IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 1604/DEL/2014
[A.Y 2009-10]
&
ITA No. 1214/DEL/2017
[A.Y 2012-13]

Beam Global Spirits & Wine [India] Pvt Ltd, 12th Floor, DLF Building No. 10, Tower 'C' DLF Cyber City Phase II, Gurgaon.	Vs.	The Dy.C.I.T Circle-2(1) New Delhi
PAN: AAACA 1614 R		
(Applicant)		(Respondent)

Assessee By : Shri Deepak Chopra, Adv
Shri Harpreet Singh Ajmani, Adv
Shri Yujit Pareek, Adv

Department By : Shri Sanjay I Bara, CIT-DR

Date of Hearing : 17.07.2019

Date of Pronouncement : 21.08.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The assessee has preferred two separate appeals – one against the order dated 08.01.2014 framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] pertaining to A.Y 2009-10 and the other against the order dated 31.01.2017 framed u/s 143(3) r.w.s 144C of the Act pertaining to A.Y 2012-13. Since common issues are involved in both these appeals, they were heard together and are being disposed off by this common order for the sake of convenience and brevity.

ITA No. 1604/DEL/2014 [A.Y 2009-10]

2. The assessee is aggrieved by the transfer pricing adjustments on account of:

i)	Advertisement, Marketing and Promotion expenses [AMP]	Rs. 35.09 crores
ii)	Provision of marketing support services	Rs. 0.15 crores
iii)	Outstanding receivables from AEs as loan and imputing interest	Rs. 0.12 crores

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

4. Brief facts of the case are that the appellant company is one of the companies under the Beam Global Group and engaged in the business of manufacture, sale, marketing and trading of spirits and wine/liquor products/brands, owned by and licensed to the Beam Global group. Fortune Brands is the ultimate holding company of Beam India Holding whole of equity share capital of Beam India through its subsidiaries.

5. During the year under consideration, Beam India was primarily engaged in undertaking the following business activities:

i) Bottling operations and sale of Scotch whisky in India;

ii) Manufacture and sale of liquor products in India;

iii) Distribution operations which comprise of procuring the products/brands BUI from JBB CO US directly for sale in the

Indian domestic market which includes hostels, embassies, high commissions, consulates and retail outlet, clubs and restaurants; and

iv) Rendering marketing support services to JBBCO US in order to promote the sale of products/brands BIO of JBB Co US.

6. The international transactions entered into by the assessee during the year are as under:

S.No.	Nature of transaction	Value of International transaction	MAM
1	Purchase of compound Alcoholic Preparation	159120097	TNMM
2	Distribution of Imported Liquor	17280852	RPM
3	Provision of Marketing Support services	10782778	TNMM
4	Re-imbursement of expenses	19067033	No
5	Recovery of expenses	721078	No bench marking

7. The TPO did not interfere with the bench marking in respect of transactions at Sl. Nos. 1 & 4 and 5 above.

8. During the transfer pricing assessment proceedings, the TPO noticed that the assessee has incurred an extremely high level of advertising and market promotion expenditure [AMP]. The TPO was of the opinion that the objective of heightened level of AMP expenditure is to expand the reach of the AE's brand in India. Since the assessee is not the legal owner of the brand, therefore, the beneficiary of the efforts of the assessee is the AE as the brand value increases significantly given in the efforts of the assessee.

9. Referring to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, Edition 2010, the TPO formed a belief that investment in marketing intangibles is derived from amongst other company's level of AMP, particularly those that transcend from routine cost. The TPO was of the opinion that agent should be reimbursed or compensated for this additional AMP expenditure alongwith service charges. The TPO further observed that in order to promote the brand of the AE in Indian market and to develop market for products manufactured, the assessee company incurred huge expenditure, both on promotion of brands owned by the parent AE and on development of market in India. According to the TPO, promotion of brand of the AE and development of the market for

the product manufactured are not routine AMP expenditure and such sale promotion expenditure would not be incurred by a third party as this is a also incurred to meet the aspirational needs of a consumer to own a globally branded product.

10. After considering the facts and after perusing the documents, the TPO issued a show cause notice to the assessee proposing to use the mean/average ratio of AMP/sales of the comparables chosen by the assessee itself as the CUP to determine the routine AMP expenditure with companies in similar business profile of manufacture and sale of liquor.

11. The TPO determined the AMP expenditure as percentage of sales at 27.48% as under:

a)	Net sales	Rs. 141,93,73,422/-
b)	Advertising and sales promotion	Rs. 39,00,37,751/-
c)	AMP expenses	27.48%

12. The TPO further observed that other Indian companies which have been chosen by the assessee as its comparables and which are in similar line of business of manufacture and trading of alcoholic

beverages, which are having their own brands and manufacture branded goods, spend on an average, only 4.92% of their sales on AMP.

13. The following comparables were chosen:

Name of the company	Brands owned [Major]	Net Sales for the F.Y. 2008-09	AMP expenses [Rs. Cr]	AMP as a % of Net Sales
Associated Alcohols and Breweries Ltd	It is engaged in bottling for following brands, and hence does not own any brands; • London Bridge gin • James McGill whisky • Red & While whisky • Bombay Special whisky • Jamaican Magic rum	995596397	0	0
Empee Distilleries	POWER brand of Rum, Brandy and Whisky, Old Secret Brandy VICTORIA Rum, Sixer Rum & Ail Gold VSOP Brandy	6618456000	737000	.011%
GM Breweries	G.M.SANTRA, G.M. DOCTOR, GMLIMBU PUNCH, G.M.DILBAHAR SOUNF	2097343000	138000	.006%
IFB Agro Industries Ltd	Volga, Blue Lagoon, Leonov. The company also produces some brands of Diageo and UB.	2761745000	49267000	1.7%

Tagatjit Industries	AC Vodka, AC Rum, AC Neat, AC Brandy and others	5571576000	861565000 (only selling expense, no AMP)	15%
Kesar Industries	NA	2827928000	0	0
Khoday India Ltd	Peter Scot, Red Knight, Hercules Beer, Honeywell Brandy	1213999000	109657000	9.03%
Tilaknagar Industries	Castle Club, Classic, Mansion House, Savoy etc	2369681378	322864761	13.62%
ARITHMETICAL MEAN				4.92%

14. Comparing the AMP spend of the assessee to sales at Rs. 27.48% to the mean average of comparables at 4.92%, the TPO determined the ALP of reimbursement for brand promotion of marketing intangible of the AE in India as under:

Net Sales of the taxpayer = *Rs, 141,93,73,422/-*

Arm's length % of AMP Expenditure = 4.92%

Arm's length AMP Expenditure = *4.92% of*

= *Rs. 141,93,73,422/-*

= *Rs. 6,98,33,172/-*

Expenditure incurred by the tax payer on AMP = Rs. 39,00,37,751 /-

Expenditure incurred for developing the intangibles = Rs. 39,00,37,751 –

= Rs. 6,98,33,172

= Rs. 32,02,04,579/-

Add Mark up @15%	=	115% of Rs. 32,02,04,579/-
	=	Rs.36,82,35,266/-
Arm's length value for AMP activity	=	Rs. 36,82,35,266/-
Value received by the tax payer	=	NIL
Difference	=	Rs. 36,82,35,266/-

15. The assessee filed a detailed reply objecting to the proposed adjustment which did not find any favour with the TPO.

16. After excluding some of the comparables chosen by the TPO mentioned hereinabove, final comparables and their AMP /sales value taken by the TPO is as under:

Sl No	Name of the Company	AMP as a % of Net Sales
1	Associated Alcohols and Breweries	0
2	Empee Distilleries	.011%
3	GM Breweries	.006%
4	1FB Agro Industries Ltd	1.7%
5	Jagatjit Industries	15%
6	Kesar Industries	0
7	Khoday India Ltd	9.03%
8	Tilaknagar Industries	13.62%
9	Radico Khaitan Ltd	7.32%
10	Skol Industries Ltd	12.31%
Average = 5.98%		

17. Comparing the average of 5.98% of the comparables with those of the AMP spent of the assessee at 27.48%, the amount in excess of arms length, the amount of AMP was taken at Rs. 30,50,88,,252/- and after making further adjustment of mark-up based on PLR, final adjustment on account of AMP spent was made at Rs. 35,09,33,103/-.

18. The assessee vehemently agitated the matter before the DRP but without any success and accordingly, the Assessing Officer framed the assessment order u/s 143(3) r.w.s 144C of the Act.

19. Before us, the ld. AR stated that the revenue has failed to demonstrate that there exists any international transaction on account of AMP expenditure. It is the say of the ld. AR that the AMP expenditure is not covered by Indian Transfer Pricing Regulations. The ld. AR further pointed out that Bright Line Test applied by the TPO/Assessing Officer is contrary to the judgment of the Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communications India Pvt Ltd vs CIT 374 ITR 118 wherein the Hon'ble High Court has discarded the BLT. The ld. AR further pointed out that the TPO has adopted the same comparables used by the assessee and the assessee's

margin is higher than that of the comparables, therefore, no adverse inference should have been drawn.

20. It is the say of the ld. AR that in both scenario, i.e., margin including AMP and even margins after excluding AMP of the assessee is much higher than the margins of the comparables whether AMP expenses are included or not.

21. Per contra, the ld. DR strongly supported the findings of the TPO/Assessing Officer. The ld. DR pointed out that liquor is a consumer good, therefore, strong brand salience is extremely important for building a strong and sustainable market position. It is the say of the ld. DR that strong brands lead to customer loyalty, allow owners to charge a premium and also act as strong entry barriers for new players. The ld. DR stated that significant part of AMP spend goes to brand building. It is the say of the ld. DR that the TPO has used margins of the comparables as CUP and not as BLT and BLT is only a tool and not a method.

22. We have given a thoughtful consideration to the orders of the authorities below. At the very outset, we have to state that the Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communications India Pvt Ltd [supra] has discarded BLT. The Hon'ble High Court, at para 120 of its order, has held as under:

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

or test which is not stipulated in the Act or the Rules. This is beyond what the statute in Chapter X postulates. Rules also do not so stipulate."

23. 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 transactions 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.

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

> *"43. Secondly, the cases which were disposed of by the judgment, i.e. of the three 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 the Revenue's case is negated.*

XXX

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.*

XXX

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

under clauses (i) (a) to (e) to Section 92B are described as 'international transaction'. This might be only an illustrative list, but significantly it does not list AMP spending as one such transaction.

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

XXX

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

24. 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.

25. 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.*
>
> *XXX*
>
> *34. The TP adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE.*
>
> *35. It is for the above reason that the BLT has been rejected as a valid method for either determining the existence of international transaction or for the determination of ALP of such transaction. Although, under Section 92B read with Section 92F (v), an international*

transaction could include an arrangement, understanding or action in concert, this cannot be a matter of inference. There has to be some tangible evidence on record to show that two parties have "acted in concert".

XXX

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

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."

26. 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.

27. Considering the facts of the case in hand, in the light of judicial decisions discussed hereinabove, we are of the considered opinion that the Revenue needs to establish on the basis of some tangible material or evidence that there exists an international transaction for provisions of brand building services between the assessee and the AE.

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

> *"We have examined the assessment order and do not find any good ground and reason given therein to treat advertisement and sales promotion expenses as a separate and independent international transaction and not to regard and treat the said activity as a function performed by the respondent-assessee, who was engaged in marketing and distribution. Further, while segregating / debundling and treating advertisement and sales promotion as an independent and separate international transaction, the assessing officer did not apportion the operating profit/ income as declared and accepted in respect of the international transactions."*

29. 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 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.

30. 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.

31. The Hon'ble High Court of Delhi in the case of Soni Ericsson Mobile Communications India Pvt Ltd [supra] has held that if an 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 relevant findings of the Hon'ble High Court read as under:

> *"101. However, once the Assessing Officer/TPO accepts and adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would as noticed above, lead to unusual*

and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the inter-linked transaction. This would be also in consonance with Rule 10B(1)(e), which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the assumption that functions, assets and risk being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible."

32. In the light of the above, let us now examine the margins of the comparables vis a vis the margins of the assessee and the same are as under:

A.Y 2009-10

Particulars	*Revised OP/Sales (Exl AMP & S&D expense)*	*Revised OP /Sales(Exl AMP expense)*
Associated Alcohols & breweries Ltd.	*4.77%*	*3%*
Empe Distilleries	*5.95%*	*4%*

GM Breweries	7.57%	8%
1FB Agro Industries Ltd.	5.89%	6%
Jagatjit Industries	10.24%	-4%
Kesar Enterprises	11.88%	12%
Khoday India Ltd.	6.59%	2%
Tilaknagar Industries	30.28%	30%
Radico Khaitan Ltd.	21.51%	12%
Skol Industries Ltd.	6.18%	-1%
Average	11.09%	7.05%
Taxpayer	46.40%	34.77%

A.Y 2012-13

Particulars	Revised OP/Sales (Exl AMP & S&I)	Revised OP/Sales (Exl
Associated Alcohols & breweries Ltd.	9.18%	3.91%
Prag Distilleries Ltd.	13.09%	13.09%
Pearl Distilleries Ltd.	1.76%	1.49%
Winsome breweries Ltd.	8.18%	-0.45%
Utkal Distilleries Limited	-3.48%	-3.48%
Lords Distillery Ltd.	2.23%	2.23%
Silver Oak (India) Ltd.	14.33%	2.96%
Asansol Bottling & Packaging co. Pvt. Ltd.	12.45%	12.45%
Saraya Industries Ltd.	-0.11%	-3.68%
Average	6.41%	3.17%
Taxpayer	29.91%	29.91%

SUMMARY OF WORKING

Sl No	Assess-ment Year	Assessee			Comparables		
		Operating margins after including AMP and Selling and Distribution expenses	Operating margins after excluding AMP and Selling and Distributi	Operating margins after excluding AMP expenses	Operating margins after including AMP expenses	Operating margins after excluding AMP and Selling and Distribution	Operating margins after excluding AMP expenses
I.	2009-10	19.11%	46.40%	34.77%	3.71%	1 1.09%	7.05%
2	2012-13	6.75%	41.83%	29.91%	2.54%	6.4 1 %	3.17%

33. The aforementioned charts explain the entire story. Similar view was taken by the co-ordinate bench in the case of M/s Pernod Ricard [India] Pvt Ltd ITA No. 910/DEL/2015 and M/s Sennheiser Electronics India Ltd in ITA No. 7574/DEL/2017.

34. However, since the aforementioned working has been given by the assessee and needs verification, we therefore, restore this limited issue of verification of the aforesaid calculations to the file of the Assessing Officer/TPO with a direction to examine the aforesaid calculations and after being satisfied with the margins of the comparables, vis a vis that of the assessee, AMP adjustment should be

deleted. With these directions, Ground No. 1, with all its sub-grounds, is allowed.

35. The second quarrel is in respect of adjustment on account of international transaction pertaining to provision of marketing support services.

36. A perusal of the TP report of the assessee reveals the following:

> "Beam India undertakes support service of products/brands BIO sold by JBBCo., U.S. under Beam Global's brand names towards ISC and Indian GTR sales. The services, inter alia include the following:
>
> - Providing market information in relation to the potential market areas within the ISC sales and Indian GTR sales;
> - Coordinating and support providing support for timely and adequate delivery of products distributed by JBBCo., U.S. to ISC and Indian GTR sales.
> - Coordinating collection of payment fir ISC and India GTR sales
> - Providing such other information as it consider appropriate to JBB Co., U.S. in relation to ISC sales and Indian GTR sales.
> - Conducting marketing activities on behalf of JBB U.S. and
> - Undertaking such other service activities in relation to ISC sales and GTR sales as may be advised by JBB Co., U.S. from time to time.

13.2 As per the agreement between the assessee and the AE, the scope of activities is as follows:

JBB agree to engage the company for providing the marketing support services as described below and the company agrees to provide the marketing support service to JBB on such terms and condition as are agreed in this agreement and as agreed from time to time. The scope of the support service shall include, inter-alia, the following,

- To provide market information in relation to the potential market areas within the ISC sales & India GTR sales,
- To co-ordinate and provide support for timely and adequate delivery> of the products distributed by JBB to ISC sales & Indian GTR sales.
- To co-ordinate for timely collection of payments from ISC sales & Indian GTR sales.
- To provide such other information as it considers appropriate, to JBB in relation to ISC sales & Indian GTR sales.
- To conduct marketing activities on behalf of JBB.

♦> To undertake such other services activities as advised by JBB and agreed in relation to ICS sales & Indian GTR sales, from time to time.

The segment result as shown by the assessee is as follows:

Beam Global Spirits & Wine India Private Limited	
Particulars	March-09
Income	
Service income	13041903
Total Income	13041903
Expenses	
Personnel expenses	4497220
Administrative and other expenses	2233021
Selling and Distribution expenses	89458
Depreciation	223000
Total expenses	7042699
Operating profit	5999204
PLKnet cost plus markup)	85.18%
Net cost plus markup of comparable	10.44%

37. During the course of TP assessment proceedings, the TPO noticed that reimbursement for advertisement marketing has not been included in the cost base, leading to erroneous profit margin. The TPO was of the opinion that when the same is included in the cost base, it results in an operating loss. The TPO proposed to the assessee, vide letter dated 24.12.2012, that the so called reimbursement has to be

included in the cost base and as to the filters adopted by the assessee, the TPO made the following observations:

	Filter Used (for elimination)	*Remarks of this Office*
1	*Insufficient financial information*	*This is an appropriate filter. However, the companies with F.Y 2008-09 data must be selected and only data for FY 2008-09 is to be used.*
2	*Company with Nil Sales*	*This is an appropriate filter.*
3	*Sick or restructuring or abnormal financials*	*This is a suitable filter. However, with respect to abnormal financials alone cannot be a ground for rejection, it has to be seen on case to case basis.*
4	*Mfg/trading 25%*	*This is an appropriate filter*
5	*Companies with turnover more than 500 Crore*	*The appropriate filter would be Sales>1 Crore. There should be no upper limit on the sales*
6	*R&D expense> 5% of sales*	*This is not an appropriate filter. No reason has been given for adopting this filter.*
7	*Different functional profile*	*This is a correct filter. However, it has to be seen on case to case basis.*

8	*Excluding companies having RPT*	*This is a suitable filter. RPT 25% should be eliminated*

38. As to the comparables selected by the assessee, the TPO noted the following observations:

S.No,	Name of the company	Remarks of this office
1	Cyber Media India Online Limited	This company has been rejected in the accept-reject matrix of the assessee. Moreover, it has significant RPT for this year. Hence not a suitable comparable.
2		This is a suitable comparable.
3	Indiacom Ltd	Current year -12 months- data not available as the company has 18 month financial statement for the current year. Moreover, company is functionally
4	Times Innovative Media Ltd	Persistent loss making company. Hence, not suitable comparable.

39. As to the comparables rejected by the assessee, the following observations were made:

Sl. No	Name of comparable	Remarks of the assessee.	Remarks of this office.
1.	Basiz Fund Service Pvt Ltd	Functionally different	The company is engaged in providing support services to other companies- in preparing financial statements etc. Hence, a comparable company.
2.	Cameo Corporate Services Ltd	Functionally different	The annual report of the company has been perused. It is engaged in support services like Registry, transfer, archival and retrieval. Hence a comparable company.
3.	Global Procurement Con. Ltd	insufficient information	The relevant data is available. The company passes all the filters. Hence a suitable comparable.
4.	Killick agencies and Mktg Ltd	Functionally different	The annual report has been perused. The company acts as an agent for various foreign principals for sale and after sales services-AR-09-10. Hence suitable comparable.

40. After doing the aforementioned exercise, the TPO observed that as per the agreement between the assessee and the AE, providing support services are the main components of providing services. Agreement does not provide for reimbursement of these expenses. Therefore, the quantum of expenses related to the market support services claimed back as reimbursement is an integral part of these

services which has been reclaimed without an element of mark-up. The TPO further observed that no unrelated party would provide these services without an element of profit on it. Accordingly, he discarded the agreement of the assessee for not charging mark-up on alleged reimbursement of expenditure. Drawing support from various judicial decisions, the TPO was of the opinion that the legal form of an agreement is reimbursement in case of interpretation of documents and all that matters is substance of the document and not form. Finally, the Arm's Length Margin was computed as under:

Sl.	Name of the Company	OP/OC
1.	IDC (India) Ltd	10.93%
2	Basiz Fund Service Pvt Ltd	46.75%
3.	Cameo Corporate Services Ltd	14.95%
4	Global Procurement Con. Ltd	30.37%
5.	Killick agencies and Mktg Ltd	29.48%
	Average	**26.5%**

Arm's Length Margin	*26.50%*
Operating Cost	*26109732*
Arm's Length price	*33028811*
Price Received	*10782778*
Shortfall	*22246033*
Less: received as reimbursement	*19067033*
Adjustment to be made	*3179000*

41. Objections before the DRP were of no avail.

42. Before us, the ld. AR vehemently submitted that these reimbursements do not involve provision of any service by the appellant and the actual cost incurred is reimbursed and no mark up is applied on such reimbursement. The ld. AR further stated that inclusion by the TPO of reimbursement received on account of payment made by the assessee incurred by it on behalf of its AEs as operating revenue for the purpose of computation of profit margin is uncalled for which does not require any mark up for computation of profit margin. It is the say of the ld. AR that TP adjustments made by the TPO are not in consonance with the facts of the case. The ld. AR further argued on exclusion of the comparable Killick Agencies and Marketing Ltd on functional dissimilarity and inclusion of Cyber Media

India Online Ltd and Indiacom Ltd., as these comparables are functionally similar.

43. Per contra, the ld. DR strongly supported the findings of the lower authorities and in so far as the comparables are concerned, the ld. DR stated that under the TNMM, exact replica of the comparables cannot be found. Therefore, there is no fault in the comparables included by the TPO and excluded by the TPO.

44. We have given a thoughtful consideration to the orders of the authorities below. It is an undisputed fact that the assessee has not charged its P & L with expenditure incurred on account of marketing support services provided by the assessee to its AE and the amounts were reimbursed by the AE. As per the agreement between the assessee and the AE, scope of activities is clearly defined as mentioned elsewhere. In our considered opinion, routing of marketing support services through P & L is not correct. It is true that it is 'substance' over 'form' which has to be considered, but at the same time, it cannot be stretched in such a manner that the entire business set up gets disturbed. The assessee is providing marketing support services to its AEs and getting reimbursement on actual cost basis. Inference of

the TPO that no unrelated party would spend without any profit margin is, according to us, uncalled for as why would an unrelated party incur expenditure on behalf of someone unless and until he makes some profit out of it. But the same principle cannot be applied in case of related parties for the simple reason that if someone wants some expenditure to be incurred somewhere, he will obviously ask his related person or his associate to incur that expenditure on his behalf and, such incurring of expenditure is reimbursed at cost.

45. On perusal of the agreement between the assessee and the AE, and considering the scope of activities provided for marketing support services by the assessee to its AE, we are of the considered opinion that such reimbursement of expenditure at actual cost by the AE do not call for any mark-up on account of profit by the assessee. We find that for marketing support and coordination activity undertaken by the assessee for its overseas AEs, it is compensated by commission basis of sales.

46. Therefore, as far as these costs are concerned, the assessee does not add any value and does not undertake any risk whatsoever and acts only as a pass through agent. Even the OECD Guidelines at clause 7.36

provides that it would be sufficient for the AEs to reimburse such costs to the assessee without any mark-up for efforts expended by the assessee in undertaking marketing support and coordination activity for which it is already getting commission paid on sales. Moreover, it is not the case of the revenue that the assessee is in the business of providing advertisement, marketing and sales promotion services to unrelated parties. We, further find that the costs of running marketing support services and coordination services plus costs reimbursed considered together do not comprise a significant proportion of the total cost of the assessee. In our considered view, any benefit arising to the AEs is purely incidental and not intentional so as to warrant any mark up on the costs incurred by the assessee. Considering the facts of the case in the light of the agreement, we do not find any merit in the adjustment on account of mark-up on reimbursement of marketing support services and the same is directed to be deleted. We, therefore, do not find it necessary to dwell into inclusion/exclusion of the comparables. Ground No. 2 with all its sub grounds is allowed.

45. Last dispute relates to the enhancement of income by Rs. 0.12 crores by treating the outstanding receivables from AEs as loan and thereby imputing interest at the rate equal to SBI PLR + 150 basis points.

46. While examining the balance sheet, the TPO found that there were receivables which made the TPO to form a belief that payment for invoices raised by the assessee has not been received within the stipulated time. The assessee was asked to explain as to why such receivables should not be bench marked separately as international transaction. The TPO proposed to apply interest rate based on credit rating of the AE and in the absence of that the rating of the AE was proposed to be treated as BB to D category.

47. The assessee filed detailed reply and strongly objected to the bench marking of receivables on the ground that the receivables were not an international transaction which warranted bench marking. The assessee further objected on imputing an interest rate of 17.22% for the delay in the receipt of payments.

48. Reply of the assessee did not find any favour with the TPO who heavily relied on Explanation (1)(c) to section 92B which was inserted by the Finance Act, 2012 w.e.f 01.04.2002. The TPO was of the opinion that the statutory provisions and judicial decisions confer power on revenue authorities to disregard the 'form' of a transaction and look into its substance to ensure that the tax base of the country does not suffer unjust erosion.

49. The TPO proceeded by determining the applicable interest for bench marking the receivable and observed that under the CUP method the interest that is charged between unrelated parties under similar circumstances would be the arm's length interest. Thereafter, the TPO proceeded by examining the ratings for government bonds and after considering the ratings the TPO was of the firm belief that the yield rates for BB which is having the highest rating, should be applicable in the case of an assessee.

50. The TPO further observed that it is very difficult to get other tax payers in the similar circumstances so the interest rate that would have been charged in similar circumstances or the interest rate that the tax payer could have got by lending such money to private persons

in India or interest rate the company could have got from independent third party in India by lending such surplus money under comparable circumstances.

51. Considering all these circumstances, the TPO finally concluded by holding that the prime lending rate of SBI to which 500 basis points i.e. interest rate of 17.22% would be an arm's length level of interest that needs to be charged in this case for the deemed loan advanced and made an upward adjustment of Rs. 9,34,110/-.

52. Objections were raised before the DRP and after considering the facts and submissions, the DRP directed the TPO to verify the amount of receivables and in case the aggregate amount of receivables from the AEs does not exceed Rs. 50 crores, base rate of SBI should be taken plus 150 basis points and if the aggregate amount of receivable from AEs exceeds Rs. 50 crores, base rate of SBI plus 500 basis points should be taken.

53. Before us, the ld. AR vehemently stated that the delay of remittances cannot be recharacterized as unsecured loans/advances to the AEs and imputing of notional interest thereon is not in accordance

with law. The ld. AR further pointed out that even if bench marking of delay in receipt has to be done, the same should be done with internal comparables.

54. Per contra, the ld. DR strongly supported the findings of the TPO and placed strong reliance on Explanation (1)(c) to section 92B of the Act.

55. We have given a thoughtful consideration to the orders of the authorities below. We have carefully considered the rival submissions. In our considered view every indebtness cannot be construed to have arisen out of a loan transaction and interest is involved only in relation to a debt created out of loan transaction. For this proposition, we draw support from the decision of Hon'ble Supreme Court in the case of Bombay Steam Navigation reported in 56 ITR 52. This view further finds support from the decision of Hon'ble High Court of Delhi in the case of Kusum Healthcare Private Limited 398 ITR 66 wherein the Hon'ble High court, in the context of ‘receivables’ held that not every item of receivable will be considered as an international transaction of receivable and each receivable has to be seen on case to case basis. The relevant finding reads as under:

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

11. The Court finds that the entire focus of the AO was on just one AY and the figure of receivables in relation to that A Y can hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself."

12. It is not the case of the revenue that the impugned transaction is sham or bogus transaction, therefore, the re-characterization of the receivables as unsecured loans is uncalled for.

13. There is no dispute that remittances from unrelated third parties have also come with a time lag exceeding the agreed period and the undisputed fact is that the assessee has not charged any interest for delay in receipt of such remittances from unrelated parties. In the light of such undisputed fact any delay in remittances from associated enterprises should not be re-characterized as unsecured loans. We draw support from the decision of Hon'ble High Court of Bombay in the case of Indo American Jewellery Limited in ITA No.1053/2012 the relevant finding read as under

> "However, in the facts of the present case, the specific finding of the IT AT is that there is complete uniformity in the act of the assessee in not charging interest from both the Associated Enterprises and Non Associated Enterprises debtors and the delay in realization of the export proceeds in both the cases is same. In these circumstances the decision of the Tribunal in deleting the notional ifrterest on outstanding amount of export proceed realized belatedly cannot be faulted."

56. In light of the above, let us now examine the delay in receivables.

Sl No.	Invoice No.	Date of Invoice	Amount	Date of receipt of payment	Credit Period	Del av bev ond 30	Interest @ 17.22% p.a. for the delay
	Reimbursements receivable						
1	DEL/DBM/02/2008	30-Jun-08	1,953,780.00	30-0ct-08	122	92	84,801.55
2	DEL/DBM/03/2008	30-Sep-08	7,521,896.00	31-Dec-08	92	62	220,018.55
3	DEL/DBM/04/2008	31-Dec-08	9,549,457.00	20-Apr-09	110	80	360,420.05
4	DEL/DBM/01/2009	31-Mar-09	41,900.00	17-Jul-09	108	78	1,541,87
	Comm receivable						
1	DEL/COMM 003/2008	30-Jun-08	1,764,362.00	ll-Sep-08	73	43	35,792.86
2	DEL/COMM 004/2008	30-Jun-08	1,632,938.00	ll-Sep-08	73	43	33,126.72
3	DEL/COMM 005/2008	30-Sep-08	2,799,141.00	31-Dec-08	92	62	81,876.02
4	DEL/COMM 006/2008	30-Sep-08	321,918.00	31-Dec-08	92	62	9,416.23
5	DEL/COMM 007/2008	31-Dec-08	759,529.00	20-Feb-09	51	21	7,524.96
6	DEL/COMM 008/2008	31-Dec-08	1,092,709.00	20-Feb-09	51	21	10,825.90
7	DEL/COMM 001/2009	31-Mar-09	913,828.00	17-Jul-09	108	78	33,627.87
8	DEL/COMM 002/2009	31-Mar-09	1,498,353.00	17-Jul-09	108	78	55,13 7.7 5
	Total		29,849,811.00				934,110.34

57. In our considered view, since the receivables have been received by the assessee within ordinary time period, it cannot be recharacterized as unsecured loans and accordingly, no adjustment on account of delay in receipt of receivable can be made in the income of the assessee considering the fact that delay is not inordinate but reasonable. Considering the facts in hand, in totality, in light of the

factual matrix discussed hereinabove, vis a vis the judicial decisions on the point of issue, we are of the considered opinion that resorting to Explanation (1)(c) to section 92B is uncalled for. We, accordingly direct the Assessing Officer/TPO to delete the adjustment of Rs. 9,34,110/-. Ground No. 3 stands allowed.

58. Ground No. 4 is general in nature and needs no adjudication.

59. Ground No 5 has not been pressed and hence the same is dismissed as not pressed.

60. Ground No. 6 is premature and accordingly dismissed.

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

ITA No. 1214/DEL/2017 [A.Y 2012-13]

62. Ground Nos. 1 and 2 are general in nature and need no separate adjudication.

63. Ground No. 3 relates to TP adjustment on account of alleged excessive AMP expense under the presumption that the assessee has benefited the AEs.

64. An identical issue has been considered and decided by us in ITA No. 1604/DEL/2014 vide Ground No. 1. For our detailed discussion given therein, the TP adjustment is directed to be deleted.

65. Ground No. 4 is consequential to Ground No. 3. We direct accordingly.

66. Ground Nos. 5 to 13 are inter-related to Ground No. 3 and the same are accordingly disposed off.

67. Ground No. 14 relates to rejection of additional claim of expenses amounting to Rs. 84,26,731/- u/s 37(1) of the Act.

58. Facts on record reveal that during the course of scrutiny assessment proceedings, the assessee made a claim of Rs. 84,26,731/- u/s 37(1) of the Act by way of a letter alongwith all documentary evidences and relying upon the decision of the Hon'ble Supreme Court

in the case of Goetz [India] Ltd 284 ITR 323, the Assessing Officer did not entertain the claim of the assessee.

59. When the matter was agitated before the DRP, the DRP did not adjudicate on the additional claim.

60. Before us, the ld. AR vehemently argued that the CBDT vide Circular No. 14 dated 11.4.1955 has clearly directed the revenue authorities not to take advantage of the ignorance shown by the tax payers and all legitimate claim made by the tax payers should be allowed. Supporting the order of the Assessing Officer, the ld. DR stated that the claim may be examined and verified by the Assessing Officer.

61. We have given a thoughtful consideration to the orders of the authorities below. In our considered opinion, ratio laid down by Hon'ble Supreme Court in the case of Goetz [India] Ltd [supra] does not put any fetter on the appellate authorities to consider a legitimate claim even if the same is made by way of a letter. We, accordingly, restore this issue to the file of the Assessing Officer. The Assessing Officer is directed to examine /verify the genuineness of the claim

made by the assessee after affording reasonable opportunity of being heard to the assessee. The assessee is directed to furnish all details in support of its claim. Ground No. 14 is treated as allowed for statistical purposes.

62. In the result, the appeal of the assessee in ITA No. 1604/DEL/2014 is partly allowed and the appeal of the assessee in ITA No. 1214/DEL/2017 is partly allowed for statistical purposes.

The order is pronounced in the open court on 21.08.2019.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 21st August, 2019

VL/

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	