

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

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 1382/DEL/2016  
[Assessment Year: 2011-12]**

**&**

**ITA No. 1909/DEL/2016  
[Assessment Year: 2012-13]**

MSD Pharmaceuticals Pvt. Ltd  
1544, Level 15, Eros Corporate Towers  
Nehru Place, New Delhi

Vs. The Dy. C.I.T.  
Central Circle-17(1)  
New Delhi

PAN: AAECM 1106 C

**ITA No. 1563/DEL/2016  
[Assessment Year: 2011-12]**

The Dy. C.I.T.  
Central Circle-17(1)  
New Delhi

Vs. MSD Pharmaceuticals Pvt. Ltd  
1544, Level 15, Eros Corporate Towers  
Nehru Place, New Delhi

PAN: AAECM 1106 C

[Appellant]

[Respondent]

**Date of Hearing : 13.01.2020**

**Date of Pronouncement : 15.01.2020**

Assessee by : Ms. Rashmi Chopra, Adv

Revenue by : Shri Surendra Pal, CIT - DR

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER,**

The above cross appeals by the assessee and Revenue in ITA No. 1382/DEL/2016 and ITA No. 1563/DEL/2016 are preferred against the order u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] dated 28.01.2016 pertaining to assessment year 2011-12. The assessee has also preferred appeal in ITA No. 1909/DEL/2017 against the order dated 30.01.2017 framed u/s 143(3) r.w.s 144C of the Act pertaining to A.Y 2012-13. Since all these appeals pertain to same assessee involving common issues and were heard together, we are disposing them off by this common order for the sake of convenience and brevity.

2. The quarrel can be summarised as under:

(a) Applicability of Most Appropriate Method.

The Revenue has applied Transactional Net Margin Method [TNMM] whereas the assessee alleges Resale Price Method [RPM] is the Most Appropriate Method and whether subvention revenue is part of operating profit thereby affecting PLI.

(b) Adjustments on account of Advertising, Marketing Promotion [AMP] spent.

(c) Additions on account of corporate issues.

3. At the very outset, the ld. counsel for the assessee stated that all the issues have been decided by the co-ordinate bench in assessee's own case in Assessment Year 2010-11 in favour of the assessee and against the revenue. The order of the Tribunal has been furnished on record.

4. The ld. DR strongly supported the findings of the Assessing Officer and filed written submissions in support of his contentions.

5. We have given thoughtful consideration to the orders of the authorities below. The present appeals have been set aside to the file of the Tribunal by order of the Hon'ble High Court of Delhi in ITA Nos. 971 & 972/2012 judgement dated 13.11.2017 to decide the issues de novo on merits.

6. Similar was the fate in Assessment Year 2010-11 and the co-ordinate bench has considered the contentious issues in ITA No. 1423/DEL/2015 vide order dated 23.12.2019.

7. In so far as applicability of MAM is concerned, the relevant findings of the co-ordinate bench read as under:

"34. Now coming to the next issue raised, which is with regard to distribution segment. The Ld.AR for the assessee before us has pressed Ground of appeal No. 6 and pointed out that other transfer pricing issues would become academic in nature except Ground of appeal No.7 on the issue of subvention income whether operating revenue or not, if decided in favour of the assessee. So, we proceed to look at the said ground of appeal. The assessee is aggrieved by the orders of the authorities below in holding that the Transactional Net Margin Method was most appropriate method to be applied as against RPM selected by the assessee to be the most appropriate method. The case of the assessee was that it was not adding any value to the goods imported as it was only undertaking distribution activities and hence, RPM was the most appropriate method to be applied. However, TPO was of the view that on account of promotion of drugs, expenses were incurred which resulted in value addition and because of the same, RPM could not be held to be correct method. The Ld.AR for the assessee before us has relied on the following decisions:-

(i) ACIT vs Kobelco Construction Equipment India Ltd. [2017] 81 taxamnn.com 31 (Delhi-Trib.);

(ii) M/s. Celio Future Fashion Pvt.Ltd. vs ACIT ITA No.1928/Mum/2016(Mum.-Trib.) order dated 15.03.2019

35. The Ld. DR for the Revenue on the other hand placed strong reliance on the orders of the authorities below and pointed out that under RPM, there was requirement of high level comparability, whereas under the Transactional Net Margin Method there was tolerance range.

36. We have heard the rival contentions and perused the record. For deciding the aforesaid issue raised by the assessee under the distribution segment, we may refer to our decision in the paras above, wherein we have held that the expenditure incurred on promotion, advertisement and marketing by the assessee is not an international transaction to be benchmarked in the hands of the assessee. The case of the Assessing Officer/TPO in this regard was that since the assessee while undertaking the activities of the distribution had also incurred expenses which resulted in value additions and hence, RPM could not be applied. As we have already held that no adjustment is to be made on account of transfer pricing adjustment of AMP expenses in the hands of the assessee, the case of the Assessing Officer/TPO falls in the absence of any value addition. Accordingly, we hold that in the case of the assessee, RPM is the most appropriate method to be applied. In this regard, we find support from the ratio laid down by the M/s. Celio Future Fashion Pvt. Ltd. (supra) and Kobelco Construction Equipment India Ltd. (supra). The RPM method identifies the price at which product purchased from the AE is resold to unrelated party; then in the case of resellers, who do not alter the tangible goods and services or

use any intangible assets to add substantial value to the property or services i.e. resale is made without any value addition, then in such facts and circumstances, RPM method is to be applied as method to benchmark the international transaction undertaken. We hold so and allow the ground raised by the assessee on this issue. The Assessing Officer is directed to apply the RPM method in order to benchmark the international transaction undertaken by the assessee in the distribution segment, after allowing reasonable opportunity of hearing to the assessee. We only adjudicating Ground No.6 and all other grounds raised by the assessee in this regard, are not adjudicated, on the ground that the assessee itself had pleaded that the balance grounds of appeal would become academic in case Ground No.6 and the issue on AMP expenses is allowed in the case of the assessee."

8. In so far as subvention income is concerned and whether the same is part of operating margin, the relevant findings of the co-ordinate bench read as under:

*37. Now, coming to the last issue which is raised regarding subvention income received by its AE. While computing the operation margin of the assessee, the Assessing Officer noted that the assessee had received subvention income from its AE. Referring to the recitals in the sales agreement entered into by the assessee with MSD BV at pages 22 & 23 of the TPO's order,*

*it was concluded by the TPO that the subvention payment, was in the nature of compensation, was clearly an extraordinary item of income and should be excluded from the computation of operating income of the assessee. In this regard, reference was made to the Safe Harbour Rules introduced by Income Tax 16th Amendment Rules, 2013. He thus considered the subvention income as non-operating income, for the purpose of computation of PLI. It was also observed by the Assessing Officer vide para 5.35 at page 26 of the TPO's order that if the shortfall in the revenue of the assessee is compared vis-à-vis the subvention payment of Rs.77.12 crores, there was still shortfall of Rs.1.14 crores. Accordingly, he proposed to enhance the income of the assessee by Rs.19.27 crores. The said adjustment was made by the Assessing Officer in the draft assessment order and objections were rejected by the DRP and final assessment order was passed against the assessee. The assessee has raised Ground of appeal No.7 with regard to non-inclusion of subvention income as part of operating income.*

*38. The assessee has also raised additional grounds vis-à-vis the decision of the Assessing Officer/TPO on reliance of Safe Harbour Rules.*

*39. We have heard the rival contentions and both the authorized representatives. First of all the issue relates to the subvention income received by the assessee amounting to Rs.77.12 crores. As per the understanding between the parties vide clause 5 to schedule (A) of the sales agreement between*

*MSD India and MSD BV, it was agreed upon that since in the initial years of operation, it was anticipated that the assessee would incur significant start up operating cost and would incur losses in these years, so in order to assist the assessee in its initials years of operation, for transfer pricing purposes, MSD BV would make subvention payments to the assessee to reimburse part of operating expenses. The amount of the subvention payments were to be mutually agreed upon between the parties. It was further provided that "the transfer pricing subvention payments/reimbursement of operating expenses under the agreement, shall be payable as per the groups normal inter company payment procedures". The Ld.AR for the assessee referred to page 60 & 65 of the Paper Book to point out that subvention income received by the assessee has been offered as other income and has been brought to tax. This aspect is not disturbed by the authorities below as the TPO had not disturbed the benchmarking of distribution segment. The assessee further points out that the subvention payment was inextricably linked to the distribution activity carried on by the assessee. In the initial years, the assessee had incurred losses as these were its initial years of operations. So to reimburse part of the operating expenses, the AE made subvention payments to the assessee which may be considered as operating receipt of the assessee.*

*40. We find that similar issue arose before the Pune Bench of the Tribunal in Nalco Water India Ltd. vs ACIT in ITA No.742/Pun/2017, relating to Assessment Year 2012-13 order dated 06.09.2019 wherein intention to pay subvention amount was for limited period so as to ensure that the assessee therein did not become sick company. The assessee therein had also offered the said subsidy as taxable in its hands as noted by para 9 of order. Coming to the treatment of the subvention /subsidy received by the assessee from its parent company and whether the said subvention amount was operating in nature and the same had to be included as receipt in the hands of the assessee, while computing the PLI for the year under consideration, it was held as under:-*

*15. "We have heard the rival contentions and perused the record. The issue arising by way of ground of appeal No.2 is against treatment of subvention / subsidy received by assessee from its parent company Nalco, USA. The second issue which is raised on without prejudice basis vide ground of appeal No.11 is whether the said subvention amount is operating in nature and the same has to be includable as receipt in the hands of assessee while computing PLI for the year under consideration. The assessee was a subsidiary of Nalco, USA and since it was incurring losses, the parent company allowed promotional allowance to prevent the assessee from becoming sick company. This is evident from the Memo placed at page*

*139 of Paper Book and also from consequential Memo for approval of subvention and relevant e-mails and relevant documents thereto. The assessee received sum of Rs.65,19,47,000/- towards subvention. The assessee had offered the said amount as taxable in its hands initially but before the DRP, it was pleaded that the same was not taxable in its hands. The issue vis-à-vis its taxability i.e. receipt of subvention from parent company now stands settled by recent decision of Hon'ble Supreme Court in Siemens Public Communication Network (P.) Ltd. Vs. CIT (supra). The Hon'ble Supreme Court had held that voluntary payments made by parent company to its loss making Indian company can also be understood to be payments made in order to protect the capital investment of assessee company. It was further held that if that is so, then the payment in question could not be held to be revenue receipts, hence they were capital receipts in the hands of assessee. Similar proposition has been laid down by the Hon'ble High Court of Kolkata and Hon'ble Delhi High Court in different decisions.*

*16. Applying the said proposition to the facts of present case, where the assessee had received the alleged subvention amount or the subsidy as referred to by the Assessing Officer / TPO / DRP, the amount received by assessee from its parent company Nalco, USA was a*

*capital receipt in the hands of assessee and hence, was not taxable in its hands.*

*17. Coming to the next aspect of treatment of said amount while determining the PLI of assessee, the assessee claims that the amount is to be taken as operating income since the said receipt was to make good losses incurred by assessee in earlier years and also current year. The assessee has time and again stressed that taxability of receipt under the Income Tax Act cannot affect the calculation of operating margins of assessee, as the amount which had been received was during the course of its business i.e. preventing the assessee from going into losses, hence the recomputation of PLI in the hands of assessee.*

*18. The first question which arises is whether the capital receipt in the hands of assessee can be held to be operating in nature. While deciding the said aspect as to whether Nalco, USA had granted the assessee a onetime promotional allowance in order to save it from becoming sick, this aspect is to be seen from the fact that during the year under consideration the assessee had booked losses of Rs.63.16 crores in its Profit and Loss Account. Once the subsidy of Rs.65.19 crores was credited, there was profit of Rs.2.03 crores. In other words, profit during the year was attributable to subvention amount of Rs.65.19 crores and hence, it cannot be held that the*

*amount was not operational in nature. The item of receipt was undoubtedly, an exceptional item of income but was not an extraordinary item of income. The assessee was also compensated for additional revenue expenses incurred by it for transferring its establishment from Kolkata to Pune and then running the same at Pune. Such onetime payment received by assessee is thus, operating in nature. The learned Authorized Representative for the assessee had pointed out that the subvention amount related to two years. We hold that amount relatable to the year, need to be considered for computing PLI of the assessee. We direct the Assessing Officer to carry out the said exercise. As far as reliance on the decision of Mumbai Bench of Tribunal in the case of UPS Jetair Express Pvt. Ltd. (supra) is concerned, wherein the proposition laid down was since the subvention income had been offered to tax, then the same would be available to the assessee for set off against TP adjustment proposed by TPO. The said proposition will not be applicable to the issue raised before us since the Hon'ble Apex Court has decided the taxability of subvention income to be capital in nature and hence, the said income is not taxable in the hands of assessee and same would not be available as set off as against TP adjustment made by Assessing Officer/TPO. Accordingly, there is no merit in the directions of DRP in this regard. We in the final analysis hold that subvention income is capital receipt in the hands*

*of assessee, hence not taxable. Further, we hold that the said subvention amount is operating in nature and has to be included as operating income while computing PLI in the hands of assessee restricted to the amount relatable to the instant assessment year. Thus, ground of appeal No.2 raised by assessee against taxability of subvention income is allowed and ground of appeal No.11 also stands allowed in favour of assessee."*

*41. Following the same parity of reasoning, we hold that the subvention amount received by the assessee before us is operating in nature and the same has to be included as operating income, while computing PLI in the hands of the assessee. The assessee in the present appeal has not raised any issue about its taxability and hence, the said status is not disturbed. This Ground of appeal No.7 is allowed. "*

9. Respectfully following the findings of the co-ordinate bench [supra], we hold accordingly. Ground No. 6 with all its sub-grounds are allowed.

10. Coming to the adjustment on account of AMP spent is concerned, the co-ordinate bench in its order [supra] considered the issue at length and held as under:

"32. In the facts of the present case, the Assessing Officer/DRP/TPO have given a finding that there was no arrangement between the assessee and its AE, as far as incurring of AMP expenditure was concerned. However, the Assessing Officer/DRP/TPO observed that the AMP expenditure was an international transaction which had not been benchmarked by the assessee, which needed to be benchmarked and he goes on to determine the price of the said transaction by applying BLT. In the facts before us, we hold that the expenses which were booked by the assessee were for promotion of drugs, which undoubtedly have been imported by the assessee from its AE, but while spreading awareness to promote its sales, it cannot be said, in the absence of any agreement or arrangement to the contrary, that the assessee was promoting the brands of its AE. Since the expenditure incurred by the assessee was neither incurred at the instance or behest of its AE nor there was any understanding or arrangement between the parties to allocate or contribute any part of the expenditure or towards reimbursement of any part of AMP expenditure, then no transaction or international transaction could be said to be involved between the assessee and its AE. In the absence of the same, the incurring of the expenditure by the assessee for its needs of the business is purely a domestic transaction and not governed by any of the transfer pricing regulations. The Courts upheld that the onus is upon the Revenue to demonstrate that there existed an arrangement between the assessee and its AE under which the assessee was obliged to incur excess amount of

AMP expenses to promote the brands owned by the AE. In the case of the assessee, there is clear finding of the revenue that there was no such arrangement between the assessee and its AE.

33. There is no provision either in the Act or in the Rules to justify the application of BLT for computing the arms length price and also in the absence of BLT, the existence of an international transaction visà-vis the AMP expenditure cannot exist. Further, we hold that there cannot be a quantification of adjustment for determining the AMP expenses incurred by the assessee after applying the BLT, to hold the same to be excessive and thereby an existence of international transaction between the assessee and its AE. We find no merit in exercise carrying of Assessing Officer/DRP/TPO in this regard and delete the Transfer pricing adjustment made on account of AMP expenditure. Accordingly, we delete the adjustment on account of transfer pricing analysis of AMP expenditure."

11. As mentioned elsewhere, the Id. DR has strongly supported the findings of the lower authorities and through his written submissions, highlighted the OECD guidelines alongwith BEPS report on intangibles. The BEPS report can be summarised as follows:

"C.6 The salient points of BEPS report on Intangibles can be summarized as follows:

"In summary, the guidance contained in this chapter ensures that:

- Legal ownership of intangibles by an associated enterprise alone does not determine entitlement to returns from the exploitation of intangibles;
- Associated enterprises performing important value-creating functions related to the development, maintenance, enhancement, protection and exploitation of the intangibles should be appropriately remunerated;
- An associated enterprises assuming risk in relation to the development, maintenance, enhancement, protection and exploitation of the intangibles must exercise control over the risks and have the financial capacity to assume the risks, in accordance with the guidance on risks in Section D. 1.2 of the chapter "Guidance on Applying the Arm's Length Principle", including the very specific and meaningful control
- Entitlement of any member of the MNE group to profit or loss relating to differences between actual and expected profits will depend on which entity or entities the risks that caused these differences and whether the entity or entities are performing the important functions in relation to the development, enhancement, maintenance, protection or exploitation of the intangibles or contributing to the control over the economically significant risks and it is determined that arm's length remuneration of these functions would include a profit sharing element.

- An associated enterprise providing funding and assuming the related financial risks, but not performing any functions relating to intangible, could generally only expect a risk-adjusted return on its funding.
- If the associated enterprise providing funding does not exercise control over the financial risks associated with the funding, then it is entitled to no more than a risk-free return.
- The guidance on the situations in which valuation techniques can appropriately be used is expanded.
- A rigorous transfer pricing analysis by taxpayer is required to ensure that transfers of hard-to-value intangibles are priced at arm's length."

C.7 To sum up, the BEPS report clearly endorses adjustments on account of DEMPE of intangibles carried out when it states in paragraph 6.75 that "A key consideration in each case is that associated enterprises that contribute to the development, enhancement, maintenance, protection, or exploitation (DEMPE) of intangibles legally owned by another member of the group must receive arm's length compensation for the functions they perform, the risks they assume, and the assets they use. In evaluating whether associated enterprises that perform functions or assume risks related to the DEMPE have been compensated on an arm's length basis, it is necessary to consider (i) the level and nature of activity undertaken; and (ii) the amount and form of compensation paid." This recognition of the need for the compensation lays down a sound basis for justifying a transfer pricing adjustment in a case where DEMPE

functions are performed that benefit the associated enterprise. The BEPS report and the illustrative examples included therein, recognize that performing functions and incurring marketing expenditure substantially in excess of the levels of function and expenditure that an independent enterprises in comparable transactions incurs results in benefits to the associated enterprise for which he assessee requires to be compensated at arm's length

C.8 If the Indian entity is performing functions and incurring marketing expenditure, thereby providing benefits to the associated enterprise which is substantially in excess of the levels of function and expenditure of independent enterprises in comparable transactions, it is required to be compensated at arm's length by its AE.

C.9 The above clearly confirms that expenditure on advertisement, marketing and promotion leads to build-up of intangibles and such spend should be capitalized for proper reflection in the Balance Sheet. Failure to do so, as by the assessee in the instant case, calls for immediate compensation by the AE for the significant economic value created for the AE's brand by such advertisement spend. The OECD has also recognized that characterization of an intangible for general tax purposes may not hamper or distort its true characterization of being an intangible. Thus, OECD has reinforced the view that advertisement spend by the assessee leads to creation of an intangible and whatever characterization

has been given by the assessee for such advertisement spend for general tax purposes won't impact the creation of an intangible by the assessee for its AE, for which the former needs to be commensurately compensated with a mark-up.

C.10 From the above discussion, while it can be inferred that the TPOs are bestowed with the legal mandate for benchmarking of DEMPE functions. The AMP expense is an implicit transaction in the form of development, enhancement, maintenance, protection and exploitation (DEMPE) functions performed by the assessee which results in the creation and enhancement of marketing intangibles which is elaborately discussed in the BEPS report discussed in preceding paragraphs. In view of the above discussion, the additional evidences filed by the taxpayer should not be accepted and are liable to reject."

12. The OECD Guidelines highlighted by the Id. DR read as under:

"B. 6 This juncture, it is also relevant to note the following portion of the OECD guidelines, where the discussion is made, about the selection of the comparables.

"3.43 In practice, both quantitative and qualitative criteria are used to include or reject potential comparables. Examples of qualitative criteria are found product portfolios and business strategies. The most commonly observed quantitative criteria are:

- Size criteria in terms of Sales, Assets or Number of Employees. The size of the transaction absolute value or in proportion to the activities of the parties might affect the relative competitive positions of the buyer and seller and therefore comparability.
- Intangible-related criteria such as ratio of Net Value of Intangibles/Total Net Assets Value, or ratio of Research and Development ("R&D")/Sales where available: they may be used for instance to exclude companies with valuable intangibles or significant R&D activities when the tested party does not use valuable intangible assets nor participate in significant R&D activities.
- Criteria related to the importance of export sales (Foreign Sales/Total Sales), where relevant.
- Criteria related to inventories in absolute or relative value, where relevant.
- Other criteria to exclude third parties that are in particular special situations such as start-up companies, bankrupted companies, etc. when such peculiar situations are obviously not appropriate comparisons.

*The choice and application of selection criteria depends on the facts and circumstances of each particular case and the above list is neither limitative nor prescriptive."*

B.7 The above paragraph of the OCED guidelines clearly emphasizes the importance of relevant costs/sales and the use of intensity of such cost/sales as a factor of comparability for the purpose of identification of comparables. Accordingly, it is absolutely clear that intensity of functions, which is captured in the financial statements through line item of the cost debited in the PstL A/c is a relevant and important comparability criterion. In the present case, if there are differences in functions, (related to AMP or any other function), its manifestations are in the indirect expenses of the taxpayer and the comparables. This office having found that such differences do exist in the level of indirect expenses (as a percentage of sales) led to the conclusion that there are obvious differences in functions between the taxpayer and the comparables. Hence it becomes necessary for this office to apply Rule 10B(2) if a proper benchmarking exercise must be carried out.

B.8 The claim of the taxpayer that intensity of function need not be adjusted while computing arm's length is also opposed to judicial guidance. The Hon'ble ITAT Delhi has held in the case of Casio India Pvt. Ltd (ITA 4726/Del/2010) as follows.

*It is discernible that the prescription of Rule I OB is in complete harmony with the ratio of the judgment in the case of Sony Ericson Mobile (supra), to the effect that the AMR functions carried out by the taxpayer are required to be necessarily compared with the AMP functions carried out by a comparable entity in determining the AMP of ALP expenses. Difference between the functions, if capable of adjustment,*

should be given effect to in the profit rate of the comparable such difference cannot be given effect to, then, the probable comparable should be eliminated from the list of comparables.

A bare reading of the above judgments, rendered subsequent to and based on the judgment of Hon'ble High Court of Delhi in the case of Sony Ericsson clearly point to the conclusion that for the purpose of comparability with the entities carrying out distribution and marketing, only such comparables are required to be identified which are also carrying out both distribution and marketing functions. It is further held by the Hon'ble Tribunal that if no such comparables are identified which are carrying out both the functions in a similar manner, suitable comparability adjustment should be carried out to bring the comparables at par to the taxpayer

It is also relevant to note that the type of comparability adjustment mentioned in the OECD guidelines as an example is the segmentation of financial data to eliminate significant non comparable transactions, as reproduced below:

A. 6.1 Different types of comparability adjustments

"3.48 Examples of comparability adjustments include adjustments for accounting consistency designed to eliminate differences that may arise from differing accounting practices between the controlled and uncontrolled transactions; segmentation of financial data to eliminate significant •

comparable transactions; adjustments for differences in capital, functions, assets, risks."

If removal of financial data to eliminate significant non comparable transaction is a relevant comparability adjustment, matching the intensities of costs relevant to a function and attribution of costs signifying the carrying out of function should also be considered as a type of comparability adjustment only.

B. 9 The concept of comparability adjustment is recognized even by international guidance on transfer pricing. The United Nations Practical Manual on Transfer Pricing for Developing Countries, 2013 (UN TP Manual) makes the following remarks on the problem:

"5.1.5. A controlled and an uncontrolled transaction are regarded as comparable if the economically relevant characteristics of the *two* transactions and the circumstances surrounding them are sufficiently similar to provide a reliable measure of an arm's length result. It is recognized that in reality two transactions are seldom completely alike and in this imperfect world, perfect comparables are oft en not available. It is therefore *necessary* to use a practical approach to establish the degree of comparability between controlled and uncontrolled transactions. To be comparable does not mean that the two transactions are necessarily identical, but instead means that either none of the differences between them could materially

affect the arm's length price or profit or, where such material differences exist, that reasonably accurate adjustments can be made to eliminate their effect. Thus, in determining a reasonable degree of comparability, adjustments may need to be made to account for certain material differences between the controlled and uncontrolled transactions. These adjustments (which are referred to as "comparability adjustments") are to be made only if the effect of the material differences on price or profits can be ascertained with sufficient accuracy to improve the reliability of the results."

Thus, in light of discussion above, the submission of the assessee is baseless and needs to be rejected. "

13. After considering the w/s by the ld. DR, we are of the considered view that the co-ordinate bench has considered all the contentions and has decided the issue. Therefore, respectfully following the decision of the co-ordinate bench, Ground No. 7 with all its sub-grounds is allowed.

14. Coming to the corporate issue in Assessment Year 2011-12, we find that even before us, the ld. counsel for the assessee could not furnish any details/evidences. Therefore, we do not find any reason to interfere with the findings of the lower authorities. Ground Nos. 2 and 3 are accordingly dismissed.

15. Grievance raised by the revenue in its cross appeal is consequential to the findings given by us in assessee's appeal and accordingly, the Revenue's appeal is dismissed.

16. In the result, the appeal of the assessee is partly allowed whereas the appeal of the Revenue is dismissed.

17. Coming to the assessee's appeal for Assessment Year 2012-13, the quarrel is two-fold - one relating to the applicability of MAM and second, d in respect of adjustment made to AMP spent.

18. Both these issues have been decided by us in ITA No. 1382/DEL/2016 [supra]. For our detailed discussion and findings given therein, both the issues are allowed.

19. In the result, the appeal of the assessee is allowed.

20. To sum up, in the result:

ITA No. 1382/DEL/2016	Allowed
ITA No. 1909/DEL/2016	Partly Allowed
ITA No. 1563/DEL/2016	Dismissed

The order is pronounced in the open court on 15.01.2020.

Sd/-

[SUDHANSHU SRIVASTAVA]  
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]  
ACCOUNTANT MEMBER

Dated: 15<sup>th</sup> January, 2020.

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 Bench	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Bench	
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	