

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

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER  
AND  
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA Nos.2307 & 4757/Del/2013  
Assessment Years: 2007-08 & 2008-09

MakeMy Trip (India) Pvt. Ltd., Vs DCIT,  
243, Ground Floor, Tower-A, Circle-6(1),  
SP Infocity, Udyog Vihar, Phase-I, New Delhi.  
Gurgaon.

PAN: AADCM5146R

ITA Nos.2692 & 4974/Del/2013  
Assessment Years: 2007-08 & 2008-09

DCIT, Vs MakeMy Trip (India) Pvt. Ltd.,  
Circle-6(1), Plot No.103, Udyog Vihar, Phase-I,  
New Delhi. Gurgaon.

PAN: AADCM5146R

(Appellant)

(Respondent)

Assessee by	:	Dr. Rakesh Gupta, Advocate & Shri Somil Agarwal, Advocate
Revenue by	:	Shri Surender Pal, CIT, DR
Date of Hearing	:	04.03.2020
Date of Pronouncement	:	22.06.2020

ORDER

PER R.K. PANDA, AM:

ITA No.2307/Del/2013 filed by the assessee and ITA No.2692/Del/2013  
filed by the Revenue are cross appeals and are directed against the order dated 4<sup>th</sup>

February, 2013 of the CIT(A)-29, New Delhi, for assessment year 2007-08. ITA No.4757/Del/2013 filed by the assessee and ITA No.4974/Del/2013 filed by the Revenue are cross appeals and are directed against the order dated 28<sup>th</sup> June, 2013 of the CIT(A)-29, New Delhi, for the assessment year 2008-09 . For the sake of convenience, these cross appeals were heard together and are being disposed of by this common order for the sake of convenience.

ITA No.2307/Del/2013(by the assessee) & ITA No.2692/Del/2013 (by the Revenue) for A.Y. 2007-08

2. Facts of the case, in brief, are that MakeMy Trip (India) Pvt. Ltd. (MMT India) was incorporated on 13 April 2000 as a Private limited company in New Delhi, India. MMT India is engaged in the business of online selling of travel products and solutions. It offers comprehensive services for the global traveller including air tickets, hotel reservations, car bookings and holidays. MMT India caters exclusively to the inbound -into Indiaø leisure and small-business travel market. MMT India is focused on tapping the potential of the lucrative Rs.100 billion Non Resident Indian market in North America, United Kingdom and Australia. MMT India has offices in New Delhi (IATA certified location), New York and Sydney. In addition to this the Company has appointed franchise partners in London and all major cities in India. The company also has a network of leading tour operators to provide travel related services within all cities and over 30 countries internationally. It filed its return of income on 31<sup>st</sup> October, 2007

declaring the total income at nil, i.e., loss of Rs.32,72,39,840/-. Since the assessee had entered into certain international transactions with its AEs, the AO referred the matter to the TPO for determination of the ALP of the international transactions entered into by the assessee u/s 92CA(1) of the IT Act. The TPO, during the course of TP assessment proceedings, noted that the assessee has entered into the following international transactions:-

S.No.	Name of the transactions	Method	V a l u e (in Rs.)
1	Provision of tour and travel related	TNMM	5,167,031
2	Customer handling and Data Management Services	TNMM	45,486,861
3	Receipt of tour and travel related services	TNMM	164,026,775
4	Reimbursement of expenses paid	Cost-to-cost	36,001,993
5	Reimbursement of expenses received	Cost-to-cost	17,939,728
6	Issue of Share capital	NA	355,425,000

3. He noted that for benchmarking of the international transactions relating to tours and ticketing services and customer handling, data management services and telemarketing services to its group entity, the assessee has used external TNMM to benchmark the transaction using NCP (Net Profit Margin on cost) as its PLI. The assessee has used nine companies as comparables. The average arithmetic mean for three years of comparable companies were shown at 7.40% which is less than the NCP margin of the assessee at 12.02%. Accordingly, it was claimed to be at arm's length.

4. However, the TPO did not accept the arguments advanced by the assessee. He noted that the assessee has less charged Rs.31,81,07,110/- in the matter of

AMP expenses and, therefore, he proposed upward adjustment of the same. Without prejudice to these findings, he further noted that the assessee did not incur the expenses amounting to Rs.27,76,20,794/- claimed as Advertisement and business promotion expenses incurred wholly and exclusively for the purpose of its business. Such expenses which are not incurred wholly and exclusively for the purpose of the assessee and which are incurred to further the interest of other persons including the group companies cannot be allowed to be claimed against the taxable income. Further, nature of such expenses is capital nature since these are incurred to give enduring benefit to the multinational group trading in Indian market. Therefore, he held that the claim of such expenses which are neither wholly and exclusively incurred for the purpose of business of the assessee and which are incurred for creating brand name of a multinational group in India cannot be allowed to be claimed against the taxable income of the assessee. The TPO, invoking the brightline principle to arrive at the correct amount by which the assessee was required to be compensated/reimbursed, made addition of Rs.31,81,07,110/- on account of AMP services. Similarly, the TPO proposed an upward adjustment of Rs.1,47,93,024/- on account of ticketing and tours and travel packages. The AO accordingly made addition of Rs.33,29,00,134/- to the total income of the assessee on account of transfer pricing adjustment which included Rs.31,81,07,110/- on account of AMP services and Rs.1,47,93,024/- on account of ticketing and tours and travel packages.

5. The AO, invoking the provisions of section 14A r.w. Rule 8D made a disallowance of Rs.5,71,124/- to the total income of the assessee. Similarly, following the decision of his predecessor, the AO rejected the claim of depreciation on website development cost amounting to Rs.2,55,09,969/-. The AO accordingly determined the total income of the assessee at Rs.3,17,41,387/-

6. In appeal, the Id.CIT(A) deleted the addition of Rs.31,81,07,110/- made by the AO on account of adjustment of AMP expenses, but, restricted the adjustment of Rs.1,47,93,024/- on account of short charge to MMT US for ticketing services and tours/travel packages to Rs.50,000/-. So far as the disallowance u/s 14A is concerned, he restricted the same to Rs.73,910/- as against Rs.5,71,124/- made by the AO. So far as disallowance of depreciation on website development charges at Rs.2,55,09,969/- is concerned, he directed the AO with certain directions in the light of the decision of the Tribunal in assessee's own case for A.Y. 2004-05. However, neither the assessee nor the Revenue is in appeal before us against the above finding of the CIT(A) for which we are not concerned with the same.

7. Aggrieved with such part relief granted by the CIT(A), the assessee as well as the Revenue are in appeal before us by raising the following grounds:-

7.1 Grounds of appeal of the assessee:-

ØThe appellant respectfully submits as under:

Transfer Pricing (ØTP) Adjustment - 1NR 50,000

1. Under the facts and circumstances of the case and in law, the Ld. CIT (A) erred in upholding transfer pricing adjustment to the extent of INR 50,000 (out of total disallowance of INR 1,47,93,024) in regard to ticketing and tours and packages services provided by the appellant to its associated enterprise namely. Makeinytrip.com Inc. (MMT US).

Disallowance under section 14A of the Act- INR 73,910

2. Under the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in upholding the disallowance of INR 73,910 (out of total disallowance of INR 5,71,124 made by the AO) under section 14 A of the Act.

The above grounds of appeal are without prejudice to and independent of one another.

The appellant craves leave to add, supplement, amend, vary, withdraw or otherwise modify the grounds mentioned herein above at or before the time of hearing.

The appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.ö

## 7.2 Grounds of appeal of the Revenue:-

öThe order of the learned CIT (Appeals) is erroneous & contrary to facts & law:

1. On the facts and in the circumstances of the case, the learned CIT (A) erred in rejecting the transfer pricing approach of the Transfer Pricing Officer and thereby deleting the addition of Rs. Rs.31,81,07,110/- on account of adjustment of AMP expenses as computed vide order under section 92CA(3) of the Act dated 29.10.2011.

2. On the facts and in the circumstances of the case, the learned CIT (A) erred in rejecting the transfer pricing approach of the Transfer Pricing Officer and thereby restricting the adjustment of Rs.1,47,93,024/- on account of short charge to MMT, US for ticketing services and tours and travels packages service to Rs.50,000/-.

3. On the facts and circumstances of the case, the Ld CIT(A) has erred in rejecting the internal comparison made by the TPO, wherein both the segments were involved in similar business.

4. The Ld CIT(A) has erred in facts and circumstances of the case, in accepting the transfer pricing approach of the assessee.

5. The Ld CIT(A) has erred on the facts and circumstances of the case, in accepting the additions evidence u/s 46A when adequate opportunity was already provided to the assessee during the course of the TP/assessment proceedings.

6. The Ld CIT(A) erred on the facts and circumstances of the case, in concluding MMT to be an Indian brand without appreciating the business model of the assessee.

7. The Ld CIT(A) has erred on the facts and circumstances of the case, in concluding that the AMP expenditure of the assessee rendered in the nature of service to its AE is not an international transaction.

8. On the facts and circumstances of the case, the Ld CIT(A) erred in restricting the disallowance under section 14A of the Act computed in accordance with Rule 8D of the I.T. Rules at Rs.73,910/- as against 571,124/- computed by the A.O.

9. The Ld CIT(A) has erred in excluding expenses on growth oriented units from the purview of section 14A on the ground that no dividend is generated from them, despite the fact that profit from transfer of a unit of an equity oriented fund is either exempt u/s10 (38) of the Act or is taxable at a lower rate u/s111A of the Act.

10. That the appellant craves leave to add, alter, amend or forgo any ground(s) of the appeal raised above at the time of the hearing.ö

8. Ground Nos.1 to 7 by the Revenue and ground No.1 by the assessee relate to the order of the CIT(A) in deleting the addition of Rs.31,81,07,110/- on account of adjustment of AMP expenses and restricting the addition of Rs.1,47,93,024/- for ticketing services and tours and travel services packages to Rs.50,000/-.

9. The ld. DR strongly supported the order of the TPO. He submitted that the assessee had spent Rs.31,36,22,787/- on AMP out of which Rs.3,60,01,993/- has been reimbursed to it by the subsidiary MakeMy Trip Inc. This was 50.40% of assessee's operating income of Rs.62.22 crores. The assessee had selected nine

comparable companies from the ITES sector for benchmarking the charge received by it from MMT US for its back office activity for rendering ticketing services and tours and travel related services to MMT US. Out of the nine companies selected by the assessee, financials of six companies for F.Y. 2006-07 were available. The remaining three companies had spent 40.0583% of the sales as AMP expenses as against 50.40% in case of the assessee. Therefore, applying the same benchmark, the TPO had determined the excess AMP expenses by the assessee at Rs.313,259,999/-. The ld. DR submitted that the TPO has rightly made the addition of the above amount to the total income. He submitted that because of the development of brands in India, the US company is capitalizing that brand building and developing brand in US. Therefore, to some extent, the AMP expenses has to be considered for the purpose of TP adjustment. However, the TPO has not done any adjustment. Further, the CIT(A) has accepted certain additional evidences and given relief to the assessee. Therefore, he submitted that the matter should be restored back to the file of the TPO for fresh adjudication of the issue. So far as the short charge of Rs.1,47,93,024/- on account of ticketing and tours & travel packages is concerned, he submitted that the TPO has given justifiable reasons while proposing upward adjustment. Therefore, the same should be upheld.

10. The ld. Counsel, on the other hand, heavily relied on the order of the CIT(A). He submitted that the ld.CIT(A) has given a categorical finding that the brand is owned by the assessee and not by the US company. Further for the A.Y.

2010-11 the Department has accepted that it is not an international transaction. So far as the additional evidences filed before the CIT(A) are concerned, he submitted that these are only for the AMP expenditure and the documents are vital. Referring to the decision of the Honøble Delhi High Court in the case of *CIT vs. Virgin Securities and Credits P. Ltd., reported in 332 ITR 396*, he submitted that the Honøble High Court in the said decision has held that before admitting the additional evidences, the CIT(A) had obtained a remand report from the AO. The additional evidence was crucial to the disposal of the appeal and had a direct bearing on the quantum of the claim made by the assessee. Rule 46A of the Income-tax Rules, 1962 permits the CIT(A) to admit additional evidences if he finds that the same is crucial for disposal of the appeal. He submitted that the Id.CIT(A) in the instant case has obtained a remand report from the AO. Therefore, the Revenue should not have any grievance since the AO was given due opportunity of being heard before admission of the additional evidence which is vital for determination of the case in hand.

10.1. Referring to the decision of the Honøble Bombay High Court in the case of *Prabhavati S. Shah, reported in 231 ITR 1*, he submitted that the Honøble High Court in the said decision has held that if prima facie information is necessary for the claim of the assessee, the CIT(A) should consider the necessary evidence in exercise of his power u/s 250(4) of the Act. It has been held that when a statutory authority has the powers to do something, then, it has a corresponding duty to

exercise such powers whenever circumstances warranting exercise of such powers exist.

11. He also relied on various other decisions filed in the case law compilation and synopsis.

12. So far as the argument of the Id. DR that AMP expenses was not incurred by the assessee wholly and exclusively for the business of the assessee and was capital in nature is concerned, the Id. Counsel for the assessee, referring to the decision of the Honøble Delhi High Court in the case of *CIT vs. Salora International Ltd.*, 308 ITR 199, submitted that the Honøble High Court in the said decision has held that where the assessee incurred advertisement expenditure for launching products and the Tribunal had given the finding that the assessee had to incur such expenditure to meet the competition in the market for selling the product, then, the entire expenditure is allowable as revenue expenditure and the finding of the Tribunal does not call for any interference and, therefore, no substantial question of law arises.

12.1 Referring to the decision of the Honøble Delhi High Court in the case of *CIT vs. Monto Motors Ltd.*, vide ITA No.978/2011, order dated 12<sup>th</sup> December, 2011, he submitted that the Honøble High Court has upheld the decision of the Tribunal where the Tribunal has held that the advertisement expenses when incurred to increase the sales of products are usually treated as revenue expenditure. Since the

memory of purchaser or customer is short, advertisements are issued from time to time and the expenditure is incurred periodically, so that the customers remained attracted and do not forget the products and its qualities. Advertisement and sales promotion are conducted to increase the sale and their impact is limited and felt for a short duration and no permanent character or advantage is achieved and is palpable, unless special or specific factors are brought on record.

12.2 Referring to the decision of the Honøble Delhi High Court in the case of *CIT vs. Jubilant Food Works India Pvt. Ltd., reported in 271 CTR 227*, he submitted that the Honøble High Court in the said decision has held that expenditure incurred by the assessee on advertisement expenses is revenue in nature since no permanent character or advantage is achieved via the same and such expenses for advertising the consumer products generally are a part of the process of profit earning and not in the nature of capital outlay. So far as the order of the CIT(A) in restricting the addition on account of transfer pricing adjustment in regard to ticketing and tours & travel package services to Rs.50,000/- is concerned, the Id. Counsel submitted that the same addition was sustained by the CIT(A) on the basis of and without prejudice to the arguments taken by the assessee before the CIT(A). However, no addition is called for.

13. We have considered the rival arguments made by both the sides, perused the orders of the AO the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions relied upon by both the sides. We

find, the TPO, in the instant case, has made transfer pricing adjustment of Rs.33,29,00,134/- which comprises of two additions, i.e., on account of AMP services of Rs.31,81,07,110/- and ticketing and tours & travel package services of Rs.1,47,93,024/-. So far as the addition on account of AMP services of Rs.31,81,07,110/- is concerned, it is the case of the TPO that the assessee has less charged the above amount from its AE. According to the TPO, the assessee had spent Rs.31,36,22,787/- on AMP out of which only Rs.3,60,01,993/- had been reimbursed to it by its subsidiary MakeMy Trip.com Inc. This was 50.40% of the assessee's operating income of Rs.62.22 crores. Since, according to the TPO, out of the nine comparables selected by the assessee, the financials of six companies for A.Y. 2006-07 were available and the remaining three companies had spent only 0.05% of sales as its AMP as against 50.40% in the case of the assessee, the TPO concluded that the assessee had spent excessively of AMP of Rs.31,32,51,999/- meaning thereby that as against Rs.31,36,22,787/- spent by the assessee on AMP, only Rs.3,62,788/- should have been spent. The TPO, therefore, treated this excess AMP expenses as international transaction and inferred that it was for promotion of MakeMy Trip brand only for which the assessee should have been compensated. It is also the case of the TPO that the beneficiary of this excess AMP was parent company MMT Mauritius since, later on, MMT Mauritius had listed 50 lakh shares at USD 15 each totaling to USD 70 million on Nasdaq, USA on 13<sup>th</sup> August, 2010. According to the TPO, MMT Mauritius has been benefitted by the listing of the company in the US at a premium. According to the TPO, when the assessee

MMT India was in losses, the shares of its parent MMT Mauritius were being quoted at a premium at Nasdaq IN USA. Therefore, the beneficiary of excess AMP expenses by MMT India was MMT Mauritius. Therefore, MMT Mauritius should have compensated MMT India for services rendered in connection with promotion of marketing intangibles which accrued to the benefit of MMT Mauritius. It is also the case of the TPO that even otherwise also such huge expenditure of AMP should have been capitalized since the assessee derives an enduring benefit.

14. We find, the Id.CIT(A) after obtaining a remand report from the AO had given a finding that the assessee is the owner and sole beneficiary of MakeMy Trip or MMT brand since the trade mark -MakeMy Trip has been registered in the name of MakeMy Trip (India) Pvt. Ltd., w.e.f. 25<sup>th</sup> April, 2006. Even the TPO himself at various places of his order has accepted that MMT India is the owner of MMT brand. We find the Id. CIT(A) had also given a finding that neither the share premium received from incoming shareholders upon IPO listing nor steady value creation in the hands of founder/existing shareholders be deemed to qualify as any kind of benefit accruing to MMT Mauritius under the provisions of the Act. Further, he has also given a finding that the AMP expenses incurred by the assessee is wholly and exclusively for the purpose of business and not capital in nature. While admitting the additional evidence, he had also given justifiable

reasons as to why he has accepted the same under Rule 46A of the IT Rules. The relevant findings of the CIT(A) from para 7 onwards read as under:-

7.0 Finding:

7.1 During the course of appellate proceedings, the appellant furnished a copy of agreement dated 01.04.2006 between appellant and MMT Mauritius. It also furnished a list of 3 new comparables viz. Thomas Cook, Cox & King, Shree Raj Travels & Tours for tire purpose of application of bright line test, Since these documents were not furnished before AO, these were sent to AO requiring him to furnish his remand report u/r 46A. The AO furnished his remand report vide letter dated 03.12.2012, The appellant also furnished a rejoinder to it vide letter dated 28.12.2012. I have considered both remand report and the rejoinder in context, of factual matrix of the case. The AO has argued that adequate opportunities were provided to the appellant during assessment stage and therefore there is no case u/r 46A for admission of these additional evidences. The appellant has argued that intercompany covenant has been furnished to substantiate its claim that the brand is owned by the appellant, a fact which even the AO has not explicitly denied. Further, financials of 3 new comparables have been furnished because the AO has wrongly taken comparables of ITES companies which were taken by the appellant for the purpose of bench marking its receipts from provision of ticketing & tour and package services to MMT Inc. US. It is seen that the appellant has taken this plea before the AO also but it was not considered. The AO did not ask for copy of intercompany agreement during assessment stage to verify the actual ownership of the brand. Therefore, considering the fact that these additional evidences are vital to decide the relevant issue, I hereby admit the additional evidence u/r 46A.

7.2 After considering the TPO/AO's orders and the arguments of the appellant, I am of the considered view that appellant is the owner and sole beneficiary of the MakeMyTrip or MMT brand. The trademark 'MakeMyTrip' has been registered in name of MakeMyTrip (India) Pvt. Ltd. w.e.f. 25.04.2006 as evidenced by registration certificate dated 29.10.2008 issued by Government of India, Registrar of Trade marks. Further, Para 2 of the intercompany covenant dated 01.04.2006 establishes beyond all doubt that MMT India is the owner and sole beneficiary of MMT brand. Even the TPO himself has indicated at various places of his order his acceptance that MMT India is the owner of MMT brand. Therefore Bright Line Test or Arm's Length AMP Expenditure Test suggested in the OECD Guidelines/Australian Tax Office Guidelines/ US case laws, which is relevant only in the context of promotion of brand owned by the foreign AE, is not applicable in the appellant's case. The said bright line test comes into operation in a situation where a business enterprise is incurring excessive AMP expenditure for promoting a brand owned by its foreign AE. Based on appellant's submissions

and evidences placed on record, it is explicitly clear that the appellant is the sole beneficiary of the AMP expenses. A Special Bench of Honøble Delhi Tribunal in case of LG electronics India Pvt. Ltd. v ACIT ITA No. 5140/Del/2011 (judgment dated 23.01.2013) has taken a view that a tacit understanding could be assumed between brand owner and brand licensee regarding excess AMP spend by the licensee, but that assumption is applicable only in cases where the Indian entity promotes brand owned by its foreign affiliate. In appellantø case, it is the appellant who owns the brand. Therefore, provisions regarding armø length price would not apply to the appellantø case. It has been found that MMT Mauritius has also got ñMakeMyTripø mark registered in its name in Mauritius w.e.f. 19.07.2011 vide registration certificate dated 14.10.2011. The appellant has explained that it has been done to protect future business interests of the appellantø planned business operations in Mauritian territory. Even this future event has no bearing on the fact that the appellant is both legal and economic owner of the brand ñMakeMytripø The MMT Mauritius is only an investment company as its audited financial statements for the year ending 31.03.2007 shows only interest income and nothing else. It is pertinent to mention that MMT Mauritius had been granted a Category 1 Business licence w.e.f. 05.05.2000 and conditions as mentioned in said licence certificate mention that the stated purpose of the company is to engage in investment holding activities.

7.3 Further, I concur with the contentions of the appellant that neither share premium received from incoming shareholders upon IPO listing nor steady value creation in the hands of founder / existing shareholders be deemed to qualify as any kind of ñbenefitø accruing to MMT Mauritius under the provisions of the Act. Share issue at a premium does not give any benefit to the company. If the company decides to buy back these shares, the premium has to be returned to the shareholders who sell the shares. And if the shareholders sell the shares in the market, the premium is earned by the shareholder & not by the company. In any case, if because of robust economic growth of a company, there is appreciation in market value of capital investment of its shareholders, then the company has no legal, economic or moral right to get reward/compensation from its shareholders out of such appreciation.

7.4 Lastly, in view of a plethora of case laws on the subject including those cited by the appellant in paragraph 6.3 above, I have no hesitation to hold that the AMP expense of appellant is wholly and exclusively for the purposes of its business and further it is not capital in nature. The AO has not given any reasons in his order to substantiate his observations that AMP expense of the appellant are not wholly and exclusively for the purpose of its business and these are in nature of capital expenses.

7.5 Since, it has been held that the appellant does not render any services in connection with promotion of marketing intangibles which accrue to the

benefit of MMT Mauritius; there is no question of applying a mark up for determining the compensation.

7.6 Therefore, addition of Rs 31,81,07,110 made on account of AMP expense is deleted. This disposes of grounds of appeal no. 8 to 15.ö

15. We further find from the submissions made by the Id. Counsel that from A.Y. 2010-11 onwards, the Department has accepted that such AMP expenses is not an international transaction and no addition has been made by the AO. From the various details furnished by the assessee, it is seen that the following AMP expenses were incurred by the assessee from A.Y. 2010-11 to 2016-11 and the TPO has not considered the same as an international transaction:-

Assessment Year	AMP expenses	Whether it was considered international transaction by TPO?
2010-11	461,907,373	No
2011-12	577,466,197	No
2012-13	807,126,413	No
2013-14	604,210,658	No
2014-15	811,585,225	No
2015-16	690,400,000	No
2016-17	4,741,800,000	No

16. So far as the ground raised by the Revenue relating to acceptance of additional evidence is concerned, we find that the Id.CIT(A), in the instant case, has called for a remand report from the AO and, thereafter, only has admitted the same and has given his finding on the basis of such additional evidence. The

Honøble Delhi High Court in the case of Virgin Securities and Credits P. Ltd. (supra) has held that when the additional evidence was crucial to the disposal of the appeal and had a direct bearing on the quantum of the claim made by the assessee, Rule 46A of IT Rules, 1962 permits the CIT(A) to admit the additional evidence if he finds that the same is crucial for the disposal of the appeal. The various other decisions relied on by the Id. Counsel for the assessee also support his case that when the evidences are very important for effective adjudication of the grounds raised by the assessee in the appeal and when the CIT(A) forwards these additional evidences to the AO for his comments in the shape of a remand report, then, the same is required to be admitted. It has also been held in various decisions that if the evidence goes to the very root of the matter and essential for rendering substantial justice, then, the same is required to be admitted. Since, in the instant case, the Id.CIT(A) has forwarded those additional evidences to the AO for his comments in the shape of a remand report and since the additional evidence goes to the root of the matter and are essential for rendering substantial justice, therefore, we do not find any merit in the grounds raised by the Revenue for admission of such additional evidence in violation of Rule 46A of the IT Rules.

17. So far as the grievance of the Revenue that the AMP expenses incurred by the assessee is capital in nature is concerned, we find the Honøble Delhi High Court in the case of Salora International Ltd. (supra) has observed as under:-

õ3. The first issue that is sought to be raised in this appeal pertains to advertising expenditure of approx. Rs. 3.08 crores. According to the AO, the

expenditures was incurred for launching of its products. The AO was of the view that such expenditure was of an enduring nature and, therefore, treated one-third as "capital expenditure" and only allowed the two-thirds of the said amount as "expenditure, to the assessee". The CIT(A) allowed the entire amount after treating the expenditure as "revenue expenditure". The findings of the CIT(A) were confirmed by the Tribunal by virtue of the impugned order. Particularly, the Tribunal held that there was a direct nexus between the advertising expenditure and the business of the assessee and that the assessee had to incur such expenditure to meet the competition in the Indian market for selling its products in India. A finding was returned that unless the assessee made its products known to the market, its business would suffer. Consequently, the Tribunal held the entire expenditure on advertising to be of a revenue nature and allowed the same. The Tribunal also noted the decision of the Supreme Court in the case of *Empire Jute Co. Ltd. vs. CIT* (1980) 17 CTR (SC) 113 : (1980) 124 ITR 1 (SC) wherein the Supreme Court held that there could be cases where the expenditure even if it was incurred for obtaining of a benefit of an enduring nature may, nevertheless, be on the revenue account and, in such cases, the test of "enduring benefit" may breakdown.ö

18. We find the Honøble Delhi High Court in the case of *Jubilant Foodwork Pvt. Ltd. (supra)* has held that the expenditure incurred by the assessee on advertisement expenses is revenue in nature since no permanent character or advantage is achieved via the same and such expenses for advertising consumer products generally are a part of the process of profit earning and not in the nature of capital outlay. Similar view has been taken by the Honøble Delhi High Court in the case of *CIT vs. Monto Motors Ltd. (supra)*.

19. In view of the above discussion and in view of the detailed order passed by the CIT(A) on this issue and considering the fact that the Revenue in assessee's own case for AYs 2010-11 onwards has not considered such AMP expenses as international transaction, therefore, we do not find any infirmity in the order of the

CIT(A) in deleting the addition of Rs.31,81,07,110/- on account of adjustment of AMP expenses as computed u/s 92CA(3) of the IT Act.

20. So far as the order of the CIT(A) in restricting the adjustment of Rs.1,47,93,024/- on account of short charge to MMT US for ticketing charges and tours and travel package services to Rs.50,000/- is concerned, we find the Id.CIT(A) while deciding the issue has observed as under:-

ö10.0 Finding;

I have carefully gone through various submissions of the appellant. I find force in the appellant's contention that comparison of gross profit mark ups earned by the appellant from öTicketingö and öTour Management Servicesö rendered to MMT US can not be compared with the corresponding mark ups earned from rendering of similar services to other customers because the efforts made by MMT US for acquisition of customers, marketing and business development expenditure etc and the business risks assumed by MMT US would not be factored in such comparison. If at all this comparison has to be made, then corresponding expenses incurred by MMT US ought to be factored in, as was accepted by my predecessor in appeal for AY 2005-06. The appellant has worked out that approximately 16.44 percent of AE's operating expenses will be allocated to the appellant since the appellant will receive 16.44 percent of the total gross profit of AE if the TPO's approach is applied. Accordingly, Rs. 1.474 crores (being 16.44 percent of the AE's operating expenses amounting to Rs. 8.965 crores) is required to be allocated to the appellant. After such factoring in, the addition to be made on this account would remain Rs.50,000 only as per working furnished by the appellant. Therefore, following the reasoning of then CIT(A) given in appellate order for AY 2005-06, out of Rs 1,47,93,024 added by the AO, addition of only Rs 50,000 is upheld and the balance Rs 1,47,43,024 is deleted. The grounds of appeal no. 3 to 7 are therefore partly allowed.ö

21. We do not find any infirmity in the order of the CIT(A) on this issue. We find, while restricting the addition to Rs.50,000/- as against Rs.1,47,43,024/- added by the AO/TPO, he has upheld the order of his predecessor for A.Y. 2005-06. The assessee had also given the break-up on the basis of the finding given by

the CIT(A) in A.Y. 2005-06. Nothing substantial was brought to our notice either by the Ld. AR or by the Id. DR against the finding given by the Id.CIT(A) on this issue. We, therefore, uphold the same and the ground raised by the assessee and the Revenue on this issue are dismissed. Accordingly, ground of appeal Nos.1-7 filed by the Revenue and ground No.1 raised by the assessee are dismissed.

22. Ground of appeal No.8 and 9 filed by the Revenue and ground of appeal No.2 by the assessee relate to the part relief given by the CIT(A) out of the addition made by the AO u/s 14A of the IT Act.

23. After hearing both the sides, we find, the AO, invoking the provisions of section 14A r.w. Rule 8D, made disallowance of Rs.5,71,124/- to the total income of the assessee. We find, the Id.CIT(A) restricted such disallowance to Rs.73,910/- by observing as under:-

¶12.0 I have carefully considered the contentions raised by the appellant, assessment order and factual matrix. During the year, the appellant held the following investment in mutual funds:

Name of Plan	Nature of Plan
G 148 Standard Chartered Fixed maturity - 4 <sup>th</sup> plan growth	Growth plan
Prudential Life Liquid institutional Plus Plan	Growth Plan
Prudential ICICI FMP series 27 Monthly Plan	Dividend re-investment plan

I find that out of the three mutual funds, two viz. G148 Standard Chartered Fixed Maturity - 4th Plan Growth and Prudential Life Liquid Institutional Plus Plan, are growth oriented i.e. no dividend is payable on these units, and hence section 14A would not be applicable in case of interest expense relatable to investment in those units. In case of third mutual fund viz. Prudential ICICI

FMP Series 27 Monthly Plan, it is dividend yielding Dividend Re-investment Plan and hence disallowance under section 14A is called for. Investment in this plan was Rs 5 crore at the beginning of the year and it was sold during the year on 20.6.2006 i.e. after 80 days, meaning thereby that there was average investment of  $5 \times 80 / 365 =$  Rs 1.10 crore in these units during FY 2006-07 . Disallowance of Rs 5,71,124 had been made by the AO against average investment of Rs 8.5 crore in these three mutual funds. Therefore disallowance against average investment of Rs 1.10 crore would be  $5,71,124 \times 1.10 / 8.5 =$  Rs 73,910. The AO is Thus, disallowance u/s 14A is confirmed to the extent of Rs. 73,910 and the AO is directed to give relief accordingly. The grounds of appeal no. 16 to 19 are accordingly partly allowed.ö

24. It is the submission of the Id. Counsel for the assessee that he has not received any exempt income during the year and, therefore, he has no objection if the same is restored to the file of the AO for verification of the issue in the light of the decision of the Honøble Supreme Court in the case of Cheminvest Ltd., 387 ITR 33 wherein it has been held that in absence of any exempt income, no disallowance u/s 14A can be made. Since the issue requires verification at the level of AO, therefore, we deem it proper to restore this issue to the file of the AO with a direction to find out as to whether the assessee has, in fact, received any exempt income and decide the issue in the light of the decision of the Honøble Supreme Court in the case of Cheminvest (supra). Needless to say, the AO shall give due opportunity of being heard to the assessee and decide the issue as per fact and law. We hold and direct accordingly. Grounds No.8 and 9 filed by the Revenue and ground No.2 filed by the assessee are accordingly allowed for statistical purposes.

25. Ground No.10 filed by the Revenue being general in nature is dismissed.

26. In the result, the appeals filed by the assessee and the Revenue are partly allowed for statistical purposes.

ITA No.4757/Del/2013 (By the assessee) & ITA No.4974/Del/2013 (by the Revenue) (Assessment Year: 2008-09)

27. Grounds of appeal of the assessee read as under:-

øThe appellant respectfully submits as under:

Disallowance under section 40(a)(ia) of the Act of Payment Gateway Charges-

INR 10,93,40,316

1. Under the facts and circumstances of the case and in law, the Ld. CIT (A) erred in upholding the disallowance of INR 10,93,40,316 under section 40(a)(ia) of the Act, being the aggregate amount paid by the Appellant to the banks for availing Payment Gateway facilities.

2. Under the facts and circumstances of the case and in law, the Ld. CIT (A) erred in holding that the amount paid to the banks for availing Payment Gateway facilities, which are standard facilities provided by Banks to its customers, are in the nature of æcommission or brokerageø within the meaning of Section 194H of the Act and consequentially TDS should have been deducted on such payments.

3. Under the facts and circumstances of the case and in law, the Ld. CIT (A) has failed to appreciate that the banks in providing Payment Gateway facility, act on Principal to Principal basis with the Appellant and they are neither agent nor do they act on behalf of the Appellant and the provisions of Section 194H of the Act are not applicable.

4. Under the facts and circumstances of the case and in law, the Ld. CIT (A) has failed to appreciate that, CBDT vide Notification No. 56/2012 [F. NO. 275/53/2012-1T(B)] dated December 31, 2012 has notified that no TDS shall be deductible on credit/debit card commission between the merchant and the acquirer bank with effect from January 1, 2013. The Payment Gateway facility charges being similar to credit/debit commission, the aforesaid beneficial notification equally applies to the transactions, prior to the effective date of notification,

5. Under the facts and circumstances of the case and in law, the Ld. CIT (A) failed to appreciate that the Appellant has been making payments to various banks on account of Payment Gateway charges from Financial Year 2000-01 onwards and no adverse inference has been drawn by the Income-tax department in this regard in the past and therefore payment made to banks should not be disallowed following the principles of Hon'ble Mumbai Bench of the Income-tax Appellate Tribunal in the case of CIT Vs Kotak Securities Limited (Appeal No 311 of 2009).

The above grounds of appeal are without prejudice to and independent of one another.

The appellant craves leave to add, supplement, amend, vary, withdraw or otherwise modify the grounds mentioned herein above at or before the time of hearing.

The appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.ö

#### 27.1 Grounds of appeal filed by the Revenue read as under:-

ö1. Whether in the facts and circumstances of the case, the Ld. CIT (A) erred on the facts and circumstances of the case, in accepting the additional evidence u/s 46A when adequate opportunity was already provided to the assessee during the TP/assessment proceeding.

2. The Ld. CIT (A) has erred on the facts and circumstances of the case, in rejecting the Transfer Pricing approach of the TPO.

3. The Ld. CIT (A) has erred on the facts and circumstances of the case, in rejecting the internal comparison made by the TPO, wherein both the segments were involved in similar business.

4. The Ld. CIT (A) has erred on the facts and circumstances of the case, in accepting the Transfer Pricing approach of the assessee.

5. The Ld. CIT (A) has erred on the facts and circumstances of the case, in accepting the additional evidence u/s 46A when adequate opportunity was already provided to the assessee during the TP/assessment proceedings.

6. The Ld. CIT (A) has erred on the facts and circumstances of the case, in concluding MMT to be an Indian brand without appreciating the business model of the assessee.

7. The Ld. CIT (A) has erred on the facts and circumstances of the case, in concluding that the AMP expenditure of the assessee rendered in the nature of service to its AE is not international transaction.

8. The Ld. CIT (A) erred in holding that the assessee was not under an obligation to deduct tax on the payment gateway charges made to Citi Bank and American Express Bank as order u/s 195/197 is valid only for the Indian branches of the above bank and not for the payments received on behalf of the Head Office. The Credit Card Commission payments are not received by the branches of the above bank located at various places in Indian but by the Head Office of the above bank. Hence, the above order is not valid for the payment gateway charges.

9. That the order of the Ld. CIT (A) is erroneous and is not tenable on facts and in law.

10. That the grounds of appeal are without prejudice to each other.

11. The appellant craves leave to add, supplement, amend, vary, withdraw or otherwise modify the grounds mentioned herein above at or before the time of hearing.ö

28. Grounds No.1 to 7 filed by the Revenue are identical to grounds of appeal No.1 to 7 in Revenue's appeal for A.Y. 2007-08 in ITA No.2692/Del/2013. We have already decided the issue and the grounds raised by the Revenue have been dismissed. Following similar reasonings, the above grounds raised by the Revenue are dismissed.

29. Grounds No.1 to 5 filed by the assessee and the ground No.8 filed by the Revenue relate to part relief granted by the CIT(A) on account of addition made by the AO for non-deduction of TDS on payment of gateway charges paid to HDFC and ICICI Bank.

30. Facts of the case, in brief, are that during the course of assessment proceedings, the AO noted that the assessee has claimed bank charges of Rs.12,52,49,946/- in the P&L Account. From the details furnished by the assessee, the AO noted that the assessee has paid the following charges:-

Nature of Expenses	Amount (Rs.)
Payment of Gateway Charges	11,99,39,901/-
Bank charges ó General	53,10,044/-

31. It was further stated that no tax has been deducted on the above two payments on account of the following:-

1. that the assessee is a e-commerce company and is using automated facility to charge a customer through its website using his debit/credit/prepaid card or bank account (Net banking) on-line.
2. that TDS provisions are not applicable to its case.
3. that the services provided by bank do not fall under the definition of Technical Services as given in explanation 2 to section 9(1)(vii) of the I.T. Act.
4. that since the services provided by bank do not fall within the purview of technical services as defined in the Income Tax Act, no tax was liable to be deducted on these services.

32. Relying on various decisions, it was submitted that neither the provisions of section 194H nor the provisions of section 194J are applicable to the assessee and, therefore, the payment gateway charges are not liable for tax deduction at source either u/s 194H or u/s 194J. However, the AO was not satisfied with the argument advanced by the assessee. Rejecting the various explanations given by

the assessee and observing that the payments made to bank in respect of payment gateway services is commission on which tax was liable to be deducted u/s 194H of the IT Act and the AO made an addition of Rs.11,99,39,901/- to the total income of the assessee.

33. In appeal, the Id.CIT(A) held that the assessee had furnished nil TDS certificate obtained from Citi Bank and American Express Bank u/s 195 of the IT Act. The certificates furnished from Citi Bank and American Express Bank shows that gateway charges were received by the Indian Branches on their own account and payments have been duly declared in their respective return of income only in India. He, therefore, held that the assessee was under obligation to deduct tax while making payment of gateway charges to Citi Bank and American Express Bank. After going through the process involved in payment gateway facility, he held that there is no human intervention involved at the time of clearance of the payments through gateway facility. Following the ratio of the decision in the case of Bharti Cellular Ltd. (supra), he held that no technical services within the meaning of Explanation-2 to section 9(1)(vii) of the Act are provided by the banks when the payment is cleared through gateway facility. He, thereafter, held that the provisions of section 194H would be applicable to payment gateway charges paid to banks. Since the assessee has not made TDS as per provisions of section 194H on these payments, he upheld the action of the AO in disallowing these payments u/s 40(a)(ia) of the Act. He, however, held that payments made to Citi Bank and

American Bank are not considered for the purpose of disallowance u/s 40(a)(ia) of the Act. Aggrieved with such order of the CIT(A), both the Revenue and the assessee are in appeal before us.

34. We have heard the rival arguments made by both the sides and perused the record. It is the submission of the Id. DR that provisions of Explanation (2) to section 195 are applicable to the assessee according to which tax is required to be deducted from any payment made to a non-resident outside India. The assessee has the option to obtain a No-deduction Certificate from the AO which he has not done in the instant case. It is the submission of the Id. Counsel for the assessee that identical issue had come up before the Tribunal in assessee's own case for A.Y. 2009-10 and the Tribunal, vide order dated 26<sup>th</sup> September, 2017, has decided the issue pertaining to non-deduction of taxes on payment gateway charges in favour of the assessee with certain directions/observations. Further, the appeal filed by the Revenue was dismissed by the Hon'ble High Court. Under these circumstances and considering the totality of the facts of the case, we deem it proper to restore this issue to the file of the AO with a direction to decide the issue afresh in the light of the decision of the Tribunal in assessee's own case for A.Y. 2009-10 and decide the issue as per fact and law. Needless to say, the AO shall give due opportunity of being heard to the assessee while deciding the issue. We hold and direct accordingly. The grounds of appeal No.1 to 5 by the assessee and ground of appeal No.8 by the Revenue are accordingly allowed for statistical purposes.

35. Grounds No. 9 to 11 filed by the Revenue being general in nature are dismissed.

36. In the result, both the appeals filed by the Revenue and the assessee are partly allowed for statistical purposes.

The decision was pronounced in the open court on 22.06.2020.

Sd/-

(KULDIP SINGH)  
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)  
ACCOUNTANT MEMBER

Dated: 22<sup>nd</sup> June, 2020.

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi