IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH: BANGALORE

BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(TP)A No.330/Bang/2015
Assessment Year: 2010-11

M/s. Nike India Private Limited No.701, The Millenia, Tower-B Murphy Road, Ulsoor Bangalore-560 008 **PAN NO : AABCN9612K**	**Vs.**	Deputy Commissioner of Income-tax Circle-5(1)(2) Bangalore
APPELLANT		**RESPONDENT**

IT(TP)A No. 804/Bang/2016
Assessment Year: 2011-12

M/s. Nike India Private Limited No.701, The Millenia, Tower-B Murphy Road, Ulsoor Bangalore-560 008	**Vs.**	Deputy Commissioner of Income-tax Circle-5(1)(1) Bangalore
APPELLANT		**RESPONDENT**

IT(TP)A No. 356/Bang/2017 & IT(TP)A No.739/Bang/2017
Assessment Years: 2007-08 & 2012-13 respectively

M/s. Nike India Private Limited No.701, The Millenia, Tower-B Murphy Road, Ulsoor Bangalore-560 008	**Vs.**	ACIT Circle-5(1)(1) Bangalore
APPELLANT		**RESPONDENT**

IT(TP)A No.3321/Bang/2018
Assessment Year: 2014-15

M/s. Nike India Private Limited No.701, The Millenia, Tower-B Murphy Road, Ulsoor Bangalore-560 008	**Vs.**	Deputy Commissioner of Income-tax Circle-5(1)(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri N Venkatraman, K.R. Vasudevan, A.R.
Respondent by	:	Smt. Neera Malhotra and Shri Muzaffar Hussain & Shri Rajesh Kumar Jha, D.Rs.

Date of Hearing	:	30.09.2020
Date of Pronouncement	:	14.10.2020

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

All the appeals have been filed by the assessee and they relate to the assessment years 2007-08, 2010-11, 2011-12, 2012-13 and 2014-15. All these appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. The assessee is engaged is carrying on wholesale business in footwear, apparel and support equipments of Nike Brand in India. The assessee is a wholly owned subsidiary of Nike holding BV, Netherlands, which in turn is held by M/s. Nike Inc., USA.

3. We shall first take up the appeal filed by the assessee for the assessment year 2007-08, wherein the assessee is challenging the validity of reopening of assessment. Facts relating to this issue are stated in brief. The original assessment in the hands of

the assessee for assessment year 2007-08 was completed u/s 143(3) r.w.s. 144C of the Act on 10.10.2011. Subsequently, the A.O. reopened the assessment by issuing notice u/s 148 of the Act on 26.3.2014 i.e. after expiry of 4 years from the end of the assessment year. In response to the same, the assessee requested the A.O. to treat the return originally filed u/s 139 of the Act on 31.10.2007 as the return filed in response to the notice issued u/s 148 of the Act. The assessee also requested the A.O. to furnish the reasons recorded for issue of notice u/s 148 of the Act. In response to the same, the A.O. furnished reasons to the assessee, which are extracted below:

> *"The assessee company M/s. Nike India Pvt. Ltd., is engaged in the business of importing footwear, Apparel, Sports Equipment & accessories for wholesale trading in India. The assessee has filed return of income declaring a loss of Rs.24,70,79,533/-. During the scrutiny assessment, after adding the ALP adjustment of Rs.10,39,95,254/- the loss was assessed at Rs.14,30,84,279/-.*
>
> *The Hon'ble ITAT, in the case of the assessee, for AYs 2005-06 & 2006-07, upheld the adjustment which the TPO has made in these two years, towards reimbursement of expenses without mark-up by the assessee to its AE. The Hon'ble ITAT has confirmed the TPO's findings that these expenditures are in fact the expenditures to be incurred by Nike Inc. US and not by the Nike India Pvt. Ltd., Nike India should not have reimbursed the same. These expenditures which were on travel, accommodation and conveyance, salary payment to employees of Nike Inc., US and cost of samples etc. are in fact the liabilities of Nike Inc., US and in view of the fact that, the nature of these expenses are such that they cannot be attributed to have been solely and exclusively incurred for the distribution business of the assessee company and that the assessee has not derived any tangible benefit from these expenses. In view of the above, these expenditures should not be debited to the P&L account by the assessee.*
>
> *For A.Y. 2007-08 also the assessee company has reimbursed such expenditure amounting to Rs.4,75,49,193/- to its AE M/s. Nike Inc, USA. Therefore, I have reason to believe that*

the income chargeable to tax to the extent of Rs.4,75,49,193/- has escaped assessment within the meaning of sec.147 of the I.T Act."

4. It can be noticed that the reasons for reopening was related to the "reimbursement of expenditure" made by the assessee to its Associated Enterprises. In the original assessment proceedings, the AO/TPO had held that the expenses reimbursed were incurred for the purposes of business of the assessee only. It was accepted to be at arms length. Hence no transfer pricing adjustment was made during the course of original assessment proceedings. However, the AO has reopened the assessment of AY 2007-08 on noticing a subsequent decision rendered by Tribunal for another year, wherein T.P adjustment made in respect of identical reimbursement of expenses was upheld by the Tribunal.

5. The assessee objected to the reopening of the assessment, which was rejected by the AO. Thereafter, the A.O. completed the assessment on 14.12.2016 u/s 143(3) r.w.s.147 r.w.s. 144C(1) of the Act. It is pertinent to note that the ld. DRP did not accept the contentions of the assessee that there was change of opinion and accordingly confirmed the validity of the reopening of the assessment.

6. Before us, the Ld. A.R. submitted that the A.O. has reopened the assessment after expiry of 4 years from the end of the assessment year without mentioning that there is failure on the part of the assessee to disclose truly and correctly all material facts necessary for assessment. Further, in the reasons recorded for reopening, the A.O has clearly mentioned that the reopening was necessitated on account of the decision rendered by Income Tax Appellate Tribunal in the case of assessee for assessment

years 2005-06 & 2006-07. The Ld. A.R. submitted that the assessee has submitted all the details relating to 'reimbursement of expenses" before the A.O/TPO during the course of assessment proceedings and the same has been accepted to be at arms length. However, the A.O. has reopened the assessment only on account of a subsequent decision rendered by the Tribunal, meaning thereby, the AO has changed his opinion on the issue of reimbursement of expenses and accordingly reopened the assessment. However, there was no failure on the part of the assessee to disclose all material facts during the course of original assessment proceedings. He submitted that the subsequent order of a court cannot be taken into consideration to come to the conclusion that there was failure on the part of the assessee to disclose all material facts necessary for assessment, as held by Hon'ble Bombay High Court in the case of Sesagoa Ltd. Vs JCIT(2008) 294 ITR 101. The Ld. A.R. further submitted that it is imperative on the part of the A.O. to mention in the reasons for reopening that there was failure on the part of the assessee to disclose truly and fully all material facts, when the reopening is done after expiry of 4 years from the end of the relevant assessment year, as held by Hon'ble Madras High Court in the case of Shri Shakti Textiles Ltd. Vs. JCIT (2010) 193 Taxmann 216. Failure to record so will vitiate the reassessment proceedings. He submitted that the assessee had furnished all the relevant details to the AO during the course of original assessment proceedings and hence, there is no failure as contemplated in the proviso to sec. 147 of the Act. The Ld. A.R. further submitted that the Hon'ble Karnataka High Court has held in the case of CIT Vs. Karnataka Bank (2014) 52 Tamann.com 526 that when there is no case of failure on the part of the assessee to

disclose fully and truly all material facts necessary for assessment and further where the assessing authority applied its mind and being satisfied with the claim had allowed the case of the assessee, the assessing authority could not have initiated proceedings u/s 147 of the Act, after the end of 4 years. He submitted that an identical view has been expressed by coordinate bench in the case of DCIT Vs. N.N. Dastur & Company Pvt. Ltd. (ITA No.300/Bang/2014).

7. The Ld. A.R. further submitted that the TPO has sought all details in relation to reimbursement of expenses during the course of original assessment proceedings and the assessee also furnished the same, vide its letter dated 12th April, 2020. After perusing the details so furnished the TPO/AO came to the conclusion that the 'cost to cost' reimbursement of expenses incurred by the assessee was for its own business purposes and accordingly, the transaction was considered to be at arm's length. The Ld. A.R. submitted that the TPO/AO had taken a conscious view on the matter of reimbursement of expenses during the course of original assessment proceedings. However, the AO has reopened the assessment for considering the very same issue, in view of the subsequent decision rendered by the Tribunal against the assessee in assessment year 2005-06 and 2006-07. Hence, it is a clear case of change of opinion and reopening is not permissible as held by Hon'ble Supreme Court in the case of Kelvinator India Ltd. (2010) 320 ITR 561. Accordingly, the Ld. A.R. submitted that the reopening is bad in law and accordingly, the impugned assessment order is liable to be quashed.

8. On the contrary, the ld. D.R. submitted that the reopening was done by the A.O. on account of fresh facts coming to his notice as a result of order passed by the Tribunal against the assessee in assessment year 2005-06 & 2006-07. The Ld. D.R. submitted that the TPO has held the reimbursement of expenses to be at arm's length in the original assessment proceedings based on the explanations given by the assessee that these expenses are related to the business of the assessee. However, in assessment years 2005-06 & 2006-07, the TPO had noticed that these expenses are not related to the business activities of the assessee. The view of the TPO was upheld by the Tribunal by holding that the nature of these expenses is such that they cannot be attributed to have been solely and exclusively incurred for the distribution business of the assessee. The Ld. D.R. submitted that the order so passed by the TPO/ITAT has brought fresh facts, which were not earlier considered in the original assessment proceedings. These fresh facts have led to the AO to believe that there was escapement of assessment. Accordingly, the Ld. D.R. submitted that the reopening is valid.

9. We heard the rival contentions and perused the record. A perusal of reasons for reopening recorded by the A.O., which is extracted above, would show that the A.O. has reopened the assessment as a result of order passed by the Tribunal in the assessee's own case for assessment years 2005-06 & 2006-07, wherein the Tribunal has upheld the transfer pricing adjustment made in respect of reimbursement of expenses. It is a fact that during the year under consideration, the TPO had held in the original assessment proceedings that the reimbursement of expenses is related to the business activities of the assessee and

hence are at arm's length. Be that as it may, the undisputed fact is that reopening has been done after expiry of 4 years from the end of the assessment year, in which case the conditions prescribed in proviso to section 147 of the Act has to be satisfied by the AO before reopening of assessment. The proviso to section 147 reads as under:

> *"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."*

10. Hence, it is imperative on the part of the A.O. to show that there was failure on the part of the assessee to disclose fully and truly all material facts relating to the assessment. Admittedly, no such allegation has been made by the A.O. in the reasons for reopening. The Hon'ble Madras High Court has held in the case of Shri Shakti Textiles Ltd. (supra) that the A.O. should have recorded in the reasons for reopening that there was failure on the part of the assessee to make true and full disclosure. The A.O. has not recorded that there was failure on the part of the assessee in the reasons for reopening. When there is no failure on the part of the assessee, the reopening after expiry of four years is bad in law as held by Hon'ble jurisdictional Karnataka High Court in the case of Karnataka Bank (supra).

11. In any case, we notice that the TPO/AO has taken a conscious decision on this issue on the basis of explanations furnished by the assessee. Having taken a conscious decision, it is not permissible for the AO to take a different view on the basis of subsequent decision of the Tribunal, after expiry of four years from the end of the relevant assessment year. The decision rendered by Hon'ble Bombay High Court in the case of Sesa Goa Ltd (supra) supports the case of the assessee.

12. Accordingly, we find merit in the contentions of the assessee that the reopening is bad in law for more than one reason and hence the assessment order is liable to be quashed. Accordingly, we allow the legal ground urged by the assessee and accordingly the impugned assessment order is liable to be quashed. We order accordingly.

13. We shall now take up the appeals filed for assessment year 2010-11 to 2012-13 & 2014-15.The Ld A.R advanced his arguments on issue wise, since identical additions have been made in more than one year. The Ld D.R also followed the same sequence. Accordingly, we proceed to dispose of the appeals issue-wise.

14. The first common issue relates to the T.P adjustment made in respect of Advertisement and Market Promotion (AMP) expenses other than that paid to BCCI for advertisement. This issue is being contested in AY 2010-11, 2011-12, 2012-13 and 2014-15.

14.1 The TPO took the view that the assessee is spending huge amount towards selling and marketing expenses. He also noticed

that the assessee was incurring losses and further noticed that the losses have arisen mainly due to incurring of huge AMP expenses. The TPO further noticed that the average AMP expenses incurred by comparable companies was 0.76% of the sales. Accordingly, the TPO determined the above said indicator of 0.76% as the bright line. The AMP expenses incurred by the assessee included the expenses incurred in accordance with advertisement agreement entered by the assessee with "Board of Control for Cricket of India" (BCCI). In respect of the said expenditure, the assessee had also received a share from its Associated Enterprises (AE). Since the AMP expenses incurred by the assessee was far in excess of the industry average, the TPO treated the excess expenditure over and above the industry average as "non-routine expenses".

14.2 The TPO further noticed that the assessee is sourcing its products from local manufacturers only and was using brand name NIKE, belonging its AE. Accordingly, he took the view that the non-routine AMP expenses have been incurred by the assessee for the purposes of promoting the brand name of its AE. Accordingly, he took the view that the assessee should have received reimbursement of non-routine AMP expenses from its AE with a mark-up. The TPO computed the average margin declared by some comparable companies and took the same as the "mark-up" margin. Accordingly he added the mark-up to the non-routine expenses and computed the amount that should have been received by the assessee from its AE. From the amount so arrived at, he reduced the reimbursement received from AE and made T.P adjustment of remaining amount.

14.3 The workings made by the TPO in various years have been extracted below:-

(A) Assessment Year 2010-11:-

(a) AMP expenses incurred by the assessee - Rs.69,26,82,429

(b) Reimbursement received on account of BCCI – Rs.19,59,48,094

(c) Average spend on AMP by comparable companies - 0.76%

(d) Average margin earned by companies in business Marketing support services - 24.80%

1.	Allowable Expenditure	0.76% of Rs.69,26,82,429**	Rs.52,64,386
2.	Expenditure to be disallowed Less:-	Rs.69,26,82,429 52,64,386	
	Total (A)		Rs.68,74,18,043
3.	Mark-up on Expenditure (B)	(Rs.68,74,18,043 * 24.86%	Rs.17,04,79,675
4.	Reimbursement to be received with mark-up ((A) + (B))		Rs.85,78,97,717

5.	Reimbursement to be received Less:- Amount received	Rs.85,78,97,717 Rs.19,59,48,094	
	T.P Adjustment		Rs.66,19,49,623

(** Appears to be a mistake. The TPO has taken AMP expenses instead of Sales amount)

(B) Assessment Year 2011-12:-

The TPO computed the T.P adjustment as under:-

1.	Allowable Expenditure	1.02% of Rs.231,12,21,724	Rs.2,35,74,462
2.	Expenditure to be disallowed Less:- Add:- Salary of seconded expatrates	Rs.89,58,16,134 2,35,74,462 70,30,601	
	Total (A)		Rs.87,92,72,273
3.	Mark-up on Expenditure (B)	(Rs.68,74,18,043 * 21.10%	Rs.18,55,26,450
4.	Reimbursement to be received with mark-up ((A) + (B))		Rs.106,47,98,723
5.	Reimbursement to be received Less:- Amount received	Rs.106,47,98,723 Rs. 14,39,85,554	
	T.P Adjustment		Rs.92,08,13,169/-

(C) Assessment Year- 2012-13:-

The TP adjustment was worked out by the TPO as under. In this year, the assessee has not spent on BCCI.

1.	Allowable Expenditure	1% of Rs.337,38,63,131	Rs.3,37,38,631
2.	Expenditure to be disallowed Less:-	Rs.90,90,34,786 3,37,38,631	
	Total (A)		Rs.87,52,96,155
3.	Mark-up on Expenditure (B)	(Rs.87,52,96,155 * 13.27%	Rs.11,61,51,800
4.	Reimbursement to be received with mark-up ((A) + (B))		Rs.99,14,47,955
	T.P Adjustment		Rs.99,14,47,955

(D) Assessment Year 2014-15:-

The T.P adjustment was worked out by the TPO is as under. In this year also, the assessee has not spent on BCCI.

1.	Allowable Expenditure	2.37% of Rs.604,86,36,830	Rs.14,33,52,693
2.	Expenditure to be disallowed Less:-	Rs.90,48,56,110 14,33,52,693	
	Total (A)		Rs.76,15,03,417
3.	Mark-up on Expenditure (B)	(Rs.76,15,03,417 * 10.78%	Rs. 8,20,90,068
4.	Reimbursement to be received with mark-up ((A) + (B))		Rs.84,35,93,485
	T.P Adjustment		Rs.84,35,93,485

14.4 It was brought to our notice that the issue of T.P adjustment made in respect of AMP expenses was examined by the co-ordinate bench in the assessee's own case in IT(TP)A No.232/Bang/2014 and IT(TP)A No.260/Bang/2014 relating to AY 2009-10. We notice that the Tribunal has bifurcated the AMP expenses into two categories, viz.,

(a) AMP expenses other than BCCI expenses

(b) AMP expenses relating to BCCI.

We notice that the Tribunal has decided the first category of expenses in favour of the assessee. However, the second category of expenses was restored to the file of AO/TPO with the direction to re-examine the AMP expenses relating to BCCI. The issue relating to first category is being contested in AY 2010-11, 2011-12, 2012-13 and 2014-15. The issue relating to "AMP expenses-BCCI" is being contested in AY 2010-11 and 2011-12.

14.5 With regard to the first category, the co-ordinate bench has decided the issue in favour of the assessee in AY 2009-10 (supra) with the following observations:-

"9. As regards the other local AMP expenses apart from BCCI we find that such expenses are incurred by the assessee for promotion of its advertisement and promotion of its products and there is no agreement or arrangement either in writing or otherwise with the AE as nothing has been brought on record to indicate that apart from the expenses of BCCI the assessee and its AE has any understanding or agreement for incurring of AMP expenses by the assessee. Therefore, except the BCCI expenses of Rs.34.04 Crores the rest of the expenses of AMP cannot be considered as an international transactions in view of the decision of the co-ordinate bench of this Tribunal in the case of ***Essilor India Pvt. Ltd. Vs. DCIT*** *(supra) wherein the co-ordinate bench of this Tribunal has discussed this issue in detail in paras 16 to 22 as under :*

"16. We have heard the rival submissions and perused the material on record. We shall now deal with grounds relating to TP adjustments made by the TPO/AO as confirmed by the ld.DRP on AMP expenditure. The issue that arises for consideration is whether the advertisement, marketing and promotion expenses

incurred by the assessee can be said to be incurred not only for the benefit of the assessee-company but also by way of rendering services of promoting the brand of foreign AE viz. Essilor International SA, France. The case of the assessee-company is that the expenditure was incurred only for increasing the sales of its product and no benefit accrued to its foreign AE and there is no international transaction on AMP expenditure as envisaged within the meaning of sec.92B of the Act. The ld.DRP confirmed the existence of international transaction on AMP expenditure following the law laid down by the Special bench of Tribunal in the case of LG Electronics India (P) Ltd. & others (sura). However, ld.DRP remitted the matter to the file of TPO for determination of ALP in the light of law laid down therein. The correctness of the decision of the Special bench of the Tribunal in the case of LG Electronics India (P) Ltd., (supra) was considered by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India (P) Ltd.(supra). The following questions were addressed by the Hon'ble Delhi High Court:

> *"(i) Whether the additions suggested by the Transfer Pricing Officer on account of Advertising/Marketing and Promotion Expenses (AMP Expenses' for short) was beyond jurisdiction and bad in law as no specific reference was made by the Assessing Officer, having regard to retrospective amendment to Section 92CA of the Income Tax Act, 1961 by Finance Act, 2012.*
>
> *(ii)Whether AMP Expenses incurred by the assessee in India can be treated and categorized as an international transaction under Section 92B of the Income Tax Act, 1961?*
>
> *(iii) Whether under Chapter X of the Income Tax Act, 1961, a transfer pricing adjustment can be made by the Transfer Pricing Officer/ Assessing Officer in respect of expenditure treated as AMP Expenses and if so in which circumstances?*
>
> *(iv) If answer to question Nos.2 and 3 is in favour of the Revenue, whether the Income Tax Appellate Tribunal was right in holding that transfer pricing adjustment in respect of AMP Expenses should be computed by applying Cost Plus Method.*
>
> *(v) Whether the Income Tax Appellate Tribunal was right in directing that fresh bench marking/comparability analysis should be undertaken by the Transfer Pricing Officer by applying the parameters specified in paragraph 17.4 of the order dated 23.01.2013 passed by the Special Bench in the case of LG Electronics India (P) Ltd.?"*

17. The conclusions of the Division Bench in Sony Ericsson (supra) are as under:

(i) The Court concurred with the majority of the Special Bench of the ITAT in the LG Electronics case qua the applicability of 92CA(2B) and how it cured the defect inherent in 92CA(2A). The issue concerning retrospective insertion of 92CA(2B) was decided in favour of the Revenue.

(ii) AMP expenses were held to be international transaction as this was not denied as such by the assessees.

(iii) Chapter X and Section 37(1) of the Act operated independently. The former dealt with the ALP of an international transaction whereas the latter deals with the allowability/disallowability of business expenditure. Also, once the conditions for applicability of Chapter X were satisfied nothing shall impede the law contained therein to come into play.

(iv) Chapter X dealt with ALP adjustment whereas Section 40A(2)(b) dealt with the reasonability of quantum of expenditure.
(v) TNMM applied with equal force on single transaction as well as multiple transactions as per the scheme of Chapter X and the TP Rules. Thus, the word 'transaction' would include a series of closely linked transactions.

(vi) The TPO/AO could overrule the method adopted by the Assessee for determining the ALP and select the most appropriate method. The reasons for selecting or adopting a particular method would depend upon functional analysis comparison, which required availability of data of comparables performing of similar or suitable functional tasks in a comparable business. When suitable comparables relating to a particular method were not available and functional analysis or adjustment was not possible, it would be advisable to adopt and apply another method.

(vii) Once the AO /TPO accepted and adopted the TNMM, but chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would lead to unusual and incongruous results as AMP expenses was the cost or expense and was not diverse. It was factored in the net profit of the inter-linked transaction. The TNMM proceeded on the assumption that functions, assets and risks 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.

(viii) The Bright Line Test was judicial legislation. By validating the Bright Line Test the Special Bench in LG Electronics Case (supra) went beyond Chapter X of the Act. Even international tax jurisprudence and commentaries do not recognise BLT for bifurcation of routine and non-routine expenses.
(ix) Segregation of aggregated transactions requires detailed scrutiny without which there shall be no segregation of a bundled transaction. Set off of transactions segregated as a single transaction is just and equitable and not prohibited by Section 92(3). Set-off is also recognized by international tax experts and commentaries.

(x) Segregation of bundled transactions shall be done only if exceptions laid down in CIT v. EKL Appliances Ltd. [2012] 345 ITR 241 (Del) are justified. Re-categorisation and segregation of transactions are different exercises; former would require separate comparables and functional analysis.

(xi) Economic ownership of a brand would only arise in cases of longterm contracts and where there is no negative stipulation denying economic ownership. Economic ownership of a brand or a trade mark when pleaded can be accepted if it is proved by the Assessee. The burden is on the Assessee. It cannot be assumed.
(xii) After the order of the Supreme Court in the Maruti Suzuki case, the judgment of the Delhi High Court does not continue to bind the parties. This position was misunderstood by the majority of the Special Bench in the LG Electronics Case.

(xiii) The RP Method loses its accuracy and reliability where the reseller adds substantially to the value of the product or the goods are further processed or incorporated into a more sophisticated product or when the product/service is transformed. RP Method may require fewer adjustments on account of product differences in comparison to the CUP Method because minor product differences are less likely to have material effect on the profit margins as they do on the price.

(xiv) Determination of cost or expense can cause difficulties in applying cost plus (CP) Method. Careful consideration should be given to what would constitute cost i.e. what should be included or excluded from cost. A studied scrutiny of CP Method would indicate that when the said Method is applied by treating AMP

expenses as an independent transaction, it would not make any difference whether the same are routine or non-routine, once functional comparability with or without adjustment is accepted.

(xv) The task of arm's length pricing in the case of tested party may become difficult when a number of transactions are interconnected and compensated but a transaction is bifurcated and segregated. CP Method, when applied to the segregated transaction, must pass the criteria of most appropriate method. If and when such determination of gross profit with reference to AMP transaction is required, it must be undertaken in a fair, objective and reasonable manner.
(xvi) The marketing or selling expenses like trade discounts, volume discounts, etc. offered to sub-distributors or retailers are not in the nature and character of brand promotion. They are not directly or immediately related to brand building exercise, but have a live link and direct connect with marketing and increased volume of sales or turnover. The brand building connect is too remote and faint. To include and treat the direct marketing expenses like trade or volume discount or incentive as brand building exercise would be contrary to common sense and would be highly exaggerated. Direct marketing and sale related expenses or discounts/concessions would not form part of the AMP expenses.

(xvii) The prime lending rate cannot be the basis for computing markup under Rule 10B(1)(c) of the Rules, as the case set up by the Revenue pertains to mark-up on AMP expenses as an international transaction. Mark up as per sub-clause (ii) to Rule 10B(1)(c) would be comparable gross profit on the cost or expenses incurred as AMP. The mark-up has to be benchmarked with comparable uncontrolled transactions or transactions for providing similar service/product.

(xviii) The exceptions laid down in EKL Appliances Case (supra) were neither invoked in the present case nor were the conditions satisfied.

(xix) An order of remand to the ITAT for de novo consideration would be appropriate because the legal standards or ratio accepted and applied by the ITAT was erroneous. On the basis of the legal ratio expounded in this decision, facts have to be ascertained and applied. If required and necessary, the assessed and the Revenue should be asked to furnish details or tables. The ITAT, in the first instance, would try and dispose of the appeals, rather than passing an order of remand to the AO /TPO. An

endeavour should be to ascertain and satisfy whether the gross/net profit margin would duly account for AMP expenses. When figures and calculations as per the TNM or RP Method adopted and applied show that the net/gross margins are adequate and acceptable, the appeal of the assessed should be accepted. Where there is a doubt or the other view is plausible, an order of remand for re-examination by the AO/TPO would be justified. A practical approach is required and the ITAT has sufficient discretion and flexibility to reach a fair and just conclusion on the ALP. Impugned order of the ITAT 21. The Assessee then filed appeals being ITA Nos. ITA No. 3861/Del/2010, 4924/Del/2011, 6580/Del/2013 and 6382/Del/2012 for the said four AYs in question. The above four appeals were disposed of by the common impugned order dated 23rd May 2014 by the ITAT.

18. It is important to note that in the cases dealt by the Hon'ble Delhi High Court along with Sony Ericsson Mobile Communication India (P) Ltd.(supra), the assessees were distributors of products manufactured by the foreign AE. The said assessees themselves were not manufacturers. More over none of the said assesses appears to have questioned the very existence of international transaction with foreign AE. It was also not disputed that the said international transaction of incurring AMP expenditure could be subject matter of TP adjustments in terms of sec.92 of the Act.

19. In the present case, the assessee-company imports the lens from its foreign AE and after some processing, sells the products on its own. However, the amount of value addition on account of processing in terms of total revenue is not clear from the material on record. That apart, the assessee-company has been throughout contesting before all the authorities the very existence of international transaction on account of incurring AMP expenditure between assessee-company and its AE and therefore, the contentions that the law laid down by the Hon'ble Delhi High Court in Sony Ericsson Mobile Communication India (P) Ltd. (supra) should be applied to the case on hand, is not correct. Therefore, the submission of the learned Departmental Representative that the matter be remanded to the file of TPOD for fresh decision in the light of law laid down by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India (P) Ltd.(supra), cannot be acceded to.

20. Subsequent to the decision in the case of Sony Ericsson Mobile Communication India (P) Ltd.(supra), the Hon'ble Delhi High Court had rendered five decisions on the same issue. Those decisions are:

(i) Maruti Suzuki India Ltd. Vs. CIT (282 CTR 1),
(ii) CIT vs. Whirlpool of India Ltd. (129 DTR (169),

(iii) Bausch & Lomb Eyecare (India) (P) Ltd. Vs. Addl.CIT (129 DTR 201) and
(iv) Yum Restaurants (India) Pvt. Ltd. Vs. ITO (ITA No.349/2015 dated 13/01/2016) and
(v) Honda Seil Products

In the above-mentioned decisions, the issue of the very existence of international transaction on incurring AMP expenditure and the method of determination of ALP was the subject matter of appeal before the Hon'ble Delhi High Court. The Hon'ble Delhi High Court had categorically held that in the absence of agreement between Indian entity and foreign AE whereby the Indian entity was obliged to incur AMP expenditure of a certain level for foreign entity for the purpose of promoting the brand value of the products of the foreign entity, no international transaction can be presumed. It was further held that the fact that there was an incidental benefit to the foreign AE, it cannot be said that AMP expenditure incurred by an Indian entity was for promoting brand of foreign AE. One more aspect highlighted by the Hon'ble High Court is that in the absence of machinery provisions, bringing an imagined transaction to tax was not possible. While coming to this conclusion, the Hon'ble High Court had placed reliance on the decisions of the Hon'ble Apex Court in the cases of CIT vs. B.C.SrinivasaSetty (128 ITR 294) and PNB Finance Ltd. Vs. CIT (307 ITR 75). The Hon'ble Delhi High Court after referring to its earlier decision in the case of Maruti Suzuki India Ltd (supra) and Whirlpool of India (P) Ltd.,(supra) had considered the question of existence of the international transaction and computation of ALP thereon in the case of Bausch & Lomb Eyecare (India) (P) Ltd.(supra) vide para 51 to 65 as under:

> *"51. The central issue concerning the existence of an international transaction regarding AMP expenses requires the interpretation of provisions of Chapter X of the Act, and to determine whether the Revenue has been able to show prima facie the existence of international transaction involving AMP between the Assessee and its AE.*
>
> *52. At the outset, it must be pointed out that these cases were heard together with another batch of cases, two of which have already been decided by this Court. The two decisions are the judgement dated 11th December 2015 in ITA No. 110/2014 (Maruti Suzuki India Ltd. v. Commissioner of Income Tax) and the judgment dated 22nd December 2015 in ITA No. 610 of 2014 (The Commissioner of Income Tax-LTU v. Whirlpool of India Ltd.) and many of the points urged by the counsel in these appeals have been considered in these two judgments.*
>
> *53. A reading of the heading of Chapter X ["Computation of income from international transactions having regard to arm's length price"]*

and Section 92 (1) which states that any income arising from an international transaction shall be computed having regard to the ALP and Section 92C (1) which sets out the different methods of determining the ALP, makes it clear that the transfer pricing adjustment is made by substituting the ALP for the price of the transaction. To begin with there has to be an international transaction with a certain disclosed price. The transfer pricing adjustment envisages the substitution of the price of such international transaction with the ALP.

54. 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.

55. Section 92B defines 'international transaction' as under:

"Meaning of international transaction. 92B.(1) For the purposes of this section and sections 92, 92C , 92D and 92E , "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. (2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise."

56. Thus, under Section 92B(1) an 'international transaction' means- (a) a transaction between two or more AEs, either or both of whom are non-resident (b) the transaction is in the nature of purchase, sale or lease of tangible or intangible property or provision of service or

lending or borrowing money or any other transaction having a bearing on the profits, incomes or losses of such enterprises, and (c) shall include a mutual agreement or arrangement between two or more AEs for allocation or apportionment or contribution to the any cost or expenses incurred or to be incurred in connection with the benefit, service or facility provided or to be provided to one or more of such enterprises.

57. Clauses (b) and (c) above cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of BLI 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 BLI and B&L, USA whereby BLI is obliged to spend excessively on AMP in order to promote the brand of B&L, USA. 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 an 'international transaction'. This might be only an illustrative list, but significantly it does not list AMP spending as one such transaction.

58. In Maruti Suzuki India Ltd. (supra) one of the submissions of the Revenue was: "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." This was negatived by the Court by pointing out: "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."

59. In Whirlpool of India Ltd. (supra), the Court interpreted the expression "acted in concert" and in that context referred to the decision of the Supreme Court in Daiichi Sankyo Company Ltd. v. Jayaram Chigurupati 2010(6) MANU/SC/0454/2010, which arose in

the context of acquisition of shares of Zenotech Laboratory Ltd. by the Ranbaxy Group. The question that was examined was whether at the relevant time the Appellant, i.e., Daiichi Sankyo Company and Ranbaxy were "acting in concert" within the meaning of Regulation 20(4) (b) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. In para 44, it was observed as under:

"The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares etc. of a certain target company. There can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares etc. of the target company. For, de hors the element of the shared common objective or purpose the idea of "person acting in concert" is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition of substantial acquisition of shares etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sine qua non for the relationship of "persons acting in concert" to come into being."

60. The transfer pricing 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 proceeding to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE. In any event, after the decision in Sony Ericsson (supra), the question of applying the BLT to determine the existence of an international transaction involving AMP expenditure does not arise.

61. There is merit in the contention of the Assessee that a distinction is required to be drawn between a 'function' and a 'transaction' and that every expenditure forming part of the function cannot be construed as a 'transaction'. Further, the Revenue's attempt at re-characterising the AMP expenditure incurred as a transaction by itself when it has neither been identified as such by the Assessee or legislatively recognised in the Explanation to Section 92

B runs counter to legal position explained in CIT v. EKL Appliances Ltd. (supra) which required a TPO "to examine the 'international transaction' as he actually finds the same."

62. In the present case, the mere fact that B&L, USA through B&L, South Asia, Inc holds 99.9% of the share of the Assessee will not ipso facto lead to the conclusion that the mere increasing of AMP expenditure by the Assessee involves an international transaction in that regard, with B&L, USA. A similar contention by the Revenue, namely, that even if there is no explicit arrangement, the fact that the benefit of such AMP expenses would also ensure to the AE is itself sufficient to infer the existence of an international transaction has been negatived by the Court in Maruti Suzuki India Ltd. (supra) as under:

"68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an exercise. The Court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions". Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it 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. .....

70. What is clear is that it is the 'price' of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an ALP adjustment."

71. Since a quantitative adjustment is not permissible for the purposes of a TP adjustment under Chapter X, equally it cannot be permitted in respect of AMP expenses either. As already noticed hereinbefore, what the Revenue has sought to do in the present case is to resort to a quantitative adjustment by first determining whether the AMP spend of the Assessee on application of the BLT, is excessive, thereby evidencing the existence of an international transaction involving the AE. The quantitative determination forms the very basis for the entire TP exercise in the present case.

.....

74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to Section 92B of the Act. The problem does not stop here. Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?

63. Further, in Maruti Suzuki India Ltd. (supra) the Court further explained the absence of a 'machinery provision qua AMP expenses by the following analogy:

"75. As an analogy, and for no other purpose, in the context of a domestic transaction involving two or more related parties, reference may be made to Section 40 A (2) (a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the AO "is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods." In such event, "so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction." The AO in such an instance deploys the 'best judgment' assessment as a device to disallow what he considers to be an excessive expenditure. There is no corresponding 'machinery' provision in Chapter X which enables an AO to determine what should be the fair 'compensation' an Indian entity would be entitled to if it is found that there is an international transaction in that regard. In practical terms, absent a clear statutory guidance, this may encounter further difficulties. The strength of a brand, which could be product specific, may be impacted by numerous other imponderables not limited to the nature

of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on. A simplistic approach using one of the modes similar to the ones contemplated by Section 92C may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance."

64. In the absence of any machinery provision, bringing an imagined transaction to tax is not possible. The decisions in CIT v. B.C. Srinivasa Setty (1981) 128 ITR 294 (SC) and PNB Finance Ltd. v. CIT (2008) 307 ITR 75 (SC) make this position explicit. Therefore, where the existence of an international transaction involving AMP expense with an ascertainable price is unable to be shown to exist, even if such price is nil, Chapter X provisions cannot be invoked to undertake a TP adjustment exercise.

65. As already mentioned, merely because there is an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of the foreign AE. As mentioned in Sassoon J David (supra) "the fact that somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being allowed by way of a deduction under Section 10 (2) (xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law".

21. Respectfully following the ratio of the decision of the Hon'ble Delhi High Court in the above cases, we hold that no TP adjustment can be made by deducing from the difference between AMP expenditure incurred by assessee-company and AMP expenditure of comparable entity, if there is no explicit arrangement between the assessee-company and its foreign AE for incurring such expenditure. The fact that the benefit of such AMP expenditure would also enure to its foreign AE is not sufficient to infer existence of international transaction. The onus lies on the revenue to prove the existence of international transaction involving AMP expenditure between the assessee-company and its foreign AE. We also hold that that in the absence of machinery provisions to ascertain the price incurred by the assessee-company to promote the brand values of the products of the foreign entity, no TP adjustment can be made by invoking the provisions of Chapter X of the Act.

22. Applying the above legal position to the facts of the present case, it is not a case of revenue that there existed an arrangement and agreement between the assessee-company and its foreign AE to incur AMP expenditure to promote

brand value of its products on behalf of the foreign AE, merely because the assessee-company incurred more expenditure on AMP compared to the expenditure incurred by comparable companies, it cannot be inferred that there existed international transaction between assessee-company and its foreign AE. Therefore, the question of determination of ALP on such transaction does not arise. However, the transaction of expenditure on AMP should be treated as a part of aggregate of bundle of transactions on which TNMM should be applied in order to determine the ALP of its transactions with its AE. In other words, the transaction of expenditure on AMP cannot be treated as a separate transaction. In the present case, we find from the TP study that the operating profit cost to the total operating cost was adopted as Profit Level Indicator which means that the AMP expenditure was not considered as a part of the operating cost. This goes to show that the AMP expenditure was not subsumed in the operating profitability of the assessee-company. Therefore, in order to determine the ALP of international transaction with its AE, it is sine qua non that the AMP expenditure should be considered as a part of the operating cost. Therefore, we restore the issue of determination of ALP, on the above lines, to the file of the AO/TPO. The grounds of appeal raised by the assessee-company on this issue are partly allowed."

Thus it is clear that the Tribunal has analysed all the precedence on this issue and by following the decision of Hon'ble Delhi High Court in the case of ***Sony Ericsson Mobile Communication India (P) Ltd. Vs. CIT*** *374 ITR 118 has held that the AMP expenditure incurred by the assessee more than the comparable companies cannot lead to the conclusion that there exists any international transactions between the assessee and its foreign AE in the absence of any arrangement, understanding or agreement between the assessee and its AE to incur AMP expenses to promote the brand value of the AE. Accordingly, to maintain the rule of consistency, we follow the decision of the co-ordinate bench of this Tribunal so far as the AMP expenditure, other than BCCI expenses incurred by the assessee and direct the A.O/TPO not to consider the same as an independent international transactions but the same would be part of other international transactions . "*

14.6 With regard to the second category relating to BCCI expenses, the co-ordinate bench has restored the matter to the file of AO/TPO with the following observations:-

10. As regards the BCCI expenditure, it has to be ascertained whether there was any brand building and promotion expenses for the brand name "NIKE" as a result of the agreement between the assessee and its AE as well as with BCCI would amounts to an arrangement, understanding or agreement between the assessee and its AE for incurring AMP expenditure by

the assessee to promote and enhance the brand value of NIKE. It requires to analyse the agreement between the assessee and BCCI and further the agreement between the assessee and its AE. The assessee has entered into an agreement dt.23.12.2005 with BCCI whereby the assessee secured rights to supply and sponsor the National Cricket Team of India through BCCI. The relevant terms and conditions as well as the purpose of the agreement enumerated in the Recital and other clauses are as under :

RECITALS

Clause 1

(b) "National Team(s)" shall mean the Men's Senior National Team, Men"s A Team, Men's Jr., Under 20, Under 18, Under 16 and other National Teams, which participate in "National Team Competition" (as such term is defined below), as well as any other national teams developed by BCCI, and the players, coaches and staff who comprise each team, and shall also include players and team participating in the BCCI academies.

(g) *"Territory" shall mean worldwide.*

(h) "Contract Year" shall mean the 12-month period from January 1 through December 31 during the Term of this Agreement.

(i) "NIKE Trademarks" shall mean the NIKE name and its brands.

(m) "NIKE Products" shall mean all products on or in connection with which any of the NIKE Trademarks appear.

(n) " Licensed Products " shall mean those NIKE Products utilizing the Licensed Marks and sold by NIKE pursuant to the terms of Paragraph 9 below.

(s) "Logo" shall, unless excluded otherwise and
Specifically dealt with, means the trademarks/ Brand
Names as specified in schedule I hereunder written or
As may be mutually acceptable between BCCI and
NIKE In writing, but subject to existing Standard Playing Conditions and Regulations and
Restrictions of ICC including its size, specification,
Dimensions, modifications or exclusions as detailed in
Schedule II hereunder mentioned.

(t) "Match" shall mean any test match or ODI
Match including tournaments, series or bi-lateral,
Tours or otherwise which is officially recognized by
BCCI and/or ICC whether organized by BCCI or any other
Cricket Board and/or included in the ICC Calendar
Involving the Indian Team.

(v) *"Rights" shall mean the advertising and Promotional rights licensed to NIKE by the BCCI.*

(w) "Sponsorship" shall mean the right licensed to NIKE to sponsor the Indian Team in all matches and to put logo on team clothing.

Clause 2. *TERM : The term of this Agreement shall commence on January 1, 2006 and subject to the terms hereof, shall continue in full force and effect for a period of five (5) years, through December 31, 2010, unless the Agreement is sooner terminated or further extended in accordance with the terms and conditions hereof (the "Term").*

3. **BASE COMPENSATION AND BONUSES.**

(a) **Base Compensation.** In consideration of the sponsorship benefits including the right for NIKE to advertise and promote its trademark on the NON LEADING ARM, and ON THE CHEST of the players shirts as the case may be as per ICC guidelines [as per Exhibit C] to be provided and licensing rights granted by BCCI (as more fully described below) and of the other obligations undertaken by BCCI herein, NIKE shall pay BCCI compensation of an amount described below for the relevant Contract Year:

5. **GRANT OF ENDORSEMENT RIGHTS & OFFICIAL SPONSORSHIP DESIGNATIONS.**

BCCI hereby grants to NIKE, and NIKE hereby accepts:

(i) The designation as "the exclusive supplier of the athletic footwear, apparel and accessory products of BCCI and Cricket India; and

(ii) The right to utilize (subject to the approval provisions of Paragraph 10 below) the Licensed Marks and/or Designations worldwide, in any media including, the worldwide web, CD-ROM and other interactive and multi-media technologies, in connection with the manufacture, advertising, marketing, promotion and sale of NIKE Products, and the NIKE brand, and in the creation and production of NIKE sports-themed games and broadcast programming, subject to Clause 10 below.

(d) The right to use, without additional cost (unless otherwise provided), in connection with the advertisement and promotion of NIKE Products and the NIKE brand, photographs and/or videotape/film footage of National Team game-action, National Team Players and/or Coaches (respectively, "BCCI Photos" and "BCCI Footage") in their respective official National Team uniforms. NIKE-S use, if any, of BCCI Photos or Footage of minimum 0f 5 Players who have not either entered into an endorsement agreement with NIKE or otherwise expressly granted permission to NIKE to use his or her image or likeness for commercial purposes shall be limited to use in a team context or incidental use only to the extent necessary to effectuate the use in which such Player's image or likeness appears as it may so decide provided that no such campaign or advertisements shall constitute personal endorsement of NIKE or any of its products or services or otherwise by any individual player (s) in any manner whatsoever nature.

Thus it is clear from the terms of the contract between the assessee and BCCI that the assessee secured worldwide right to use in connection with advertisement and promotion of NIKE products and NIKE brand through various photographs, videotape/film footage of the National Cricket Team and its officials who require to use NIKE brand name on the uniform and other accessories during the matches. As per the arrangement between the assessee and BCCI, the National Cricket Team and the officials of the National Cricket Team including coach have to use the NIKE name on their uniform and other accessories. This use of NIKE name does not indicate any specific product but clearly promotes brand name of NIKE. The assessee and its AE NIKE International Ltd. also entered into an agreement dt.1.1.2006. The Recitals and other relevant clauses are reproduced as under :

" RECITALS

The parties understand that cricket is a widely-popular sport in India and in order for the NIKE brand to succeed in the Territory, NIKE India must establish a presence in the cricketing market. In this regard, and after considerable effort, NIKE India has secured worldwide rights to supply and sponsor the national cricket team of India through the BCCI Agreement and has received the corresponding rights to retail product bearing both the NIKE Marks and the BCCI Marks.

Both parties agree that the BCCI Agreement will provide considerable benefits for the NIKE Brand in the Territory.

NIL Understands that the costs associated with sponsoring the national cricket team of India as very high and NIKE India, as a new participant in the market, is unable to support those costs unaided. Understanding that the BCCI Agreement will generate considerable retail sales for NIKE assist NIKE India with the costs of the BCCI Agreement for a limited period of time until NIKE India can support the costs of its relationship with BCCI independently.

NIKE India agrees to use best efforts to expand the NIKE business in the Territory through the BCCI Agreement, and to maximize sales of NIKE Products through its relationship with BCCI, thereby maximizing royalty sales to NIL and enhancing the value of the NIKE brand within the Territory.

In consideration for the benefits that the NIKE brand will receive through NIKE India's association with BCCI through the BCCI Agreement, NIL agrees to pay to NIKE India fifty percent (50%) of the costs of the BCCI Agreement in accordance with the terms of this Section 3."

As it is clear from the conjoined regarding of the two agreements that the expenditure in respect of securing world rights to supply and sponsor the Indian Cricket Team was for the purpose of promotion of the brand of NIKE by use of NIKE marks on the uniform of the Indian Cricket Team and all its officials as well as other accessories and playing kits. This purpose has been acknowledged by the parties in the agreement between the assessee and its AE that the BCCI Agreement will provide suitable benefit for NIKE brands in the territory. The AE of the assessee agreed to share the cost of the BCCI agreement to the extent of 50% and it was in consideration for the benefit to be received by the NIKE brand under the arrangement with BCCI. Further as per Clause 3 of the Agreement, the AE of the assessee has paid this amount against the invoice of this expenditure issued by the assessee which clearly shows that this payment of 50% of the amount by the AE was in respect of the expenditure incurred by the assessee pertaining to the AE for brand building and promotion of NIKE brands. Therefore we are of the considered view that the payment of 50% of the cost paid to the BCCI born by the AE of the assessee is under conscious

understanding and agreement between the parties to promote and enhance the brand value of NIKE which belongs to the AE of the assessee. Accordingly, this transaction of incurring the expenditure of securing the sponsorship of the Indian Cricket Team through BCCI is an international transaction and has to be benchmarked as per the provisions of the transfer pricing in terms of Chapter X of the Income Tax Act.

11. As per the definition of the international transactions as contemplated under Section 92B r.w.s. 92F(v) it does not necessarily require transfer or assigning of property or creating any right or interest in the property but even an arrangement, understanding or an action in concert having a bearing on the profit, income, losses or assets of the enterprises would fall in the term of international transaction. Since the TPO has considered the entire expenditure as international transactions which we have reversed to the extent of the expenditure incurred in normal course without any agreement, understanding or action in concert therefore, the determination of ALP of the international transactions to the extent of the sharing of cost between the assessee and AE paid to the BCCI is required to be reconsidered and readjudicated. Accordingly, we set aside this issue to the record of the TPO.A.O for determination of ALP afresh. The other AMP expenses should be considered as part of the operating cost."

Accordingly, following the decision rendered by the co-ordinate bench in AY 2009-10 in the assessee's own case, we decide the issue relating to first category in favour of the assessee in AY 2010-11, 2011-12, 2012-13 and 2014-15. We restore the issue relating to second category to the file of AO/TPO with similar directions in AY 2010-11 and 2011-12.

15. The next issue urged by the assessee relates to T.P adjustment in respect of reimbursement of expenses. The details of expenses and the year in which they are being contested are given below:-

(a) Purchase of trade samples - AY 2010-11, 2011-12

(b) Payment of salary to expatriates – AY 2010-11, 2012-13, 2014-15

(c) Expenses incurred on sporting events – AY 2010-11, 2011-12

(d) Expenses relating to freight and insurance – AY 2010-11.

The view taken by TPO in respect of each of the item are discussed below.

(a)In respect of "Purchase of samples", the AO noticed that the assessee has purchased samples from its AE and also incurred freight charges relating to samples. The TPO took the view that the samples supplied to the retailers would benefit the AE only. Accordingly, he determined the ALP of samples (including the freight charges) as NIL.

(b) The TPO noticed that the AE has sent its employees on secondment basis to the assessee and the assessee has incurred salary expenses on them. The TPO took the view that the services performed by these expatriates will benefit only its AE in the form of increased sales and it will not benefit any routine distributor. The TPO accordingly determined the ALP as NIL.

(c) Expenses incurred on sporting events are in the nature of costs incurred on purchasing promotional product for sponsoring events like Human race, NSW product launch and Manchester United Cup. The TPO noticed that the assessee could not demonstrate as to how these expenses are related to Indian market and further how it is related to the assessee, who is a routine distributor. Accordingly the TPO determined the ALP of this expenses as NIL.

(d) Expenses relating to freight and insurance were related to import of trade samples purchased from its AE. The TPO held that these are not related to the business activities of the assessee. Accordingly he determined the ALP of this expense as NIL.

15.1 Before us, the assessee submitted as under:-

Reimbursement of Expenses

Assessment year	*Ground of appeal in Form 36B/Form 36*
2010-11	*Ground No.16 to Ground No.20*
2011-12	*Ground No.20 to Ground No.21 and Ground No.23 to Ground No.25*
2012-13	*Ground No.22*
2014-15	*Ground No.10 to Ground No.12*

- Years for which transfer pricing adjustment was undertaken for reimbursement of expense

Nature of reimbursement of expenses	*AY 2010-11*	*AY 2011-12*	*AY 2012-13*	*AY 2014-15*
Purchase of trade samples from the AE	✓	✓		
Payment of salary to expatriates	✓		✓	✓
Expenses incurred on sporting events	✓	✓		
Expenses relating to freight and insurance	✓			

"Nature of expenses reimbursed

Purchase of trade samples from the AE

Assessment year	*Reference to Paperbook*
2010-11	*Page 73*
2011-12	*Page 61*

NIPL being an entrepreneur distributor bears all risks in relation to its distribution activity in India. The samples, displayed by NIPL to third party distributors are new products proposed to be introduced by NIKE Group into the market. Given that the distribution of products are seasonal and the production scheduling happens well in advance, display of samples to third party distributors would enable NIPL to receive sales order from the third party distributors for the coming seasons. ***Accordingly, NIPL incurs incidental Air freight cost / Warehousing Cost in relation to the sales samples which is required in NIPL's ordinary course of business to derive its sales revenue.***

The learned TPO adopted the approach followed in the earlier years for the treatment of the cost incurred with respect to samples from NIKE Inc. The Appellant has clearly demonstrated during the submissions made before the learned TPO that these expenses were incidental in nature and did not construe an expense incurred in relation to payment for the samples.

Given this, the Assessee finds no reason for these expenses not to be considered at arm's length as these are only freight and related costs in relation to the samples which are absolutely relevant for NIPL to receive sales order from third party distributors and thus derive sales revenue.

Further, the assessee wishes to submit that the learned TPO erred in holding that the person placing the order on the third party factory supplier is the AE without appreciating the fact that, it is NIPL which places a purchase order on the third party factory supplier.

Payment of salary to expatriates:

Arguments	*Assessment year*	*Reference to paper book*
Key terms of the Secondment Agreement	*2010-11*	*Page 81*
	2012-13	*Page 39 to Page 46*
	2014-15	*Page 319*
A copy of taxes paid by the expats are provided as evidences before the learned TPO/AO/DRP	*2010-11*	*Page 83*
	2012-13	*Page 39 to Page 46*
	2014-15	*Page 319*

NIKE Inc. seconded its employees to NIPL for the benefit of the business of NIPL. The seconded employees were experts in their related fields andthese employees were requested by the Appellant to be deputed to India for the purpose of assisting the Appellant in the business. The salary cost incurred by NIKE Inc., US and other expenditure incurred in respect of these employees deputed is cross-charged to the Appellant. These expatriates are paying personal taxes in India and are duly filing their respective income tax returns.

The secondment of employee to NIPL was purely for the benefit of NIPL and that it enjoys all associated benefits with it and therefore can be termed as the "Economic Owner" of the seconded employees.

In relation to the above, reliance is placed on the following rulings of ***IDS Software Solutions (I) Pvt Ltd. (ITA No. 87/13ang/2008)*** *and* ***Caterpillar India Private Limited (ITA 630/Bang/2010).***

Further reliance is placed on the judicial decision in the case of ***Caparo Engineering India Pvt. Ltd [TS-325-ITAT-2018(DEL)-TP]*** *wherein it was held that where the employees have been deployed for the business operations of the assessee, the ALP cannot be determined as NIL on the basis of failing benefit test.*

Therefore, it is clear from the above that the employees seconded to NIPL were purely for the benefit of NIPL and that it enjoys all associated benefits with it and therefore can be termed as the "Economic Owner" of the seconded employees.

The Appellant wishes to submit that NIPL is a full-fledged distributor and the services rendered by the seconded employees benefit NIPL and accordingly it is the duty of NIPL to incur such cost.

Expenses incurred on sporting events

Assessment year	*Reference to paper book*
2010-11	*Page 87*
2011-12	*Page 68*

The reimbursements of expenses paid also include expenses incurred on purchasing promotional product for sponsoring events like Human race, NSW product launch and Manchester United Cup.

Expenses relating to freight and insurance

Assessment year	*Reference to paper book*
2010-11	*Page 88*

In this respect, the assessee wishes to submit that freight and insurance cost is incurred in respect of samples obtained from AE. In other words, these costs are incurred by Nike Inc., US and thereafter cross-charged to NIPL."

15.2 However, we notice that an identical issue has been examined by the co-ordinate bench in the assessee's own case in IT(TP)A Nos.653 & 654/Bang/2011 relating to AY 2005-06 & 2006-07 – Order dated 10-05-2013. We further notice that this issue has been decided against the assessee with the following observations:-

"5.5.1 We have heard both the parties and carefully perused and considered the rival contentions and the material on record. The main issue for consideration before us is whether or not the expenses incurred by the parent company, Nike Inc., USA can be attributed solely and totally to the business of distribution undertaken by the assessee. It is the contention of the assessee that these expenses incurred towards cross payment charges in the relevant period amounting to Rs.4,79,96,697 are solely related to the business of the assessee in India. Per Contra, revenue's view is that the assessee has failed to establish and demonstrate that these expenses are to be attributed to the business operations of the assessee.

5.5.2 To understand and appreciate the role and business of the assessee and the interplay it has with its parent company, Nike Inc., USA, in respect of its operations, an examination of the Transfer Pricing Study/Report submitted by

the assessee is both informative and useful. In the Transfer Pricing report, under the heading "Brief on the Business", it is mentioned that –

"1.2.3 Nike India, a wholly owned subsidiary of NIKE Holdings Inc., is responsible for distribution of footwear, sports apparel and equipment. In addition, NIKE India Provides administrative support in relation to the marketing and brand promotion initiatives of NIKE Group in India.

1.2.4 The development of arm's length price in this analysis recognizes that NIKE India acts as a wholesale distributor and is primarily engaged in the business of providing value added services, acting as an intermediary between entrepreneurs and customers. This analysis reflects the provisions of the OECD Guidelines concluding that, at arm's length, companies engaged in providing such value added services are entitled to receive compensation appropriate to the services performed and the capital invested in their businesses, but are not entitled to share in any returns attributable to the marketing or commercial intangibles that belong to the entrepreneur.

1.2.5 NIKE group owns virtually all the valuable intellectual property rights (know how, copy rights, etc.) and other commercial or marketing intangibles (brand names, trade marks, etc.) and is involved in complex operations of developing proprietary technologies NIKE group also bears all the significant business and entrepreneurial risks of product acceptability and performance in the market: On the other hand, NIKE India does not own any interest in these intangibles and is a mere service provider. Eased on an analysis of the functions performed and risks assumed, we conclude that NIKE group has more complex operations and bears greater share of risks."

5.5.3What emerges from a perusal of the above paragraphs of the Transfer Pricing Study report submitted by the assessee is that;

> *i) NIKE Group, the parent company, does certain marketing brand promotion initiatives, with some administrative support from the assessee;*
>
> *ii) The assessee is merely a wholesale distributor and is only an intermediary between Nike Group and the ultimate customer. It is only a service provider, is compensated for its services and has absolutely no stake in the marketing and commercial intangibles, which belong only to the parent company.*
>
> *iii)- The business risk of product acceptability and performance in the market is borne by Nike Group, the parent company and the assessee does not own any interest in the same.*

5.5.4 Admittedly, as per the submissions of the assessee, the cost of samples is incurred to increase and improve the product awareness, the responsibility for which vests with the parent company, Nike Inc., USA. In this factual matrix, there is no reason why a mere service provider, merely acting as an intermediary between the entrepreneur and the customer, should bear the expenses related to increasing the product awareness and product acceptability in the market. The submissions made by the assessee before us and before the authorities below have been contradictory to what is stated in the assessee's Transfer Pricing Study and this is not acceptable. Further, as pointed out by the TPO, the assessee has separately booked substantial expenses amounting to approx. Rs.2.42 Crores towards advertising, marketing and sales promotion which is approx.. 8% of sales turnover and these have been allowed as expenses incurred towards promotion of product sales. The onus for proving that the expense! incurred by the parent, Nike Inc, USA, are towards the sales of the products and not for the purpose of creating brand awareness is on the assessee, which onus is not discharged by the assessee. Also considering that the assessee itself has admitted that the parent, Nike Inc. USA has brand marketing and promotion initiatives in India, it is but natural to conclude that the expenses incurred by Nike Inc., USA are towards creation of brand awareness, for which the parent has the responsibility. In this view of the matter, the expenses on cost of samples, etc., have to be attributed to the parent, Nike Inc., USA and therefore it is not correct to conclude that these expenses have to be borne by the assessee.

5.5.5 As regards the expenses related to employees, of the parent company who have been deputed to the assessee, the FAR analysis in the Transfer Pricing Study/Report related to the employees states as under:

Risk Category and Description	*Exposure to NIKE India*	*Exposure to NIKE Group*
Manpower Risk: *Any enterprise, which is largely dependent for its success, upon quality personnel with superior technical knowledge is faced with this risk. Competitive market forces expose such an enterprise to the risk of losing its trained personnel*	*NIKE India has to hire and retain good personnel. However, recruitment of key employees at higher levels are guided by Bike Group*	*NIKE Group bears a greater degree of this risk as it needs to retain key employees and trained technical people.*

As .is stated in the Transfer Pricing Study, the recruitment of key employees at higher levels in the assessee company are guided by the parent group, negating the claim of the assessee made before us that these employees are totally under the control of the assessee. Further, from the secondment agreement submitted by the assessee before us, it is seen that the personnel deputed from the parent company are working as

General Manager, India Sales Director, Manufacturing leader, Category Business Director and the like. There is no plausible reason put forth to justify why a mere service provider, who is only an intermediary between the entrepreneur viz. Nike Inc., USA and the customer should incur costs related to manufacturing leader, category business director, etc. Also it is inconceivable why a third party unrelated entity would employ people from the entrepreneur to man such key senior positions in its organization. Further, we also find that the assessee has not furnished any evidence to substantiate its claim that these persons, indeed only work in the distribution activities which is the sole work undertaken by the assessee. The onus for providing evidence to substantiate its claim rests with the assessee which, in the facts and circumstances as discussed above, the assessee has not discharged.

*5.5.6 In respect of the expenses amounting to Rs.1,74,93,025 claimed in *Miscellaneous Expenses", the assessee has put forth only a general explanation that these represent couriering expenses, etc. No further details as to the nature of expenses, the purpose for which they were expended etc. has been forthcoming from the assessee. The assessee has also not furnished any evidence to establish that these expenses were indeed incurred for and on behalf of the assessee. In the absence of these details, the claims put forth by the assessee remain unsubstantiated.*

55.7 Another contention of the assessee is that since the same set of expenses has been held to be at arm's length in the assessee's own case for Assessment Year 2008-09, therefore, they should be treated as arm's length in the year under consideration. We are unable to accept the contention that the transfer pricing adjustment made in the two years under consideration has to be negated only on the ground that such an adjustment was not made in the subsequent year. It is a well settled position in law that the assessment of every year stands on its own legs and the 'principle of res judicata' does not apply to income tax assessment proceedings. The ALP for each year is determined based on the set of facts applicable to each of the individual years and no common proposition can be propounded for all the years. As mentioned earlier, for the two years under consideration before us, the assessee has not furnished any evidence to substantiate its claim that these persons work only for the distribution activity undertaken by the assessee. The onus for bringing such evidence on record to substantiate the claim rests with the assessee and we find that such onus has neither been discharged before us nor before the authorities below. If these expenses were held to be at arm's length in the subsequent year, then the assessee must have furnished evidence before the TPO to show that these persons had contributed for the distribution activities of the assessee for that year. The facts could be different for each year be different for the same assessee depending on various factors and stage of the assessee's business and require to be viewed differently. From the copies of secondment agreement submitted to us, we find that the employees seconded are different for different years performing different functions, as seen from their designations. In this view of the matter the contention that the adjustment made in the two years under consideration require to be deleted merely be similar

adjustment was not made in the subsequent year is not acceptable. We find that the facts applicable to the two years under consideration do not support the case of the assessee. In fact, as explained earlier, the statements, averments, admissions made in the Transfer Pricing Study submitted by the assessee does not support the stand urged by the assessee before us.

5.5.8 In view of the facts and circumstances of the case, as discussed above, on the issue of payment of cross charges of expats costs and contractor charges claimed as reimbursements to the parent company, Nike Inc., USA, we are of the considered opinion that the TPO has been right in holding that:

i) the nature of these expenses are such that they cannot be attributed to have been solely and exclusively for the distribution business of the assessee;

ii) the claim of the assessee that it had derived tangible benefit from the expenditure has not been substantiated with evidence.

iii) there is no evidence or likelihood of any independent entity dealing in similar circumstances bearing such expenditure.

iv)

We, therefore, uphold the finding in the orders of the authorities below in making the T.P. adjustment of Rs.4,79,96,697 for assessment year 2005-06 and dismiss the grounds raised by the assessee."

Accordingly, following the decision rendered by the co-ordinate bench referred above, we decide this issue against the assessee and confirm the Transfer Pricing adjustment made by the TPO.

16. The next issue relates to the T.P adjustment made in respect of third party royalty. This issue is being contested by the assessee in AY 2010-11, 2012-13 and 2014-15.

16.1 The TPO noticed that the assessee was paying royalty on goods endorsed by celebrity sports persons around the world on the basis its sales turnover in India. The TPO noticed that the assessee has not furnished any agreement in respect of this

arrangement. The assessee could not also furnish workings as to how it is allocated to it. Further, the assessee was seen paying royalty @ 1% on the sales, in addition to the payment of third party royalty, in accordance with the agreement entered by it with M/s NEON, an Associated Enterprises, which manages endorsement contracts with world class athletes. Accordingly, the TPO took the view that the payment of third party royalty would amount to duplication of payment. The TPO also noticed that the assessee has not obtained approval from RBI for making this payment. Accordingly, he took the view that the third party royalty is not an expenditure related to the assessee. Accordingly the TPO determined the ALP of this expenditure at NIL.

16.2 The Ld A.R submitted that there is no duplication of royalty payment as presumed by the TPO. He submitted that the assessee is paying royalty of 1% for using the brand name NIKE in its products. In addition to that, the Associated Enterprise "NEON" enters into contracts with celebrities for promotion of the product, which would in turn would increase the sales. The third party royalty simply represents cross charging of royalties paid by AE back to the distributors.

16.3 We heard Ld D.R on this issue and perused the record. As observed by the co-ordinate bench in the case of the assessee in AY 2005-06, the onus to prove that the expenses incurred by the AE was towards sale of products and not for purpose of creating brand awareness lies upon the assessee. We notice that this onus has not been discharged by the assessee. The basic details like the agreement if any for reimbursing this expenses, RBI approval, business necessity/expediency in making the payment, the basis

of calculation etc., have not been furnished. Hence, the TPO has taken the view that this expenditure is not related to the business of the assessee and accordingly he has determined the ALP at NIL. Before us also, no further details were furnished. In view of the above, we are of the view that there is no infirmity in the order so passed by the TPO/AO.

17. The next issue relates to TP adjustment made in respect of payment of trade mark Royalty. This issue is being urged in assessment year 2010-11 and 2011-12. The TPO noticed that the royalty debited in P&L account is more than the royalty paid to the A.E. It was explained that the difference represented service tax payable on royalty. It was submitted that the assessee has borne the service tax component payable on the royalty. The TPO noticed that the clause 10.4 of the license agreement entered by the assessee with the A.E. provide for deduction of taxes, if any payable on royalty. Accordingly, the TPO took the view that the service tax payment is the liability of the A.E. and not that of tax payer. Accordingly, the TPO made transfer pricing adjustment to the extent of service tax component and the same was upheld by DRP also.

17.1 The Ld. AR submitted that the service tax was paid by the assessee under reverse charge mechanism and hence it was borne by the assessee. He further submitted that identical issue was examined by the TPO in assessment year 2012-13 and did not make any transfer pricing adjustment.

17.2 We heard Ld. D.R. on this issue and perused the record. Having regard to the fact that the TPO has accepted service tax

component as assessee's expenditure in assessment year 2012-13 and consequently did not make any Transfer pricing adjustment, we are of the view that this issue may be restored to the file of TPO for examining it afresh. Accordingly, we set aside the order passed by A.O. on this issue and restore the same to the file of AO/TPO.

18. The next issue relates to transfer pricing adjustment made in respect of interest paid on Compulsorily Convertible Debentures (CCD). This issue is being contested by the assessee in AY 2012-13 and 2014-15.

18.1 During the year relevant to AY 2012-13, the assessee had issued debentures to the tune of Rs.527.54 crores to M/s Nike India Holding B V (Netherlands). The Debentures carried interest rate @ 12% p.a. The TPO noticed that the average Base rate of interest determined by State Bank of India during the financial year 2011-12 worked out to 9.31%. Accordingly he proposed to make transfer pricing adjustment by adopting the rate of interest @ 9.31% under CUP method by taking the base lending rate determined by State Bank of India. The assessee submitted that the base rate is the minimum rate set by Reserve Bank of India and the bank is free to charge higher rate of interest depending upon credit risk of the customer. It also submitted that the bank lending rate cannot be considered to be comparable with the rate charged on debentures. The TPO did not accept the contentions of the assessee and accordingly made transfer pricing adjustment of Rs.4,09,95,719/- by adopting the rate of interest @ 9.31%.

18.2 In AY 2014-15, the TPO took the view that the Compulsorily convertible Debentures is a controversial financial product called "hybrid instrument". He further observed that the CCD suffer different tax treatment in different jurisdictions,, i.e., it is treated as loan in one country and dividend receipts in another country. Such hybrid instruments are criticized strongly by Organisation for Economic Cooperation and Development. The TPO referred to certain case laws and held that the CCD is in the nature of equity. Accordingly he held that the ALP of interest payable on CCD at NIL.

18.3 The Ld DRP upheld both the views taken by TPO in the above said years.

18.4 The Ld A.R submitted that the TPO has considered the interest payment made in the year relevant to AY 2015-16 and held it to be at arms length. In this regard, the TPO has made enquiries with foreign authorities and it was ascertained that the interest paid by the assessee has been offered as income by the AE in its hands.

18.5 We notice that the TPO has been taking different stand in different years. While he accepted the CCD as debentures in AY 2012-13 and reduced the rate of interest only, the TPO treated CCD as equity in AY 2014-15. However, in AY 2015-16, the TPO has accepted the rate of interest of 12% to be at arms length. We notice that the TPO has made certain enquiries in AY 2015-16 and accordingly came to the conclusion that the interest payment is at arms length. The benefit of those enquiries was not available with the TPO in the two years under consideration. Since the

issue is the same in all the years and further, in view of the conflicting stands taken by TPO, we are of the view that this issue requires fresh examination at the end of TPO. Accordingly, we restore this issue in both the years under consideration to the file of AO/TPO for examining it afresh.

19. The next issue relates to the Transfer pricing adjustment made in respect of Sourcing Commission payment. This issue is being urged in AY 2014-15.

19.1 During the year relevant to the assessment year 2014-15, the assessee has paid sourcing commission of Rs.22.24 crores to its Associated Enterprise named M/s Nike Global Trading Pte., Singapore (NGTPS). The rate of commission paid by the assessee was 7% of the value of products sourced. The assessee benchmarked the same under CUP method by selecting certain comparable companies, which had paid sourcing commission in the range of 5% to 12%. Accordingly, the assessee claimed the payment to be at arms length.

19.2 The TPO observed that the comparable companies selected by the assessee has not been proved to be really comparable. The TPO has also analysed the agreements entered by the comparable companies with their respective agents and took the view that they are materially different. Accordingly, the TPO took the view that the CUP method adopted by the assessee is not suitable to the assessee. Hence he called for various details from the assessee. After considering those details, the TPO came to the conclusion that the assessee has not been able to show that NGTPS did all those activities as mentioned in the agreements.

Accordingly he came to the conclusion that that the agreements are nothing but make belief arrangements. The TPO reinforced his views by observing that the assessee did not pay any commission till AY 2013-14 and did not mention about any sourcing agent till that year. In the absence of evidences proving that the services were provided by the sourcing agents, the TPO determined the ALP at NIL. Accordingly he made transfer pricing adjustment of Rs.22.24 crores. The Ld DRP also confirmed the same.

19.3 The Ld A.R submitted that the assessee has furnished various evidences to prove that the sourcing agent has provided services to the assessee. He submitted that the assessee has utilized services of one USA entity and one Singapore entity. However, the assessee has paid commission only to the Singapore entity. He submitted that the assessee has furnished copies of agreements entered with the agents, confirmation letter obtained from the agents, e-mail communications, summary of e-mail communications etc., before the TPO in this regard. He submitted that the TPO, however, did not examine these important evidences, but came to the conclusion that the agent has not provided services to the assessee. Accordingly he prayed that this issue may be restored to the file of TPO for examining it afresh by duly considering various evidences furnished by the assessee.

19.4 We heard Ld D.R. Having regard to the submissions made by Ld A.R, we are of the view that this issue requires fresh examination at the end of TPO. Accordingly we restore this issue to the file of AO/TPO for examining it afresh by duly considering the various evidences furnished by the assessee. After affording

adequate opportunity of being heard, the AO/TPO may take appropriate decision in accordance with law.

20. The remaining issues are corporate issues and the additions have been made by the assessing officer. The first corporate issue urged by the assessee relates to the "disallowance of purchase of samples and incidental expenses". This issue is being urged in AY 2012-13 and 2014-15.

20.1 This expenditure was disallowed by way of Transfer pricing adjustment in the earlier years. In the assessment year 2012-13 and 2014-15, the assessing officer has disallowed the expenditure incurred on purchase of samples and incidental expenses holding that this expenditure is to be borne by the manufacturer only and not by the assessee, as the assessee is only distributor of products.

20.2 The AE of the assessee, viz., Nike Inc., has introduced new products and accordingly sent samples to the assessee for giving the same to the third party distributors, who are required to display the same in their premises. The objective is apparently promotion of the new products. The AE has charged the assessee towards cost of samples given to it. The AO took the view that the assessee is only a distributor of the NIKE products and hence the expenditure on samples should be borne by the manufacturer only. Accordingly the AO took the view that the manufacturer should not pass on the burden to the assessee. Accordingly, the AO took the view that the expenditure on purchase of samples and incidental expenses are not related to the business activities

of the assessee. Accordingly he disallowed the same. The Ld DRP also confirmed the same.

20.3 The Ld A.R submitted that the assessing officer cannot sit in the arm chair of the assessee and decide the mode of conducting business. He submitted that the assessee has incurred expenditure on samples on commercial considerations and hence the same should be allowed. The Ld A.R placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of CIT vs. Dhanrajgirji Raja Narasingirji (1973)(94 ITR 544), wherein the Hon'ble Apex Court has observed as under:-

> "It is not open to the department to prescribe what expenditure an assessee should incur and in what circumstances he should incur that expenditure. Every businessman knows his interest best. So far as the apportionment is concerned we are not told why we should not consider the same as a reasonable estimate."

20.4 We heard Ld D.R and perused the record. We have noticed earlier that this expenditure was a matter of transfer pricing adjustment in AY 2010-11 and 2011-12, wherein we have confirmed the transfer pricing adjustment by following the decision rendered by the co-ordinate bench in the assessee's own case in AY 2005-06 & 2006-07. In those years, the Tribunal has decided the issue against the assessee with the following observations:-

> *"The onus for proving that the expense! incurred by the parent, Nike Inc, USA, are towards the sales of the products and not for the purpose of creating brand awareness is on the assessee, which onus is not discharged by the assessee. Also considering that the assessee itself has admitted that the parent, Nike Inc. USA has brand marketing and promotion initiatives in India, it is but natural to conclude that the expenses incurred by Nike Inc., USA are*

towards creation of brand awareness, for which the parent has the responsibility. In this view of the matter, the expenses on cost of samples, etc., have to be attributed to the parent, Nike Inc., USA and therefore it is not correct to conclude that these expenses have to be borne by the assessee."

In our view, the view expressed by the co-ordinate bench can be taken as guidance for deciding the issue in the years under consideration also. There is no dispute that the parent company Nike Inc., has introduced new products and the samples are supplied to third party distributors in order to create awareness of new products amongst the public. The assessee herein is merely an intermediary between M/s Nike Inc and the public. Hence, it is the responsibility of the assessee, first of all, to show that the expenditure on samples &incidental expenditure was incurred for the purposes of business of the assessee. Under sec.37(1), expenditure should have been laid out or expended wholly and exclusively for the purposes of business of the assessee. In the context of AMP expenses, the co-ordinate bench has taken the view that the sample expenses are related to brand promotion and marketing initiatives of the parent company of the assessee, meaning thereby, it cannot be said that this expenditure has been expended wholly and exclusively for the business of the assessee. The Ld A.R contended that the assessing officer cannot question the necessity of incurring the expenditure. However, in our view, when the transaction is between related parties, the Act places more burden on the shoulders of the assessee to prove that the expenditure is related to the business of the assessee. Further, in trade circles also, it is known fact that the expenditure on samples are borne by the manufacturers only. Hence this claim of expenditure is against the trade practice and the assessee appears to have borne the expenses only on the reasoning that the same was charged upon it by its parent company. Hence, we are of the

view that the AO was justified in holding that the burden to incur this expenditure is that of parent company and is not related to the business activities of the assessee. Accordingly, we confirm the disallowance made by the AO.

21. The next issue urged by the assessee relates to the disallowance of "Provision for Sales return". This issue is being urged in AY 2012-13 and 2014-15.

21.1 The AO noticed that the assessee has claimed deduction for "Provision for sales returns". When enquired, the assessee submitted that it creates a provision for anticipated sales returns based on a percentage of the sales made each month. It was further submitted that the provision is created only towards the margin of the anticipated sales returns. It was explained that in the subsequent year, the actual sales returns are compared with the provision made in the books and the excess provision, if any, is reversed. The AO took the view that the provision so made is not towards an ascertained liability and hence it is contingent in nature. The AO also observed that the assessee is estimating the probable sales return on the basis of its own data. Accordingly, he held that the provision for sales return is not allowable as deduction u/s 37 of the Act. The Ld DRP also confirmed the same in both the years.

21.2 The Ld A.R submitted that the provision is created on the basis of reliable estimate made on scientific basis and hence it is allowable as deduction. In this regard, he placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd (2009)(180 taxmann 422) and the

decision rendered by Hon'ble Karnataka High Court in the case of Apple India Private Ltd (ITA No.204/2008). He also relied upon the decision rendered by Hon'ble Karnataka High Court in the case of Wipro GE Medical Systems (ITA Nos. 438, 444/2002), wherein it was held that the provision for warranty is not a contingent liability and is allowable as deduction. He further submitted the assessee is required to provide for liability as per Accounting Standard 29 titled as "Provisions, Contingent liabilities and Contingent Assets". He submitted that if the provision is estimated by using substantial degree of estimation, the same is allowable as deduction. He submitted that the assessee is estimating the provision for sales returns on a scientific basis and the provision is restricted to margin portion of the anticipated sales returns. The Ld A.R submitted that the assessee, while making sales, gives unlimited right of return. Hence it would be appropriate to make a suitable provision for returns based on previous experience. Accordingly he submitted that the provision for sales return is allowable as deduction u/s 37(1) of the Act.

21.3 We heard Ld D.R on this issue and perused the record. It is the submission of the assessee that it is providing for sales returns on a scientific basis on substantial degree of estimation. It has taken support of Accounting Standard 29 (AS 29) relating to "Provisions, Contingent Liabilities and Contingent assets". AS 29 explains that a "provision" should be recognized when

- an enterprise has a present obligation as a result of past event.
- It is probable that an outflow of resources embodying economic benefit will be required to settle the obligation and

- A reliable estimate can be made of the amount of the obligation.

21.4 A careful perusal of the above said definition of "provision" given in AS 29 would show that there should exist a "**present obligation**" as a result of "**Past event**". The question here is whether the "Provision for sales return" would satisfy above said requirement?

21.5 Whether "Provision for sales return" can fall under the category of "Present obligation as a result of past event"?. The present obligation as a result of past event contemplates that there has occurred some event in the past and the same would give rise to some obligation to the assessee and further the said obligation should exist as on the Balance Sheet date. The prudence principle in accounting concepts mandates that an assessee should provide for all known losses and expenses, even though the exact quantum of loss/expense is not known.

21.6 However, we notice that the facts available in the instant case are different. The assessee has effected sale of products and accordingly, recognized revenue arising on such sales. By making "provision for sales return", what the assessee sought to do is to de-recognise the revenue so recognized by it earlier. There should not any dispute that the "past event" in the instant case is "Sales" and not "Sales return". When there is no past event, the question of "present obligation out of such past event" does not arise. Hence, we are of the view that the provision for sales return does not represent present obligation arising as a result of past event. Rather, it is an expected obligation that may arise as a

result of a future event. Accordingly, we are of the view that the 'Provision for Sales return" would not fall under the category of "Present obligation as a result of past events". Hence various case laws relied upon by the assessee and the Accounting Standard 29 would not support the case of the assessee. Accordingly, we are of the view that the assessing officer is justified in holding the "Provision for sales return" as contingent liability. Accordingly we confirm the disallowance made by the assessing officer on this issue in both the years referred above.

22. The last issue urged by the assessee relates to the disallowance made u/s 40(a) of the Act and this issue arises for consideration in AY 2012-13.

22.1 According to the assessee, Provision for expenses made by it in the earlier was disallowed in earlier years for non-deduction of tax at source. During the year relevant to AY 2012-13, the assessee had deducted and paid tax at source and hence the provision amount is allowable as deduction. The AO noticed that the claim of the assessee is not verifiable from the record and accordingly rejected the claim of the assessee.

22.2 It is the submission of Ld A.R that the assessee could not furnish the relevant details before the AO for want of time and accordingly prayed that this issue may be restored to the file of the AO for examining it afresh.

22.3 We heard Ld D.R and perused the record. Having regard to the submissions made by Ld A.R and also the observations made by the AO in the assessment order, we are of

the view that this issue requires fresh examination at the end of the AO. Accordingly, we set aside the order passed by the AO on this issue and restore the same to his file for examining it afresh in accordance with law.

23. In the result, the appeal of the assessee for AY 2007-08 is allowed and all other appeals of the assessee are treated as partly allowed.

Order pronounced in the open court on 14th Oct, 2020

Sd/-	**Sd/-**
(Beena Pillai)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 14th Oct, 2020.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.