics, TV spots, films, etc. The entire intellectual property rights relating to marketing vests with

AE, therefore, AMP promotes in creating intangibles for the AE. DRP further observed that the assessee has not submitted any agreement with the third party through which it has done its publicity and advertisement and it has also not furnished copies of advertisement provided in print media. The DRP proceeded on the premise that there was an involvement of the AE with regard to strategy factors relating to product placement and assessee has not submitted any agreement with the AE as was there in the earlier year. The DRP has also incorporated the terms of earlier agreement in the impugned order. Regarding issue of availability of material on record to hold whether AMP expenditure in addition to the expenditure benchmarked for routine distribution functions was in the nature of services to the AE or not, DRP had made following observations:-

"1. The TPO has brought sufficient material on record to justify that the taxpayer had entered into the exercise of development of marketing intangibles for its AE- by incurring of expenditure as well as by application of services without being suitably compensated.

2. The taxpayer has been taking the plea before this Panel as well as before the TPO the AMP expenditure incurred by it is on its own account and for the benefit of the distribution function of the products in India. In order to verify the veracity of this contention, this Panel requested the taxpayer to furnish the Global Advertisement Policy of the Group. It was also specified to the taxpayer that incase the taxpayer contends that there is no Global Advertisement Policy, a certificate to that effect should be furnished under the seal and signature of the AE. Vide letter dated 29.10.2014, the taxpayer has furnished a Memorandum of Understanding between the taxpayer

and the AE dated 01.07.2009. The relevant clauses of such Memorandum of Understanding are as under:

"CASIO INDIA CO., PVT. LTD. (Herein after referred as the SECOND PARTY) has exclusive rights for the sale of all the products with the trade mark of CASIO COMPUTER CO., LTD(Herein after referred as THE PRODUCTS and FIRST PARTY respectively) in India (hereinafter referred as TERRITORY). Second party as the exclusive sales company in the territory market, shall put the best efforts to expand the business of the products in territory market: for the first party, and for aforesaid purpose provide the necessary maximum information to the first party and contribute to the first party's decision of business strategy, and the second party shall put the best efforts to expand and strengthen own business set up. (Bold portion - Emphasis Supplied) Second party as an Indian company, shall strengthen the autonomous independent management system, and shall remain aware about the responsibility of contributing to Indian society, and for aforesaid purposes, gain the necessary profits and work on to strengthen the marketing and distribution channel set ups to gain the necessary profits.

The first party to gain the wide recognition and increase the value of its products and the registered trade mark, shall carry out general PR activities and events at its own cost, with respect to the market which the first party recognize the requisite necessity, and shall comply with the rules regarding the registered trade mark decided separately by the first party with its own appropriate decision, and in these cases, the second party shall fully co-operate with the first party by providing it with the necessary information and opinion also by measuring the effect of the activities carried out in its territory. (Bold portion - Emphasis Supplied)

The second party shall carry out the necessary advertising and promotional activities to expand the business of the products concerned at its own cost and own decision within its territory.

The purchase price for the second party shall be decided successively by the discussion between the first and second party;"

From the above Clauses of the MOU, it is observed that the taxpayer is agreement - bound to carry out activities for the promotion of products of its AE. It has further been stipulated that the taxpayer is bound to furnish information to AE in respect of such activities carried out by it. This makes it amply clear that-the taxpayer is engaged in activities relating to promotion of brand and development of marketing intangibles for its AE. The taxpayer has also submitted a clarification from its AE which is reproduced hereunder:

"Casio Computer Co., Ltd hereby, certify that the management of Casio India Company Private Limited and its marketing team/ department is solely responsible for decision making relating to the marketing strategies and marketing activities developed by Casio India itself and/ or expected to contribute to the product sales for the areas Casio India operates."

However, such clarification is considered by this Panel as self-serving device in the light of the MOU dated 01.07.2009 and Outsourcing of Advertisement Agreement dated 25.04.2007. The Panel in the light of above agreements holds that the conduct of the taxpayer give rise to sufficient evidence for invoking Transfer Pricing provisions on account of development of marketing intangibles and brand promotion for the AE.

8. After analyzing certain contents in the TP document and also advertisement clipping, DRP noted that for the project development function, there was involvement of AE and in the advertisement clipping also there was a clear display of *CASIO* Logo and prominently which leads to enhancement of CASIO brand in carrying out AMP expenses.

9. The DRP has also rejected the assessee's contention that AMP is covered by TNMM and it has higher profit margin on OP/sales which was at 13.11% and same was much more than the comparables. The reason for such rejection was that the assessee has failed to substantiate that it was compensated on account of discharge of AMP services and such compensation is reflected by way of higher profit margin of the assessee. The pricing policy also does not include compensation to the assessee on account of AMP. After detailed discussion, DRP held that neither the Indian transfer pricing law nor the international practice supports the simultaneously benchmarking of ALP of different transactions.

10. The DRP also rejected the search process of the comparables conducted both by the assessee as well as by the TPO and observed that in absence of any details provided by the assessee with regard to the price details on which the assessee has sold to the third in India or abroad, internal CUP cannot be worked out. The DRP then further carried out its own search process on 'Prowess' database relating to companies in 'Trade in Electrical Machinery'. The comparables selected by the DRP were as under:

Company Name	Sales	OR	OC	OP	OP/Sales	NP	NP/sales	GP	GP/sales	AMP	AMP %	Intang %	RPT
Savex Computers Ltd.	1161.14	1161.19	1119.66	41.53	3.58	18.83	1.62	101.76	8.76	1.92	0.17	0.00	0.02
Nouveau Global Ventures Ltd.	133.91	133.76	133.17	0.59	0.44	0.25	0.19	0.83	0.62	0.03	0.02	0.00	0.03

Aashee Infotech Ltd.	19.95	19.95	19.82	0.13	.065	0.1	0.50	0.15	0.75	0	0.00	0.00	0.05
Beetel Teletech Ltd.	595.8	542.59	542.48	0.11	0.02	49.82	8.36	29.76	4.99	41.76	7.01	0.55	0.05
Priya Ltd.	192.18	192.79	187.12	5.67	2.95	-1.16	-0.60	10.24	5.33	0.38	0.20	0.00	0.09
Cyber Media Digital Ltd.(merged)	3.92	4.23	3.97	0.26	6.63	-0.27	-6.89	0.75	19.13	0	0.00	0.00	0.51
Redington (India) ltd.	6188.99	6599.38	6395.64	203.74	3.29	-324.23	-5.24	432.02	6.98	0.7	0.01	0.01	0.55
Spanco Ltd.	1182.95	1299.51	1163.73	135.78	11.48	-107.75	-9.11	288.44	24.38	0.81	0.07	0.38	0.73
Jupiter International Ltd.	189.1	185.53	177.08	8.45	4.47	4.5	2.38	24.41	12.91	6.61	3.50	0.13	0.90
Compuage Infocom Ltd.	1087.8	1125.2	1107.57	17.63	1.62	-33.01	-3.03	119.72	11.01	0	0.00	0.00	1.15
GES TEchnologies Ltd.	100.6	100.56	100.23	0.33	0.33	-0.13	-0.13	119.72	11.01	0	0.00	0.00	1.92
Salora International Ltd.	524.55	526.66	530.47	-3.81	-0.73	-11.65	-2.22	29.77	5.68	3.45	0.66	0.15	2.01
Softcell Technologies Ltd.	107.53	107.04	96.85	10.19	9.48	5.48	5.10	24	22.32	0.32	0.30	0.64	3.90
Spice Mobility Ltd.	1039.81	1137.72	1037.18	100.54	9.67	-35.22	-3.39	356.28	34.26	128.59	12.37	0.17	10.28
Adit Ecommerce Pvt. ltd.	1.64	1.64	1.8	-0.16	-9.76	-0.1	-6.10	0.15	9.15	0	0.00	4.27	13.41
Average					**2.94**		**-1.23**		**11.28**		**1.62**		

11. However, after detailed discussion, the DRP observed that Bright Line Test is nothing but CUP method used by the TPO for determination of the ALP on AMP services and upheld BLT for benchmarking the AMP expenditure to justify TP adjustment.

12. Further on the issue of applying of mark up of 14.88%, DRP directed the TPO to quantify the amount of AMP service charges receivable by the AE ad apply a rate equal to the base rate of SBI to the Financial Year under consideration and apply at 150 base point.

13. Regarding TPO's action in holding sales relating to expenses, namely, trade discounts, commission etc as part of AMP expenditure, the DRP has upheld the same on the ground that the decision of the ITAT Special Bench in the case of **LG Electronics Pvt. Ltd. (supra)** is pending before the Hon'ble Delhi High court.

DECISION

14. We have heard the rival submissions and also perused the relevant findings given in the impugned orders as well as material referred to before us. The assessee had carried out various international transactions with the AE like purchase of finished goods, purchase of spare parts, receipt of product, guarantee fee, receipt of applicable SMC, modification fees and provision of customer support services. All these international transactions reported in TP study report has been benchmarked by adopting TNMM using PLI of operating profit/operating revenue. The assessee's sales has been reported at Rs.130,16,28,045/- as against the total purchase of goods for resales, processing charges, consumable, computer material and spare parts of Rs.100.81 crores; and purchases from the AEs of finished goods was at

Rs.82,17,04,260/- and spare parts worth Rs.29,04,040/-. The service income was shown at Rs.1.91 crore. For trading activities, the assessee had shown net operating profit of 13.11%. The AMP expenditure debited in the profit and loss account was Rs.5,96,81,200/- and commission on sales was debited at Rs.1,52,19,876/-, aggregating to Rs.7,49,01,076/-. Here, in this case, both TPO and DRP have heavily relied upon the agreements entered into the assessee and its AE, M/s. CASIO Computer Ltd., Japan in the earlier year, whereby the assessee was outsourcing the advertisement function to the assessee and for this purpose, AE was paying special promotion subsidy to the assessee company. The relevant agreement dated 25th April, 2007 reads as under:

> *"**Outsourcing of Advertisement agreement***
>
> *"This agreement was presented as of 25th April 2007 by and between CASIO COMPUTER CO. LTD. duly organized and existing under and by virtue of the laws and regulations of Japan and having its principal office at 6-2 Hon- machi 1 chome Shibuya- Ku, Tokyo 151-8543, Japan (hereinafter referred to as "CASIO"), and CASIO INDIA CO., PVT, LTD. duly organized and existing under the laws and regulations of India and having its principal office at 217-A, Okhla Industrial Estate, Phase- III, New Delhi 110020 (hereinafter called CASIO INDIA).*
>
> ***Article 1: Subject***
>
> *Strictly for the increased sales and enhancement of the brand image and reputation of Casio Watch & Clock in India, Casio India Co. carries out local promotion on behalf of Casio, CasioIndia shall make advance planning for such local promotion activities and furnish Casio with the schedule and its relevant estimated*

quotation before execution for possible comments, suggestions and alternations and final approval by Casio.

Article 2: Indemnification

In any case, CASIO INDIA will indemnify and hold CASIO harmless from any and all damages and expenses occurred to CASIO in connection with any claim or suit brought against CASIO alleging infringement of third party.

Article 3 Payment and Subsidy Amount

Casio shall pay to Casio India the expenses only after Casio receives the evidence. However, Casio's payment to Casio India shall not exceed JPY 7,000,000 (say Japanese Yen seven million only). Casio India shall invoice Casio not later than 30th September, 2007 to comply with the fiscal year end accounting purpose of Casio.

Article 4: Period

Promotion under this agreement must be carried out strictly in the period starting 25 day of April, 2007 and ending by 30the September, 2007. *Casio shall be exempted from payment for promotion executed before and/or after this period.*

Article 5: Evidence

Casio shall be exempted from payment of the agreed amount unless such evidence as described below are completely presented to CASIO.

1) Invoice to CASIO duly signed by CASIO INDIA.

2) Copies of corresponding invoices to concerned party (parties) issued by a local advertising agencies and/or media.

3) The proofs of advertisement carrying' the date of execution.

Article 6: Entire Agreement

All other conditions not specifically set forth in this agreement shall be amicably discussed by the two parties. This agreement shall supersede all the verbal or written advertising agreements or memorandum, if any, made between the parties prior to the agreement."

15. The aforesaid agreement first of all was relevant only for the period starting from 25th April, 2007 and ended by 30th September, 2007. It was only for this brief period the agreement for outsourcing for advertisement was entered. Based on this agreement which was relevant for the financial year 2007-08, i.e., Assessment Year 2008-09, the same agreement has been interpreted and presumed to be enforceable in the Assessment Year 2010-11 by the authorities below.

16. Before us, learned counsel, Shri Nageshwar Rao has submitted that, no such agreement or type of such agreement was there in the relevant Assessment Year and it would be erroneous to presume that such an agreement would be there for this Assessment Year also. From the very terms of the agreement it can be seen that, it was only for the limited period of six months, i.e., for 25th April, 2007 to 30th September, 2007. He further submitted that assessee is an independent and full-fledged distributor having entire risk of distribution and sales of CASIO products. The entire marketing strategy has been independently planned and executed by CASIO India and it is the assessee alone which

conducts marketing activities like market research, creation of product, brochure, monitoring, market demand, formulating market strategy and budgets. The assessee alone was responsible for deciding types of marketing activities to be performed and determines independently the appropriate advertisement and marketing mixed in telephone, newspaper magazines, road shows etc. From nowhere, it can be inferred that any AMP expenditure has been incurred either on behest on AE or for providing any kind of benefit to the AE. The assessee has been independently purchasing the finished goods and spare parts from the AE and selling the same in carrying out the sales activity in India entirely at its own risk. He further submitted that the DRP has incorrectly observed that TPO has brought sufficient material on record to justify that the assessee has entered into the exercise of development of marketing independently by its AE by incurring AMP expenditure. Such an inference is purely based on surmise dehors any material on record. The assessee had furnished all the advertisement material before the TPO which has also been acknowledged by him and the DRP has wrongly held that no such material was filed before the TPO. Even from bare perusal of the MOU dated 01.07.2009 noted by the DRP, nowhere it is borne out that the assessee has to carry out AMP functions either at the behest of the AE or providing any kind of benefit to the AE. It only highlights that the assessee shall put best effort to expand the business of the product in the territory market and to co-operate AE by providing

necessary information and opinion of the activities carried out in its territory. In fact from the said MOU, it is clearly borne out that all the necessary advertisement and promotional activities is done by the assessee on its own cost. Thus, it cannot be held that incurring of AMP expenses for promotion of sale by the assessee company was to provide any kind of benefit to the AE which needs to be reckoned as separate international transaction. He further submitted that ultimately both TPO and DRP have upheld the application of BLT which now stands rejected by the Hon'ble Delhi High Court in series of judgment, viz., Sony Ericson Mobile Communication India Ltd. reported in (2015) 374 ITR 118, Maruti Suzuki India Ltd. vs. CIT, (2015) 381 ITR 117, CIT vs. Whirlpool India Ltd., 280 ITR 154 and Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. ACIT, 381 ITR 227. Thus, here in this case, there is no independent international transaction which needs to be separately benchmarked and the issue involved is squarely covered by the decision of Hon'ble High Court wherein the decision of Special Bench of ITAT wherein the case of LG Electronics has been reversed.

17. On the other hand, ld. CIT DR strongly relied upon the order of the DRP; and further submitted that, once there was an agreement for reimbursement of advertisement expenses it goes to prove the conduct of the AE and assessee company, that AMP expenditure has to be expended on the direction and control of the AE. He further submitted that the assessee undisputedly is a distributor of its AE and brand is owned by

the AE and therefore any value addition created by AMP expenses directly benefits the AE. The assessee before the DRP has admitted that it has been adequately compensated by premium return for excess of AMP spend through sale of products in the Indian market and its pricing policy for various International transactions. Under these facts, findings of Hon'ble High Court of Delhi in the case of Sony Ericson in para 52 & 53 is squarely applicable as in present case also the assessee has admitted that it has been compensated properly for all function on entity level i.e. distribution and other functions. The relevant portion of judgement of Hon'ble Delhi High Court in the case of Sony Ericson in ITA No. 16/2014 is reproduced as under:

> *"52. The contention that AMP expenses are not international transactions has to be rejected. There seems to be an incongruity in the submission of the assessee on the said aspect for the simple reason that in most cases the assessed have submitted that the international transactions between them and the AE, resident abroad included the cost/value of the AMP expenses, which the assessee had incurred in India. In other words, when the assessed raised the aforesaid argument, they accept that the declared price of the international transaction included the said element or function of AMP expenses, for which they stand duly compensated in their margins or the arm's length price as computed.*
>
> *53. We also fail to understand the contention or argument that there is no international transaction, for the AMP expenses were incurred by the assessed in India. The question is not whether the assessed had incurred the AMP expenses in India. This is an undisputed position. The arm's length determination pertains to adequate*

compensation to the India, AE for incurring and performing the functions by the domestic AE. The dispute pertains to adequacy of compensation for incurring and performing marketing and 'non-routine' AMP expenses in India by the AE. The expenses incurred or the quantum of expenditure paid by the Indian assessee to third parties in India, for incurring the AMP expenses is not in dispute or under challenge. This is not a subject matter or arm's length pricing or determination. "

17. Considering the above positions of law, it is clear that AMP expense incurred by the assessee is an international transaction. The argument that Hon'ble High Court in subsequent decision in the case of Maruti Suzuki cited supra has held that the revenue has to establish AMP function as international transaction is not applicable to the facts of the case, as in the case of Maruti Suzuki India Ltd. was a manufacturer and not a distributor. In the case of manufacturer there is no import of finished goods from the AE which may compensate for AMP functions on behalf of AE. Further in the case of Maruti Suzuki Ltd., the assessee company was also owing Maruti Brand as per para 17 of the said order. The issue was that AE's trademark 'Suzuki' was also advertised for increasing brand value. The relevant portion of the order is reproduced as under:-

"In the final order, the TPO came to the conclusion that the trade mark 'Suzuki' owned by the SMC had piggybacked on the trade mark 'Maruti without any compensation being paid by SMC to MSIL. He also came to the conclusion that the trade mark 'Maruti' had acquired the status of a 'super brand' whereas the trade mark 'Suzuki' was a relatively weak brand. He concluded that the

promotion of the co-branding of 'Maruti-Suzuki' had resulted in (a) promotion of the trade mark of the AE; (b) the use of the trade mark 'Maruti' of the MSIL; (c) reinforcement of the Suzuki trademark which was a weak brand as compared to Maruti in India and; (d) impairment of the value of the Maruti trademark due to co-branding process."

18. Subsequent decision by Hon'ble High Court in case of Whirlpool India Ltd. ITA No. 610/2014 has followed decision of in the case of Maruti Suzuki being manufacturer; though in those cases no brand was owned by the assessee. In any case the decision of Maruti is not applicable in distributor's case. In past year, there has been compensation/subsidy from AE to the assessee for performing and enhancing brand building of AE. Overall functions including distributions AMP during this year is similar. Therefore, during this year also the assessee is performing AMP functions on behalf of AE. Thus, he submitted that AMP expense may be held as an International Trisection and bench making of AMP has to be done in accordance with the decision of Hon'ble Delhi High Court in the case of Sony Ericson after verifying the AMP and distribution function of the assessee and comparables.

19. After considering the entire gamut of facts and contentions raised by the parties, we find that both TPO and ld. DRP have ultimately benchmarked the AMP expenditure by applying Bright Line Test, willfully relying upon the decision of Special Bench in the case of **LG Electronics India Pvt. Ltd. vs. ACIT, 140 ITD 41,** wherein this approach was

upheld. However, subsequently the Hon'ble Delhi High Court in the case of **Sony Ericson Mobile Communication India Pvt. Ltd. (supra)** categorically held that BLT was not a valid test for determining the ALP transaction as it was not statutorily mandated. Later on, the Hon'ble Jurisdictional High Court has expanded this jurisprudence in other cases like **Maruti Suzuki India Ltd, Whirlpool India Ltd.;** and **Bausch & Lomb Eyecare (India) Pvt. Ltd. (supra)**. The distinction has been sought to be drawn by the ld. CIT-DR that the judgment of Sony Ericson was with regard to the batch of appeals dealing with the assessee who were distributors and subsequent judgments dealt with manufacturers who were operating as risk bearing entities. Here, in this case, the assessee undisputedly is an independent distributor whereby it was purchasing finished goods and spare parts from its AE and selling the same in India on its own risk and the profit derived from such sales has been offered to tax in India. The FAR of the assessee company for its trading segment as given in T.P. Study Report, which is not in dispute by the department are that:

- Casio India imports finished goods and spares for further distribution in the Indian market. These finished goods and components are in the nature of office automation products such as handheld calculators, desktop calculators, scientific calculators, printing calculators, data banks, digital diaries, label printers, PDA, wrist watches, digital clocks, digital cameras, electronic cash

registers, projectors and Electronic musical instruments. For this purpose, Casio India places the order directly with the AE which undertakes the responsibility of supplying the said products.

Marketing

- Marketing strategy functions are those activities that-determine the positioning of a firm s product in a market and that establish marketing techniques that bring the products to the customers' attention.
- Local marketing strategy is independently planned and executed by Casio India. Casio India conducts marketing activities such as performing market research, creation of product brochures, monitoring market demand, formulating marketing strategies and budgets. Casio India is responsible for deciding the types of marketing activities to be performed and the timing of these activities in India. Casio India determines the appropriate advertising and marketing mix in television, newspaper, magazine, cinema, print, road shows and technical training seminars.

Packaging and Labelling

- Packaging and labelling activities involve the determination of the manner in which a product is packaged and labeled for shipment to a customer and the execution of those decisions. Packaging and labelling requirements are often affected by the legal and regulatory environment of both the party shipping and party receiving the product.

- Products are dispatched by the manufacturers in the final packed condition along with an instruction manual. However, Casio India inserts a warranty card. Thus, Casio India incurs negligible packaging costs.

Pricing

- Casio India is also responsible for setting the price of products sold to customers. The main factors impacting the price of products sold to customers in India are:
  - Product margins (various pricing structures, rebates, bundled products etc.);
  - Sales volume;
  - Market share
  - Strategic segmentation, level of competition and channel capability.
  - Determining the level of rebates provided to customers is also the responsibility of Casio India.

Sales

- The sales function refers to all activities associated with direct customer contact and negotiations to bring at cut purchases by the customer of the firm s products.
- Casio India employs a sales force that is responsible for both identifying and developing new business opportunities and maintaining the existing customer base in India. The sales force is also responsible re-negotiating with customers in relation to product purchases and pricing. Casio India sets sales forecasts any sales targets

on an annual basis to assist in the product planning and budgeting process.

Distribution Channel

- Distribution networks enable the firm to locate customers, determine their needs and provide services or products to meet those needs.
- Casio India determines the distribution channel for products sold in India. Casio India is responsible coordinating the distribution of the products through their own distribution channels as well as through is extensive dealer network.

Customer Support

- Customer support involves provision of product information to the client, advising them on the selection, optimal use and maintenance of the product, training customers, provision of technical support and product servicing.
- The products of Casio India are sold with a warranty. Casio India is responsible for determination of terms ar; conditions of warranty for various products sold by it and consequently for costs incurred in this connection. Additionally, it also maintains an after sales service team which is responsible of providing repair and maintenance services to Casio India's customers. Casio India also received as product guarantee fee from Casio Japan.
- The functions performed by Casio India and its AEs, are summarized in the table below:

Type of Functions	Casio India	AEs
I *Strategic Management*		
Corporate Strategy	*Yes*	*Limited*
Budgeting	*Yes*	*No*
Corporate sen ices		
I *Administration*	*Yes*	*No*
I *Product Development Functions*		
Product Strategy and design	*No*	*Yes*
I *Procurement Functions*		
Purchasing	*Yes*	*No*
Pricing Mechanism	*Yes*	*Yes*
Move functions		
Inventory Management	*Yes*	*No.*
Logistics	*Yes*	*No*
Sales & Marketing Function		
Marketing	*Yes*	*No*
Packaging and Labelling	*No*	*Yes*
Pricing	*Yes*	*No*
Sales	*Yes*	*No*
Distribution Channel	*Yes*	*No*
Customer Support	*Yes*	*Limited*

Business Risk/ Market Risk

- Business risk arises when a firm 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.
- Casio India bears the market risk since it is also responsible for marketing the goods to ensure that the targeted sales volume results in recovery of purchase price, related expenses and a reasonable margin. Casio India is responsible for any price fluctuation in the market

and for any under-recovery of fixed or variable costs. Further, Casio India has to bear the impact of any lack of demand in the Indian market for any product though due to its trading business it has the flexibility to discontinue slow moving models without any significant costs.

- In summary, the market risks potentially faced by Casio India in India includes:
  - increased rate of technological obsolescence;
  - high levels of competition from other companies in the Indian market; and
  - increased pricing pressure from customers.

  However, since the AE supplies finished goods and components to Casio India, they would also be affected by decline in demand and price fluctuation in India. Therefore, the AEs also bear limited business risk.

Inventory Risk

- This risk relates to the potential for losses associated with carrying product or component inventory. Losses include obsolescence, shrinkage, or market collapse such that products are only saleable at prices that are inadequate to cover product costs.
- Casio India is responsible for storage of imported finished goods and spares and subsequently for sale of these goods. Thus, the inventory risk is borne by Casio India. However, for sales made to Casio India, Casio Japan maintains certain inventory and thus bears the associated inventory risk.

Scheduling Risk

- Scheduling risk relates to the uncertainty involved in scheduling import of finished goods in respond m unpredictable fluctuations in demand. Scheduling risk is of particular concern for companies with highly volatile demand or demand that is extremely sensitive to timing of product delivery.
- Casio India would primarily bear the scheduling risk as it would enter into contract with customers. Casio India would place the order on the AE along with delivery schedules. While the AE would be responsible to meet TC orders provided by Casio India within the stipulated timeframe, it also bears the scheduling risk with respect to demands made by Casio India.

Product Liability Risk

- Product liability risk refers to the risk associated with the possibility of facing legal action from customers due to defects in the products provided.
- All products sold by Casio India carry a warranty on labour and parts. Thus, Casio India bears the costs, associated with warranty repair services. These costs are taken into account during price negotiations between Casio India and its suppliers. Casio India also bears the product liability risk as it compensates the customer; are any defect in the products. Also since Casio Japan provides a product guarantee fee to Casio India, the

product liability risk is shared by the transacting entities.

- However in exceptional cases such as an inherent product fault or recall which impacts a group of prod which is due to product quality issue, the costs (including product recall) involved are borne by the product manufacturer.

Credit and Collection Risk

- When an entity supplies products or services to a customer in advance of customer payment, the firm runs risk of default of such payment.
- Since the AEs export goods to their group entity (i.e. Casio India), they bear a limited credit and collection r L In relation to payment due to Casio India from the end-customers in the Indian market, Casio India bearing related credit and collection risks such as delay in collection of receivables, bad debts, etc.

Foreign Exchange Risk

- Exchange rate risk relates to the potential variability of profits that can arise because of changes in foreign exchange rates and arises whenever the transacting currency of an entity is different from its June:, currency.
- All payments to the AEs are made in USD which is not the functional currency of the AE or Casio India. Hence both Casio India and its AE bear the risk of foreign exchange rate fluctuation between USD and their functional currency.

20. From the above FAR analysis, it can be seen that Casio India is independent risk bearing distributor who is entirely responsible for marketing, sales, distribution, budgeting, pricing, market and sales strategy, etc. and also bears all the major risks as any independent distributor would undertake. Hence, it cannot be inferred that AE has any role for sales and marketing in India or assessee is carrying out sales or marketing at the behest of AE or for its own benefit. Now we have to see that under the facts and circumstances of the case and on FAR analysis, is incurring of AMP expenditure is an international; transaction within the ambit of the Act.

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

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

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

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

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

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

(iv) all such nature of transaction described in the section will also include mutual agreement and the arrangement between the parties for allocation or apportionment or any contribution to any cost or expenses incurred or to be incurred in connection with benefit, services and facility provided to any of such parties.

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

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

.....

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

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

ii. the expression "intangible property" shall include—

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

Thus, under the expanded definition of the term 'international transaction' intangible property has been defined to include marketing related intangible assets such as trademark, trade name, brand name and logos, etc. This inter alia means that where two AEs engaged in the transaction which involved, purchase, sale, transfer, lease or use of intangibles rights then the same shall be classified as international transaction. From the above, definition, apart from transaction relating to purchase, sale or lease of tangible or intangible property, services lending or borrowing money, etc., functions having bearing on the profits, income, losses or assets is reckoned as international transaction. Besides this, if such a transaction is based on any mutual agreement or arrangement between the AEs for allocation or any contribution to any cost or expenditure incurred or to be incurred for the benefit, service or facility, then also such an agreement or arrangement is treated as international transaction. Clause (v) of Section 92F reads as under:

"92F (v). "transaction' includes an arrangement, understanding or action in concert, -

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

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

This definition of transaction has to be read in conjunction with the definition given in section 92B, which means that the transaction has to be first in the nature given in Section 92B (1);

and then when such transaction includes any kind of arrangement, understanding or action in concert amongst the parties, whether in writing or formal, then too it is treated as international transaction. Here the conjoint reading of both the sections lead to an inference that in order to characterized as international transaction, it has to be demonstrated that transaction arose in pursuant to an arrangement, understanding or action in concert. Such an arrangement has to be between the two parties and not any unilateral action by one of the parties without any binding obligation on the other or without any mutual understanding or contract. If one of the parties by its own volition is incurring any expenditure for its own business purpose, then without there being any corresponding binding obligation on the other or any such kind of an arrangement actually existing in wring or oral or otherwise, it cannot be characterized as international transaction within the scope and definition of Section 92B (1).

22. The Hon'ble Delhi High Court in the case of Maruti Suzuki, Whirlpool and Bausch & Lomb have categorically held that for an international transaction to exist within a meaning of Section 92B, the onus is on the Revenue to show there existed an agreement and understanding or arrangement that Indian entity would enter in AMP expenditure for or on behalf of AE which owns the brand. In absence of such an 'action and concern', no functional transaction can said to exist. In the case of Whirlpool India Ltd., the Hon'ble Jurisdictional High Court has laid down the following principle:-

(a) Sections 92B to 92F contemplate the existence of an international transaction as a pre-requisite for commencing the TP exercise. The Court observed that "to begin with there has to be an international transaction with a certain disclosed price. The TP adjustment envisages the substitution of the price of such international transaction with the ALP". (Para 33).

(b) The Court went to hold that, "the TP adjustment is not expected to be made by deducing the difference between the excessive AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE. It is for this reason that the Bright line test has been rejected as a valid method for either determining the existence of international transaction or for the determination of ALP of such transaction. Although, under Section 92B read with Section 92F (v), an international transaction could include an arrangement, understanding or action in concert, this cannot be a matter of inference. There has to be some tangible evidence on record to show that the two parties have "acted in concert"". (Paras 34-35).

(c) The Court cited the Supreme Court decision of Daichi Sankyo v. J. Chiguripati (Civil Appeal No. 7148 of 2009) to emphasize that "action in concert" would

necessarily entail a "shared common objective or purpose" between two or more persons. In the absence of such shared objective or purpose, no presumption of a transaction can be made.

(d) As regards the onus to show the application of TP provisions, the Court held that "initial onus is on the Revenue to demonstrate through same tangible material that the no parties acted in concert and further there was an agreement to enter into an international transaction concerning AMP expenses". (Para 37).

(e) As regards the presumption for imposing a transfer pricing adjustment in relation to AMP, the Court held that "37. The provisions under Chapter X do envisage a 'separate entity concept'. In other words, there cannot be a presumption that in the present case since WOIL is a subsidiary of Whirlpool USA, all the activities of WOIL are in fact dictated by Whirlpool USA. Merely because Whirlpool USA has a financial interest, it cannot be presumed that AMP expense incurred by the WOIL are at the instance or on behalf of Whirlpool USA." (Para 37)

(f) There is no machinery provision in the Act to bring an international transaction involving AMP expense under the ambit of transfer pricing provision if it cannot be shown that such an international transaction was entered into by the assessee. In Court's words, "It is in this context that it is submitted and rightly by the Assessee that there must be machinery provision in the Act to bring an international

transaction involving AMP expense under the tax radar. In the absence of clear statutory provision giving guidance as to how the existence of an international transaction involving AMP expense, in the absence of an express agreement in that behalf', should be ascertained and further how the ALP of such a transaction could be ascertained, it cannot be left entirely to surmises and conjectures of the IPO." (Para 39).

g) The Court further held that after the invalidation of the Bright line test by the Delhi High Court in Sony Ericsson (supra), existence of an international transaction of AMP expenditure has to be established de hors the Bright line test. There is nothing in the Act which indicates how, in the absence of the Bright line test, one can discern the existence of an international transaction as far as AMP expenditure is concerned.

23. Here, in this case, it has been vehemently argued from the side of the assessee that assessee-company had incurred expenditure on AMP to cater to the needs of the customers in the local market and such an expenditure was neither incurred at the instance or behest of overseas AE nor there was any mutual understanding or arrangement or allocation or contribution by the AE towards reimbursement of any part of AMP expenditure incurred by it for the purpose of its business. If no such understanding or arrangement exists, then no transaction or international transaction could be said to be involved between the AE and the assessee which can be reckoned to be covered within the provision of Transfer Pricing Regulation. The incurring of

expenditure by the assessee is in fact purely a domestic transaction by a domestic enterprise with a third party in India for its own business purpose. As stated above, it has been well settled by the Hon'ble Jurisdictional High Court in the case of **Maruti Suzuki India Pvt. Ltd. (supra)** that onus is upon the Revenue to demonstrate that there existed an arrangement between the assessee and its AE under which assessee was obliged to incur excess amount of AMP expenses to promote the brands owned by the AE. The relevant observation and the finding of the Hon'ble High Court in paragraph 60 reads as under:

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

obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC."

24. The Ld. CIT DR has also referred to the decision of Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India Pvt. ltd. to contend that mere incurrence of AMP expenditure in respect of brand not owned by the assessee has to be treated as international transaction. Ultimately the case of the department is that, such an international transaction has to be benchmarked as per BLT to arrive at ALP. Both the inferences by the department is not tenable in view of the Hon'ble Delhi High Court in the judgment in the case of Maruti Suzuki India Pvt. Ltd. wherein the ratio of Sony Ericsson judgement has been explained in the following manner: -

"41. Having considered the above submissions, the Court proceeds to analyse the decision in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) to determine if it conclusively answers the issue concerning the existence of an international transaction as a result of incurring of AMP expenditures by an Assessee.

42. As already noticed, the judgment in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) does not seek to cover all the cases which may have been argued before the Division Bench. In particular, as far as the present appeal ITA No. 110 of 2014 is concerned, although it was heard along with the batch of appeals, including those disposed of by the Sony Ericsson Mobile Communications India (P.) Ltd. (supra) judgment, at one stage of the proceedings on 30th October 2014 the appeal was delinked to be heard separately.

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

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

"68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the

tax authorities themselves on a 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 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****.***

{Emphasis in bold is ours}

25. Further in the judgment of Sony Ericsson Mobile Communication Pvt. Ltd. (supra), the High Court itself has

distinguished the cases before it wherein there were cases which already themselves had accepted that there exists international transaction and there were other set of cases where the assessee has disputed the international transaction. This is clear from the following passage of the judgment: -

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

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

121. During the course of hearing before us, counsel for the Revenue had submitted that paragraph 17.4 should be treated as illustrations and not as binding comparables. We would prefer to observe, that an Assessing Officer/ TPO can go and must examine the question whether the assessee is performing functions of a pure distributor or performing distribution and marketing functions, in the latter case, he must examine and ascertain whether the transfer price takes into consideration the marketing function, which would include AMP functions. This would ensure adequate transaction price and hence assure no loss of revenue. When the distribution and marketing functions are interconnected and reliable comparables are available, arm's length price could be computed as a package, if required and necessary by making adequate adjustments. When the Assessing Officer/TPO comes to the conclusion that it is not possible to compute arm's length price without segregating and dividing

distribution and marketing or AMP functions, he can so proceed after giving justification and adequate reasons. At that stage, he would have apportioned the price received or the compensation paid by the foreign AE towards distribution and marketing or AMP functions. The TPO can then apply an appropriate method and compute the arm's length price of the two independently and even by applying separate methods. This will be in terms of the provisions of the Act and the Rules and also as per the general principles of international taxation accepted and applied universally. ***On the other hand, as recorded by us above, applying 'bright line test' on the basis of parameters prescribed in paragraphs 17.4 and 17.6 would be adding and writing words in the statute and the Rules and introducing a new concept which has not been recognised and accepted in any of the international commentaries or as per the general principles of international taxation accepted and applied universally. There is nothing in the Act or the Rules to hold that it is obligatory that the AMP expenses must and necessarily should be subjected to 'bright line test' and the non-routine AMP expenses as a separate transaction to be computed in the manner as stipulated****."*

{Emphasis in bold is ours}

26. 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.

26. Another key contention of the department, especially by the DRP has been that, by way of an advertisement where there is a display of 'CASIO' Logo which needs to enhancement of CASIO brand is owned by the Assessing Officer, and therefore, incurring of AMP expenditure it enhances the brand value of the AE. First of all, brand is a capital asset and it would be fallacious to treat any kind of AMP expenditure leading to brand building. The brand building not only lead to enhancement of the value of the brand and benefits the brand owner but also helps simultaneously the brand exploiter, like distributor brand

building on one hand it falls in realm of capital and brand promotion is targets towards sales of goods which is in the realm of revenue transaction, therefore, any distributor which increase AMP expenditure for promoting the sales of its goods is not guided by motive of enhancing brand value but purely by enhancing its sales. Increase in brand value happens at a very slow pace over a long period of time and there cannot be direct co-relation between AMP expenditure and brand value because brand value depends upon numerous other factors which may not be linked with AMP expenditure. The most important component of brand is its reliability and quality of goods and image in the minds of the customers. In order to link AMP expenditure with brand value it has to be demonstrated that brand value has gone up over a period of long time and portion of this enhancement is attributable to successful AMP campaign conducted by the Indian company. The benefit to the brand owner can only be incidental and cannot be the sole guiding force for the benchmarking the AMP expenditure separately this proposition strongly support from the judgment of Hon'ble Jurisdictional High Court in the case of Sony Ericson. The relevant portion of which reads as under:

> *"103. Brand has been described as a cluster of functional and emotional values. It is a matter of perception and reputation as it reflects customers' experience and faith. Brand value is not generated overnight, but is created over a period of time, when there is recognition that the logo or the name guarantees a consistent level of quality and expertise. Leslie de Chernatony 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 So. 1201 of 1966 decided on 12th February. 1970 in Khushal Khenger Shah v. Mrs. Khorshedbanu. Dabrtda Boa mala, 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 McicNaghten in Commissioner of Inland Revenue v. Muller & Co' & Margarine Ltd. [1901] 217 AC 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 tan 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 good-will? 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 air, 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."

105. There is a line of demarcation between development and exploitation. Development of a trademark or goodwill takes place over a passage of time and is a slow ongoing process. In cases of well recognised or known trademarks, the said trademark is already recognised. Expenditures incurred for promoting product(s) with a trademark is for exploitation of the trademark rather than development of its value. A trademark is a market place device by which the consumers identify the goods and services and their source. In the context of trademark, 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 trademark. It refers to infrastructure, know-how ability to compete with the established market leaders. Brand value, therefore, does not represent trademark 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.

106. 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 assortment 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 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 AEs are in the business of sale/transfer of brands.

109. The aforesaid position finds recognition and was accepted in CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294 (SC) , a decision 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 un-proclaimed. 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.

111. Accepting the parameters of the 'bright line test' and if the said parameters 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. Bajaj. 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 (P) Ltd case (supra) in paragraph 17.6 to bifurcate and segregate 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 assessed, i.e. the tested parties in these appeals, for the latter are not legal owners of the brand name/trademark.)"

27. In any case, legal ownership of intangibles, by itself, does not confer any right ultimately to retain returns derived by MNE group from exploiting the intangibles, even though such returns is initially accruing to the legal owner as a result of its legal /contractual right to exploit the intangible. The return depends upon the functions performed by the legal owner, assets it uses, and the risks assumed; and if the legal owner does not perform any relevant function, uses no relevant assets, and assumes no relevant risks, but acts solely as a title holding entity, then the legal owner of the intangible will not be entitled to any portion of the return derived by the MNE group from the exploitation of the intangible other than the Arm's Length compensation if any for holding the title.

28. Otherwise also, it would be very difficult to determine the impact of increase intensity of advertisement function on profit margin, the impact of advertisement on sale cannot be determined or quantified in a particular year, and therefore, even if AMP expenditure is to be compared with other comparables by applying any method, it would be very difficult to make reasonably accurate adjustment to the profit margins of the comparables companies. Thus, it would be

very difficult to treat AMP as separate international transaction and any attempt to benchmark such a presume transaction in any manner would be a very difficult exercise.

29. The entire finding and approach of the TPO and DRP has been purely based on hypothesis and one of the agreement entered in the earlier year for a limited period of six months and this has been stated to be a material so as to determine that there was an international transaction qua AMP expenditure in this year. Such a presumption based on said agreement cannot be inferred in this year at all as, firstly, it was for a very limited period in one of the earlier year as stated above; and secondly, each year has to be seen independently and if no such material act is permeating then presumption cannot be drawn for perpetuity. Thus, Revenue has failed to bring on record any material or any kind of arrangement existing between the AE and Assessee Company that there was separate international transaction with regard to AMP expenditure. Thus, on the facts and circumstances of the case, we hold that AMP expenditure cannot be treated as separate international transaction which needs separate benchmarking and accordingly we delete the entire AMP adjustment made by the Assessing Officer.

30. The next issue raised in assessee's appeal is with regard to bad debts of Rs. 3,86,63,023/-,

31. The brief facts emanating from the impugned orders are that, assessee-company was initially named as "Casio Bharti

Mobile Communications Limited" with the sole motive of doing pager business in India. However, in view of the adverse scenario of the pager business in India, Casio India has discontinued the Pager business; owing to which, there were outstanding dues pertaining to Pager business and the same had been appearing in the books of accounts of Casio India since FY 2001-02. Despite numerous attempts by Casio India to recover the said amount of debts via legal notices, recovery suits and other legal actions, most of these companies either gone under liquidation or were declared dormant for which reference was made to Items 16A to 16E of the paper-books being reports on the same by the Registrar of Companies, NCT of Delhi. Subsequently, on the basis of the observations made by the Statutory Auditors, the aforesaid amount was declared as bad debts and written off in books of accounts though the provision as made in FY 2000-01 and no deduction was claimed on account of the same. It was further submitted by the assessee that as per as per normal business prudence and in accordance with generally accepted accounting principles, Rs. 4,36,84,216/- had been written off from the Books of Accounts in the FY 2009- 0. However, the same was routed through the Profit & Loss account. The amount of provision that was created in FY 2001-02 was written back amounting to Rs. 4,36,84,216/- and simultaneously an expense of Rs. 4,36,84,216/- was booked as the bad debts written off. Therefore, in effect there was no impact on the profit and loss account as it was credited and

debited with the same amount. Subsequently, on account of credit entries worth Rs.50,21,193/- the taxpayer claimed bad debts of Rs.3,86,63,023/- in the computation of Income for AY 2010-11. The break-up of the sum of Rs.4,36,84,216/- was given as under:

S. ***No.***	***Name of Company***	***Outstanding***
1.	*ABC Communications (India) Pvt.*	*79,56,990*
2.	*DSS Mobile Communications Ltd.*	*74,00,000*
3.	*Easycall Communications (India)*	*82,28,943*
4.	*Matrix Paging (India) Pvt. Ltd*	*1,17,83,045*
5.	*"Telesistem (India) Pvt. Ltd.*	*83,15,238*
Total Outstanding Amount		*4,36,84,216*

The relevant journal was also given in the following manner:

31/3/2010 Bad Debts written off	43,684,216.00
To ABC Commns. (India) Pvt. Ltd.	7,956,990.00
To DSS Mobile Communications Ltd.	7,400,000.00
To Easycall Commn. (I) Pvt Ltd.	8,228,943.00
To Matrix Paging (India) Pvt. Ltd.	11,783,045.00
To Telesistem (India) Pvt. Ltd.	8,315,238.00

32. The DRP required the assessee to submit the copy of account of all the five entities which was duly submitted. The assessee's case before the DRP was that though it has debited Rs.4,36,84,216/- in the profit & loss account but it has credited simultaneously the item 'other income' by an equivalent amount. Such credit to other income was out of write back of the provision made in FY 2000-01 of Rs.6,91,84,544/-. It was stated that the provisions so made in FY 2000-01 were not claimed as deduction by the taxpayer in the relevant year. For this purpose copy of total computation income for AY 2001-02 was submitted where the

provision for doubtful debts created during the year of Rs.6,91,84,545/- have been added to income and finally business loss of Rs.1,11,62,127/- computed. Further the item 'other income' for assessment year 2010-11 contains a sub item 'provisions no longer required written back of Rs.5,96,96,810/-, the break-up of which is as under:

Expense for which the provision is written back	***Amount (in Rs.)***
Amount of Tax Audit Fees for FY 2008-09	*5,929*
Amount of 10A Audit Fees for FY 2008-09	*7,170*
Provision for Special Additional Duty Refund for February and March 2008	*5,120*
Provision for Watch Scheme	*6,04,816*
Expense Wrongly booked	*(698)*
Provision for doubtful debts	*4,36,84,216*
Interest paid u/S 234C of the Act incorrectly booked as advance tax	*(21,201)*
Provision for Income Tax provided in FY 2005-06 to FY 2008-09 reversed as MAT credit has been taken	*1,50,51,413*
Transfer of excess credit balances in project expenses	*2,10,987*
Provision for other miscellaneous expense	*1,49,058*
Total	***5,96,96,810***

The DRP, on one hand held that addition of Rs.4,36,81,216/- should be deleted, because there was no impact on such debt in the net income computed in the P&L account; and on the other hand, in so far as amount of Rs.3,86,63,023/- was concerned, the DRP observed that this amount has not been routed through the books of account but deduction has been claimed directly u/s.36(1)(vii). The said bad debt pertains to

five entities whose outstanding amount of Rs.4,36,84,216/- and out of the said amount the assessee has claimed bad debt to the extent of Rs.3,86,63.023/-. Accordingly directed the Assessing Officer to examine that such debts should be actually written off as irrecoverable and debt should have been taken into account in computing the income of the assessee.

33. However, in the order giving effect the Assessing Officer has rejected the assessee's submission summarily holding that it cannot be conclusively held that amount of Rs.3,,86,63,203/- quantified the context prescribed u/s.36(1)(vii) r.w.s. 36(2) for allowing the bad debt.

34. After considering the submissions made by both the parties and on perusal of the relevant material referred to before us, we find that it is not in dispute that there were certain outstanding dues pertaining to earlier business and same has appeared in the books of account of CASIO India since financial year 2001-02. Later on, based on observations made by the statutory auditors, the amount was declared as bad debt and was written in the books of account. The provision was made in the Financial Year 2000-01 and no deduction was claimed on account of same in any of the year. The assessee had written-off this amount from the books of account in the relevant financial year, albeit the same was routed through the P&L account and the amount of provision that was created in financial year 2001-02 was written back

for sums amounting to Rs.4,36,84,216/- and simultaneously expenses for the same amount was booked as bad debt written off. Thus, it has been submitted that there was no impact on the P&L account as it was credited and debited with the same amount. Further, there were certain credit entries aggregating to Rs.50,21,193/- shown as other income from realization of debtors and after reducing the same, finally bad debt was claimed as Rs.3,86,63,023/- in the computation of income for the Assessment Year 2010-11. There is no dispute that amount which was considered as sales in the earlier financial year, was outstanding for a long period pertaining to aforesaid five entities, the details of which has been incorporated above.

35. Before us, the ld. counsel has also filed copy of ledger account of these parties right from the financial year 1998-99 onwards. Since assessee has credited other items the details of which has been incorporated by the DRP as reproduced above and net debt was claimed in the return of income. This amount of Rs.3,86,63,023/- ostensibly is part of the same amount of Rs.4,36,84,216/- which was actually in the nature of bad debt and has been written off in the books of account. Thus, all the conditions laid down for claiming of bad debt in accordance with Section 36(1)(vii) stands duly satisfied; and we find no reason as to why the Assessing Officer has made the disallowance, when assessee has produced all the copy of ledger account which contains amount taken as sales in the earlier years and same has been written off in this year.

Accordingly, the addition on account of bad debt is directed to be deleted.

36. Coming to the Revenue's appeal, only ground raised is against the direction of the DRP for allowing the deduction u/s.10A.

37. The facts in brief are that assessee has claimed deduction u/s.10A for its STPI Unit amounting to Rs.3217591/- and in support, Form 56F was filed claiming 100% of deduction u/s.10A. In the draft order, Assessing Officer has held that assessee was entitled to 50% as it was the 7th year of the claim after interpreting section 10A(1A) and after five years the assessee is only entitled to 50% of deduction for two years and thereafter 30% for next three years. Accordingly, he has restricted the allowability of Rs.16,08,796/-. The assessee submitted that the deduction u/s.10A has been claimed by it in the Assessment Years 2004-05, 2005-06 and 2006-07 which was allowed by the Assessing Officer and for the subsequent years the matter was in dispute before the ld. CIT (A).

38. The DRP threadbare analyzed the earlier provision of Section 10A inserted by Finance Act, 1981 and new Section 10A substituted by the Finance Act, 2000 w.e.f. 01.04.2001 and also CBDT No. 794 explaining the new provision substituting the new provision. However, analyzing the entire provisions, the DRP held that it is an undisputed fact that STP unit was set up in Financial Year 2001-02 and will be

entitled for full tenure of ten years for deduction. After relying upon CBDT No.5/2010, dated 03.06.2010, wherein the amended Section 10A and 10B were explained to extend the tax benefit uptill Assessment Year 2011-12. This circular clarified the amended provision to Section 10A (1) of the Finance Act 2010, whereby the date of sunset was extended by one more year, i.e., Assessment Year 2011-12. Accordingly, DRP held that the deduction u/s.10A is admissible to unit set up after even 01.04.2001 and the provision of Section 10A(1) as referred by the Assessing Officer would not be applicable in the case of the assessee because that was applicable only for SEZ, whereas the assessee is a STP unit.

39. After hearing both the parties and on perusal of the relevant findings given in the impugned orders, we find that it is an undisputed fact that assessee has claimed deduction u/s.10A for its STP unit. By the Finance Act, 2000 Section 10A was substituted w.e.f. 01.04.2001 wherein it was provided that deduction of profits and gains derived by an undertaking for the export of article, thing or computer software will be for the period of 10 consecutive Assessment Year beginning with the Assessment Year relevant to the previous year in which the undertaking to manufacture or produce such article, thing or computer software. The *proviso* to the said section provided that deduction shall not be allowed after 1st day of April, 2010. Later on, by Finance Act, 2010, there was an amendment in the *proviso* to Section 10A (1), whereby the sunset clause was extended by one more

year, i.e., Assessment Year 2011-12. The impact of said amendment would be that the unit set up in financial year 2001-02 will get full tenure of deduction, whereas any STP unit set up later on will get a limited tenure. Thus, assessee was entitled for deduction u/s.10A (1) wherein there was no such limit on claim of deduction. It was only in Section 10A (1A) which is applicable to SEZ, that such limit of time period for claim of deduction of 100%, 50% and 30% has been laid down. Since here in this case assessee is having a STP unit and not SEZ therefore, ld. DRP was correct in holding that provision of Section 10A (1A) will not apply, but Section 10A (1) only. Accordingly, the direction of the DRP is affirmed and Revenue's appeal is dismissed.

40. In the result, the appeal of the assessee is allowed and Revenue's appeal is dismissed.

Order pronounced in the open Court on 22nd April, 2019.

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

DATED: 22nd April, 2019

PKK: