INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1163/Del/2017
(Assessment Year: 2012-13)

BMW India Pvt. Ltd, 7th Floor, Tower-B, Building No. 8, Gurgaon PAN: AABCB7104C	Vs.	DCIT, Circle-1(1), Gurgaon
(Appellant)		(Respondent)

Assessee by :	Shri Percy Pardiwala, Sr. Adv Shri Divyanshu Agarwal, Adv
Revenue by:	Shri H. K. Choudhary, CIT DR
Date of Hearing	19/03/2019
Date of pronouncement	14/06/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee [BMW India Private Limited] against the order of the ld Deputy Commissioner of Income Tax , Circle 1 (1), Gurgaon [the ld AO] dated 24.01.2017 dated 2012-13 passed u/s 143 (3) read with section 144C of The Income Tax Act, 1961 (The Act) dated 24/1/2017. The assessee has raised the following grounds of appeal:-

"On the facts and circumstances of the case, and in law:

1. *The Learned Deputy Commissioner of Income-tax ('Ld. AO')/Transfer Pricing Officer ('Ld. TPO') pursuant to the directions of the Hon'ble Dispute Resolution Panel ('Hon'ble DRP'), have erred on facts and in law in enhancing the income of the Appellant by Rs. 86,88,34,124, by holding that the international transactions with Associated Enterprises CAEs') do not satisfy the arm's length principle envisaged under the Income-tax Act, 1961 ('the Act').*
2. *The Ld. AO / Hon'ble DRP, erred on facts and in law in enhancing the income of the Appellant by Rs. 81,05,72,232, by holding that the Appellant should have received reimbursement along with mark-up for Advertising, Marketing and Promotion ('AMP') expenditure from its AEs, alleged to be towards brand building for the AEs, and in doing so have grossly erred in:*

2.1 assuming jurisdiction in respect of the AMP expenditure when such expenditure did not satisfy the requisites of being an international transaction under Section 92B read with Section 92p'(v) of the Act;

2.2 not considering that there are no machinery provisions in Chapter X of the Act which are applicable to determine the quantum of transfer pricing adjustment made on account of AMP expenses;

2.3 misconceiving the facts by holding that the Appellant company was "promoting" BMW brand and creating marketing intangibles for the parent company; instead of appreciating that the Appellant company was only carrying out its business and AMP functions on its own account and had long term and exclusive distribution rights for the contracted territory;

2.4 failing to appreciate that once the Ld. TPO had accepted the international transactions in distribution segment to be at arm's length on the basis of Transactional Net Margin Method (TNMM) as the most appropriate method which takes into account AMP function performed by the Appellant as well as the comparable companies, separate analysis of the individual elements of cost, such as AMP, is inconsistent with the tenets of application of TNMM;

2.5 endorsing the approach that the Appellant has rendered a service to the AEs by incurring the AMP expense alleged to be towards brand building for the AEs, and by holding that a mark-up of Gross Profit/Sales ("GP/Sales") of the Appellant in respect of its distribution functions, has to be earned by the Appellant in respect of the AMP expenses;

3. The Ld. AO/Ld. TPO erred 011 facts and in law in performing an adjustment for AMP expenses allegedly to be towards brand building, 011 a protective basis, by holding that the assessee should have received reimbursement along with mark-up for AMP expenses from its AEs, and also by adjusting for differences in intensity of AMP function between the Appellant and the comparables, and in doing so grossly erred in:

3.1 making an adjustment on a protective basis which is bad in law and has no legal existence as per the provisions of the Act, hence void-ab-initio;

3.2 incorrectly holding that the AMP expense incurred by the Assessee to be "excessive" on the basis of a "bright line test" and not following the binding judicial principles as pronounced by higher courts, with the intent of making an adjustment; and

3.3 carrying out intensity based adjustment pursuant to the directions of the Hon'ble DRP and not giving cognizance to the fact that the Appellant is earning net margins commensurate to its intensity of functions, including the AMP functions performed, as compared with the comparable companies under TNMM even when adjusted for differential level of AMP expenditure;

4. *The Ld. AO/Hon'ble DRP grossly erred in disregarding various judicial pronouncements in India while proceeding to enhance the income of the Appellant.*

5. *The Ld. AO/Ld. DRP erred in enhancing the income of the Appellant by Rs. 5,82,61,892 by holding that the transaction pertaining to receipt of Information Technology ('IT') support services does not satisfy the arm's length principle envisaged under the Act and in doing so grossly erred in:*

   5.1 *rejecting the Transactional Net Margin Method ('TNMM') as the most appropriate method to test the said transaction without appreciating that the transaction is closely linked to the distribution/assembling functions of the Appellant and applying Comparable Uncontrolled Price ('CUP') Method in contravention of the provisions of Rule 10B of the Rules merely based on presumptions and holding the arm's length value of the transaction as Rs. 15,11,411;*

   5.2 *disregarding the separate transaction level analysis undertaken by the Appellant on a without prejudice basis during the assessment proceedings to benchmark the transaction of receipt of IT support services;*

   5.3 *failing to acknowledge the business efficacy of the transaction and the benefits received by the Appellant from the same; thereby challenging the commercial wisdom of the Appellant in making such payments while passing the order in contrast with the judicial pronouncements in this regard;*

   5.4 *disregarding the documentary evidences filed to substantiate the benefit received from receipt of such services; and*

   5.5 *ignoring that the facts and circumstances of the Appellant's case during the year remained unchanged when compared to AY 2007-08 and AY 2008-09 in which detailed audit and scrutiny was done with regard to the pricing and methodology of this transaction and subsequently no adverse inference drawn.*

CORPORATE TAX MATTER

6. *That on the facts and circumstances of the case and in law, the order passed by the Learned Assessing Officer ('Ld. AO') and the Learned Dispute Resolution Panel ('Ld. DRP') are bad in law.*

7. *On the facts and circumstances of the case, the Ld. AO has erred in facts and in law by rejecting the additional claim of interest on custom duty, interest on sendee tax, interest on excise duty, provision for warranty and deduction under section 80JJAA under the Income-tax Act ('Act') filed by way of a letter during the course of assessment proceedings.*

8. *That on the facts and in the circumstances of the case and in law, the Ld. AO has grossly erred by applying the decision of Hon'ble Supreme Court ('SC') in case of Goetze (I) Ltd. vs. CIT [284 ITR 323] by completely ignoring Circular N0.14 dated April 11, 1955 issued by the Central*

Board of Direct Taxes ('CBDT') which provides that all legitimate claims made by the taxpayer should be allowed.

9. *That the Ld. DRP erred on facts in observing that there is no evidence to substantiate the additional claim of deduction made by the appellant during the course of assessment proceedings.*

10. *That the Ld. DRP has erred on facts and in law, in completely ignoring the submission and details filed by the appellant substantiating that provision for warranty is made on scientific basis and is not contingent in nature.*

11. *That on the facts and circumstances of the case and in law, the Ld. DRP has erred in law, in classifying the interest due on Custom duty, service tax and excise duty as penal in nature which otherwise are compensatory in nature.*

12. *That on the facts and circumstances of the case and in law, the Ld. DRP has erred in not allowing the claim of deduction under section 80 JJAA of the Act.*

Common Grounds

13. *The Ld. AO has erred in initiating penalty proceedings under section 271(i)(c) of the Act for concealment and furnishing inaccurate particulars of income."*

2. The brief facts of the cases that Assessee Company is engaged in the business of manufacturing and trading of motor vehicles and related spare parts. It filed its return of income on 28/11/2012 showing income of INR 95,48,01,550/–. Assessee is a subsidiary of BMW holding B.V. Netherlands setup in 2006 as a sales subsidiary with an assembly plant in Chennai. 99.99% of the equity is held by Netherlands Company and 0.01% is held by BMW AG, Germany. The main business of the company was of the import, assembly, and sale of premium segment cars in India and operates as a normal sales subsidiary. It carried out assembly of knockdown kit (CKD) for BMW – 3, 5 X1 and X3 services from its assembly plant facility in Chennai. It is also engaged in the import and resale of completely built units (CBU) of six series 7 series, X5, Xt 6, and M models of cars from BMW group for resale in the Indian market.

3. It has entered into an international transaction of purchase of raw materials, purchase of traded vehicles, spare parts, and payment of interest on delayed payment to group companies. With respect to the purchase of raw material and traded vehicles, it adopted resale price method as the most appropriate method determining profit level indicator of gross profit/sales.

It selected certain comparable whose profit level indicator was 9.33% whereas the margin of BMW was 19.12% and therefore it was stated that the above transaction is are at arm's-length. With respect to the interest payment, it adopted transactional net margin method as the most appropriate method, determines the profit level indicator of operating profit/sales, and found that comparables profit level indicator was 2.59% whereas the BMWs PLI was 2.99% and therefore it was stated to be at arm's-length. With respect to the other transaction of purchase of fixed assets, commission received, receipt of IT support services and reimbursement of expenses, it adopted transactional net margin method as the most appropriate method determining profit level indicator of operating profit/sales and stated that PLI of comparable is 2.59% and the comparable of BMW is 2.99% and therefore the international transactions were at arm's-length. With respect of provision of procurement services, it adopted the transactional margin method as the most appropriate method determining profit level indicator of operating profit/total cost and stated that the PLI of comparable is 12.81 percent whereas the PLI of BMW is 10% and therefore it is at arm's-length. With respect to the payment of interest on foreign currency loan, it adopted CUP method as the most appropriate method and profit level indicator was determined at prime lending rate and stated that the comparables PLI is 14.46% whereas the PLI of assessee is 3.03% and therefore this transaction is at arm's-length.

4. The learned assessing officer referred to the learned transfer-pricing officer to determine the arm's-length price of the international transactions. The learned assessing officer issued notice on 8/1/2016 asking that why the adjustment because of AMP expenditure should not be made. The same was replied by the assessee on 21/1/2015. The learned transfer pricing officer from the audited annual accounts of the assessee company noted that assessee has incurred expenditure on advertisement, marketing and sales promotion expenditure of INR 1061703543/–. It was further stated that BMW group owns valuable intellectual property rights and other commercial or marketing intangibles and is involved in complex product development, manufacturing, and brand development operations. He further noted that expenditure on AMP has been incurred to promote the

BMW brand/trade name, which is owned by the associated enterprise. Such expenditure has resulted in brand building and increased awareness of the products bearing the BMW brand name/trade name. He further noted that in the transfer pricing study report the assessee has characterized itself as a distributor of group's products in India. The assessee objected to the above analysis of the learned transfer-pricing officer stating that assessee is a routine normal distributor, which employs routine intangible assets and bears normal risk associated with its operations. It was further stated that expenses incurred is not an international transactions as per section 92B of the income tax act. Assessee further objected to the adoption of the bright line concept by the learned transfer-pricing officer. However, the learned TPO rejected the explanation of the assessee holding that since the associated enterprises directly selling its products in India, it is in its own interest to push the advertisement expenditure of the assessee. According to him, this fact alone makes it abundantly clear that the parent-associated enterprise must compensate the assessee for the marketing intangibles and brand building created in India by the later for direct benefit of the appellant company. The learned transfer-pricing officer stated in para number 74 of his order that since the instant matter is subjudice before the various appellate forums the benchmarking is being initially done on protective basis in accordance with the stand of the Department. He further noted that the ratio of AMP/sales in the case of tested party, assessee has been computed at INR 4.74 percentage whereas of the seven comparables in the distribution segment shows that comparables average AMP/sales ratio is 1.33 percentages. Thus, the learned transfer-pricing officer noted that the value of gross sales of the assessee is INR 22,411,600,000. The AMP and sales ratio of the comparable is 1.32 percentages. Therefore the amount that represent the similar expenses on AMP by the acceptable comparable entities is only Rs. 29,58,00,000 and whereas the assessee has incurred the total AMP expenditure of INR 1,061,700,000. Therefore, INR 4,765,900,000 is an expenditure over and above similar expenses by the accepted comparable entities, which constitutes the international transactions and attributed to the associated enterprise towards buildup of intangibles that needs to be

suitably compensated by the associated enterprise. He further made an addition of Mark up at the rate of 19.12 percent of INR 146,500,000 and thus an adjustment u/s 92CA of INR 912,300,000 was proposed on protective basis.

5. The learned transfer-pricing officer also on substantive basis made an adjustment using the cost plus method for benchmarking of the AMP expenditure. He was also of the view that the learned dispute resolution panel in its order for assessment year 11-12 in assessee's own case has upheld that the AO/TPO's decision to use the cost plus method is justified. Therefore he found that the total advertisement expenditure of INR 1061703543/– was incurred by the assessee. Out of that he took advertisement, marketing and sales promotion expenditure amounting to INR 772519024/–. There from the reduced the sale support expenses and after sale support expenditure and derived the total AMP expenses of INR 6 80466951/–. He noted that the BMW India sale is Rs. 22411679254/– and therefore the AMP/sales ratio is 3.04 percentage. Thus he noted that INR 6 80466951/– is attributed towards advertisement marketing services rendered by the assessee for its parent associated enterprise for brand building. He further applied mark up at the rate of 19.12 percentage thereon of INR 130105281/– and therefore on substantive basis he proposed the adjustment of INR 810572232/– u/s 92CA of the income tax act.

6. With respect to the availing of the IT support services, titled as IGS by the assessee of INR 59773303/–, where the assessee noted that that these transaction are intrinsically linked to the primary business activity and operation of the assessee hence it has been aggregated and benchmarked accordingly, the learned transfer pricing officer rejected it and stated that none of the benefits stated to have been received a tangible or real and therefore out of the total payment of INR 59773303/– made by the assessee to its associated enterprise for intragroup services , he held that arm's-length price of such transaction is only INR 1511411/– on application of CUP method and therefore consequently he made an adjustment of INR 5 8261892/– to the ALP of IGS services availed by the assessee.

7. Consequently, he proposed an adjustment of Rs. 810572232/– being attribution of AMP expenditure and INR 58261892/– of IGS services totaling in all INR 868834124/– as per his order u/s 92 CA (3) of the income tax act dated 28/1/2016.

8. The learned assessing officer passed the draft assessment order on 15/3/2016 incorporating the above adjustment and further making an addition of INR 8741582/– being interest on income tax refund. Consequently against the returned income of INR 954801551/– the total income of the assessee was determined at INR 1831917411/–.

9. Assessee filed an objection before the learned dispute resolution panel who passed its direction on 12/12/2016 under section 144C (5) of the income tax act. The learned dispute resolution panel vide para number 15.5 of its direction directed the learned transfer pricing officer to compute the AMP adjustment by employing intensity adjustment method. The learned DRP also held that the protective adjustment made using the bright line method has been justified and is upheld. Further with respect to the intragroup services the contention of the assessee were dismissed and held that the learned transfer pricing officer is right in holding that the ALP of services to be RS. NIL .

10. Consequent of the direction of the learned dispute resolution panel the learned transfer-pricing officer passed an order giving effect to the direction of the learned dispute resolution panel on 12/12/2016. He worked out the adjustment applying the intensity adjustment using the transactional net margin method and according to that the difference between ALP and the reported margin is negative of INR (-) 1 74824339/–. Thus, he repeated the adjustment of INR 810572232/– on the basis of the cost plus method. As the adjustment because of IGS of INR 5 8261892/– was confirmed by the DRP he proposed an adjustment of INR 8 68834124/–.

11. Based on these directions of the learned dispute resolution panel and the order of the learned transfer pricing officer passed in pursuance of direction of the learned dispute resolution panel, assessment order was passed u/s 143 (3) read with section 144C of the income tax act, 1961 on 24/1/2017. The learned AO determine the total income of the assessee at INR

1831917410/–. Therefore the assessee is aggrieved with the order of the learned assessing officer has preferred this appeal before us.

12. Ground number 1 of the appeal is related to the overall transfer pricing adjustment. Ground number 2 relates to the adjustment on account of AMP expenditure on substantive basis. Ground number 3 relates to the adjustment on account of AMP expenditure on protective basis by applying bright line test. Ground number 4 relates to the reliance by the learned transfer-pricing officer on various judicial pronouncements. Ground number 5 related to the adjustment on account of IGS.

13. Ground number 1 of the appeal of the assessee is against the adjustment proposed by the learned transfer-pricing officer in appeal by the learned dispute resolution panel in general. As the specific grounds with respect to both the adjustment has been raised by ground number 2 – 5 of the appeal this ground of appeal is held to be general and hence dismissed.

14. Coming to ground number 2 – 4 of the appeal, with respect to the adjustment on account of the AMP expenditure and ground number 5 of adjustment related to the IGS services, The learned authorised representative vehemently submitted that identical issue arose in the case of the assessee for assessment year 2011 – 12 in ITA number 1514/del/2016 wherein as per order dated 25/1/2019 the identical issue has been decided. He submitted the copy of the order and referred to para number 6 onwards of that order to show that the issue is squarely covered in favour of the assessee. He referred to para number 30 of the order to show that bright line test was rejected to identify the existence of an international transaction. He further referred to para number 31 of that order to show that the revenue needs to establish the existence of international transaction. He further referred to para number 36 of the order wherein the earlier order in assessee's own case for assessment year 2010 – 11 is referred and distinguished. He further referred to para number 45 of that decision and stated that the revenue has failed to demonstrate by bringing any tangible material, evidence on record to show that international transaction does exist as far as the AMP expenditure is concerned. He further stated that during this year, also, there is no AMP reimbursement received by the assessee and therefore the facts are identical

as compared to the assessment year 2011 – 12. He therefore submitted that the issue of the determination of ALP with respect to AMP expenditure requires to be deleted.

15. Adverting to ground number 5, With respect to the IGS services, he referred to para number 48 onwards of that decision and stated that considering the decision of the coordinate bench in assessment year 2010 – 11 in ITA number 1406/del/2015 the matter has been remitted back to the TPO to determine the ALP of this transaction afresh and therefore for assessment year 2011 – 12 also the same has been set aside back to the file of the assessing officer. He therefore stated that this issue of the determination of a LP of IGS services is also required to be sent back to the learned transfer-pricing officer.

16. The learned departmental representative submitted that the issue has been decided by the ITAT in as his own case for assessment year 2010 – 11 and therefore it needs to be followed.

17. We have carefully considered the rival contention and perused the orders of the lower authorities. With respect to the adjustment on account of AMP expenditure, the issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessee's own case for assessment year 2011 – 12 in ITA number 1514/del/2016 dated 25/1/2019 as under:-

> "20. We have given thoughtful consideration to the submissions of both the sides. We have also considered the orders of the co-ordinate bench in assessee's own case in A.Y 2010-11 and the various judicial decisions relied upon by the ld. AR and by the ld. DR.
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> 21. A perusal of the transactions with related parties at page 128 of the paper book Volume I shows that there was a reimbursement of marketing/business promotion/other expenses from ultimate holding company amounting to Rs. 3,33,945/- in F.Y. 2009-10, which is not there during F.Y under consideration. This means that in the immediately preceding F.Y, the assessee itself has reported reimbursement of marketing/business promotion/other expenses, accepting the same as international transaction. On these peculiar facts

of F.Y. 2009-10, the coordinate bench came to the conclusion that AMP spend is an international transaction and set aside the assessment to the file of the Assessing Officer/TPO for determining ALP of international transaction of AMP spend afresh in accordance with the manner laid down by the Hon'ble High Court in Sony Ericsson Mobile Communications India Pvt Ltd. [supra]. 11

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

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

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

25. At clause 2.2, under the head “Responsibility in the Contract Territory”, it is mentioned “Furthermore, BMW India undertakes the following functions in the Contract Territory in accordance with the laws of the contracting territory: (i) establishment and supervision of an efficient BMW distribution network; (ii) performance of an adequate advertisement and sales promotion as well as public and media relations; and 12 (iii) collection, evaluation and communication of market information to BMW AG.”

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

promotion and advertising for the contract goods including available optional equipment and accessories".

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

28. There is no dispute that the TPO has made adjustment applying BLT which was enhanced by DRP though for a different reason. 13

29. At the outset, we have to state that the Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communications India Pvt Ltd vs CIT 374 ITR 118 has discarded the BLT. The Hon'ble High Court, at para 120 held as under:

> "120. Notwithstanding the above position, the argument of the Revenue goes beyond adequate and fair compensation and the ratio of the majority decision mandates that in each case where an Indian subsidiary of a foreign AE incurs AMP expenditure should be subjected to the bright line test on the basis of comparables mentioned in paragraph 17.4. Any excess expenditure beyond the bright line should be regarded as a separate international transaction of brand building. Such a broad-brush universal approach is unwarranted and would amount to judicial legislation. During the course of arguments, it was accepted by the Revenue that the TPOs/Assessing Officers have universally applied bright line test to decipher and compute value of international transaction and thereafter applied Cost

> Plus Method or Cost Method to compute the arm's length price. The said approach is not mandated and stipulated in the Act or the Rules. The list of parameters for ascertaining the comparables for applying bright line test in paragraph 17.4 and, thereafter, the assertion in paragraph 17.6 that comparison can be only made by choosing comparable of domestic cases not using any foreign brand, is contrary to the Rules. It amounts to writing and prescribing a mandatory procedure or test which is not stipulated in the Act or the Rules. This is 14 beyond what the statute in Chapter X postulates. Rules also do not so stipulate."

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

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

32. In this case, the Hon'ble High Court held that existence of an international transaction needs to be established de hors the Bright Line Test. The relevant finding of the Hon'ble High Court reads as under: 15

> "43. Secondly, the cases which were disposed of by the judgment, i.e. of the three Assessees Canon, Reebok and Sony Ericsson were all of distributors of products

manufactured by foreign AEs. The said Assessees were themselves not manufacturers. In any event, none of them appeared to have questioned the existence of an international transaction involving the concerned foreign AE. It was also not disputed that the said international transaction of incurring of AMP expenses could be made subject matter of transfer pricing adjustment in terms of Section 92 of the Act.

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

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51. The result of the above discussion is that in the considered view of the court the revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL. Secondly, the Court is of the view that the decision in Sony Ericsson holding that there is an international transaction as a result of the AMP expenses cannot be held to have answered the issue as far as the present Assessee MSIL is concerned since finding in Sony

Ericsson to the above effect is in the context of those Assessees whose cases have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding AMP expenses.

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60. As far as clause (a) is concerned, SMC is a non-resident. It has, since 2002, a substantial share holding in MSIL and can, therefore, be construed to be a non-resident AE of MSIL. While it does have a number of 'transactions' with MSIL on the issue of licensing of IPRs, supply of raw materials, etc. the question remains whether it has any 'transaction' concerning the AMP expenditure. That brings us to clauses (b) and (c). They cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of MSIL is "any other transaction having a bearing" on its "profits, incomes or losses", for a 'transaction' there has to be two parties. Therefore for the purposes of the 'means' part of clause (b) and the 'includes' part of clause (c), the Revenue has to show that there exists an 'agreement' or 'arrangement' or 'understanding' between MSIL and SMC whereby MSIL is obliged to spend excessively on AMP in order to promote the brand of SMC. As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i) (a) to (e) to Section 92B are described as 'international transaction'. 17 This might be only an illustrative list, but significantly it does not list AMP spending as one such transaction.

61. The submission of the Revenue in this regard is: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for

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

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68.....In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negatived by the 18 Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT"

33. In the light of the aforesaid finding of the Hon'ble High Court, before embarking upon a benchmarking analysis, the Revenue needs to demonstrate on the basis of tangible material or evidence that there exists an international transaction between the assessee and the AE. Needless to mention, that

the existence of such a transaction cannot be a matter of inference.

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

> "32. Under Sections 92B to 92F, the pre-requisite for commencing the TP exercise is to show the existence of an international transaction. The next step is to determine the price of such transaction. The third step would be to determine the ALP by applying one of the five price discovery methods specified in Section 92C. The fourth step would be to compare the price of the transaction that is shown to exist with that of the ALP and make the TP adjustment by substituting the ALP for the contract price.
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> 34. The TP adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE.
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> 35. It is for the above reason that the BLT has been rejected as a valid method for either determining the existence of international transaction or for the determination of ALP of such transaction. Although,

under Section 92B read with Section 92F (v), an international transaction could include an arrangement, understanding or action in concert, this cannot be a matter of inference. There has to be some tangible evidence on record to show that two parties have "acted in concert".

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37. The provisions under Chapter X do envisage a 'separate entity concept'. In other words, there cannot be a presumption that in the present case since WOIL is a subsidiary of Whirlpool USA, all the activities of WOIL are in fact dictated by Whirlpool USA. Merely 20 because Whirlpool USA has a financial interest, it cannot be presumed that AMP expense incurred by the WOIL are at the instance or on behalf of Whirlpool USA. There is merit in the contention of the Assessee that the initial onus is on the Revenue to demonstrate through some tangible material that the two parties acted in concert and further that there was an agreement to enter into an international transaction concerning AMP expenses. XXX

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

47. For the aforementioned reasons, the Court is of the view that as far as the present appeals are concerned,

> the Revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between WOIL and Whirlpool USA. In the absence of that first step, the question of determining the ALP of such a transaction does not arise. In any event, in the absence of a machinery provision it would be hazardous for any TPO to proceed to determine the ALP of such a transaction since BLT has been negatived by this Court as a valid method of determining the existence of an international transaction and thereafter its ALP." 21

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

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

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

> "We have examined the assessment order and do not find any good ground and reason given therein to treat advertisement and sales promotion expenses as a separate 22 and independent international transaction

and not to regard and treat the said activity as a function performed by the respondent-assessee, who was engaged in marketing and distribution. Further, while segregating / debundling and treating advertisement and sales promotion as an independent and separate international transaction, the assessing officer did not apportion the operating profit/ income as declared and accepted in respect of the international transactions."

38. In our understanding of the facts and law, mere agreement or arrangement for allowing use of their brand name by the AE on products does not lead to an inference that there is an "action in concert" or the parties were acting together to incur higher expenditure on AMP in order to render a service of brand building. Such inference would be in the realm of assumption/surmise. In our considered opinion, for assumption of jurisdiction u/s 92 of the Act, the condition precedent is that an international transaction has to exist in the first place. The TPO is not permitted to embark upon the bench marking analysis of allocating AMP expenses as attributed to the AE without there being an 'agreement' or 'arrangement' for incurring such AMP expenses. 23

39. The aforesaid view that existence of an international transaction is a sine qua non for invoking the transfer pricing provisions contained in Chapter X of the Act, can be further supported by analysis of section 92(1) of the Act, which seeks to benchmark income / expenditure arising from an international transaction, having regard to the arm's length price. The income / expenditure must arise qua an international transaction, meaning thereby that the (i) income has accrued to the Indian tax payer under an international transaction entered into with an associated enterprise; or (ii) expenditure payable by the Indian enterprise has accrued / arisen under an international transaction with the foreign AE. The scheme of Chapter X of the Act is not to benchmark

transactions between the Indian enterprise and unrelated third parties in India, where there is no income arising to the Indian enterprise from the foreign payee or there is no payment of expense by the Indian enterprise to the associated enterprise. Conversely, transfer pricing provisions enshrined in Chapter X of the Act do not seek to benchmark transactions between two Indian enterprises. 24

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

> "101. However, once the Assessing Officer/TPO accepts an d adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would as noticed above, lead to unusual and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the interlinked transaction. This would be also in consonance with Rule 10B(1)(e), which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the assumption that functions, assets and risk being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and

adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price 25 as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible."

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

XXXXX

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

XXXXX

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

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

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

It has to be so done only when there is anything in the facts and circumstances to so warrant or justify. In our considered opinion, no 27 new facts have emerged and all the facts brought on record during the course of scrutiny assessment proceedings do not indicate legally sustainable basis for remitting the matter to the file of the TPO.

45. Considering the facts of the case in totality, we are of the view that the Revenue has failed to demonstrate by bringing any tangible material evidence on record to show that international transaction does exist so far as AMP expenditure is concerned. Therefore, we hold that the incurring of expenditure in question does not give rise to any international transaction as per judicial discussion hereinabove.

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

47. This Ground of the assessee is allowed."

18. The ld DR could not show us any material to establish that there is an international transaction with respect to AMP expenses. He also could not distinguish the facts of the case of then assessee for this year with earlier years. As the facts are similar to the facts of the case of the assessee for assessment year 2011 – 12, respectfully following the decision of the coordinate bench in assessee's own case in earlier year, we also delete the adjustment on account of AMP expenditure. We also allow ground number 2 – 4 of the appeal of the assessee.

19. Ground number 5 of the appeal is relating to adjustment with respect to the intra-group services, which has also been covered by the decision of in earlier years in assessee's own case for assessment year 2010 – 11 and 2011 – 12 wherein the matter has been remitted back to the file of the learned assessing officer/transfer pricing officer for determining the AMP of this international transaction afresh. The findings of the coordinate bench

in appeal of the assessee for assessment year 2011 – 12 are at para number 48 – 56 of the appeal. No reasons were shown to us to deviate from those decisions. Therefore, respectfully following the findings of the coordinate bench in earlier years we also direct the learned AO/TPO accordingly. Accordingly, ground number 5 of the appeal of the assessee is treated as allowed for statistical purposes.

20. The ground number 6 of the appeal of the assessee is with respect to the corporate tax matters stating that the order passed by the learned assessing officer and learned dispute resolution panel is bad in law. No specific arguments were advanced against the general ground and therefore the same is dismissed.

21. Ground number 7 of the appeal of the assessee is with respect to the rejection of the claim of the assessee with respect to the additional claim of

    a. deduction of interest on custom duty,
    b. interest on service tax and
    c. interest on excise duty,
    d. provision of warranty and
    e. deduction u/s 80 JJAA of the act

22. Assessee rose above claims before the ld AO by way of a letter during the course of assessment proceedings but not filing any revised return of income. Ld AO did not entertain it simultaneously DRP also did not entertain it . There for assessee is in appeal.

23. The ld AR submits that the learned assessing officer has grossly erred by applying the decision of the honourable Supreme Court in case of Goetz India Ltd vs CIT 284 ITR 323 by completely ignoring the circular number 14 dated 11/04/1955 issued by the central board of direct taxes which provides that all legitimate claims made by the taxpayer should be considered and allowed. He submit that learned dispute resolution panel also rejected the claim of the assessee stating that there is no evidence to substantiate the additional claim of deduction made by the appellant during the course of assessment proceedings. He submitted that learned dispute resolution panel has completely ignored the submissions and details filed by the assessee substantiating that the provision for warranty is made on scientific basis and is not contingent in nature. He further stated that the

learned dispute resolution panel also did not consider that the interest due on custom duty, service tax and excise duty are not panel in nature but are compensatory in nature. With respect to the claim of the deduction u/s 80 JJ AA of the act he submitted that the claim of the deduction should be allowed to the assessee. The learned authorised representative also referred the letter dated 10/07/2015 wherein the claim is made before the learned assessing officer. He extensively referred to the various claims and stated that per se these are allowable expenditure and allowable claim of the assessee. With respect to the claim u/s 80 JJ AA of the income tax, he referred to the form number 10DDA of the income tax act and stated that the return of income has been filed by the assessee in time and therefore the claim of the assessee is allowable. He further referred to the decision of the honourable Bombay High Court in 349 ITR 336 wherein additional claim can be entertained by the learned assessing officer. He therefore submitted that the learned assessing officer/transfer pricing officer should be directed to consider the claim of the assessee on merits, which have been thrown at the threshold itself.

24. The learned departmental representative vehemently opposed the argument of the learned authorised representative and submitted that the assessee has failed to make any claim by filing the revised return, which is the only method for making a claim. As assessee has not made this, the learned assessing officer and the learned dispute resolution panel cannot be found fault with in rejecting the claim of the assessee.

25. We have carefully considered the rival contention and perused the orders of the lower authorities. Assessee has made an additional claim by letter dated 10/07/2015 before the learned assessing officer during the course of assessment proceedings but has not filed any revised return. The assessee has also submitted the revised computation of total income along with the report of the accountant for claim date of deduction u/s 80 JJ AA of the income tax act. All these documents have been placed before the learned assessing officer and the same are placed before us in form of the paper book containing 10 annexure. The issue is squarely covered in favour of the assessee by the decision of the honourable Bombay High Court in 349 ITR 336 (Bom) (2012) in Commissioner of income tax vs Pruthvi brokers and

shareholders private limited wherein it has been held that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities but is also entitled to raise additional claim before them. It is further held that the appellate authorities have the discretion to permit such additional claims to be raised. As the assessee has raised the claim on account of various issues supported by the computation of the total income as well as the report of the chartered accountant and further the original return of income of the assessee has also been filed in time, the claim of the assessee on all these account of deserves to be considered afresh. In view of this ground number 7 – 12 of the appeal of the assessee are set aside back to the file of the learned assessing officer with a direction to consider the claim of the assessee in accordance with law and decide the issue afresh after granting assessee proper opportunity of hearing. In the result ground number 7 – 12 of the appeal of the assessee are allowed accordingly.

26. Ground number 13 of the appeal of the assessee is against the initiation of penalty proceedings u/s 271 (1) (c) of the income tax act for concealment and furnishing of inaccurate particulars of income. This ground is premature at this stage and therefore the same is dismissed.

27. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 14/06/2019.

-Sd/-	-Sd/-
(KULDIP SINGH)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 14/06/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi