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

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

(THROUGH VIDEO CONFERENCE)

ITA No.7509/Del./2017
(Assessment Year : 2012-13)

ITA No.7510/Del./2017
(Assessment Year : 2013-14)

Huawei Telecommunications (India) Pvt. Ltd., 7th Floor, Tower A, Spaze I-Tech Park, Sohna Road, Sector 49, Gurgaon – 122 002.	vs.	DCIT, Circle 2 (1), New Delhi.

(PAN : AABCH1376E)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Deepark Chopra, Advocate
Shri Harpreet S. Ajmani, Advocate
Shri Rohan Khare, Advocate
Ms. Sehr Chopra, Advocate
REVENUE BY : Shri Surender Pal, CIT DR

Date of Hearing : 07.01.2021
Date of Order : 24.02.2021

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts and law have been raised in the aforesaid inter-connected appeals, the same are being

disposed off by way of consolidated order to avoid repetition of discussion.

2. Appellant, Huawei Telecommunications (India) Company Pvt. Ltd. (HTICL) (hereinafter referred to as the 'taxpayer') by filing the present appeals sought to set aside the impugned order both dated 03.10.2017 passed by the AO in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment years 2012-13 & 2013-14 on the identical grounds except difference in the amount of adjustments/additions/ disallowances and except one additional ground nos.2.6 to 2.6.5 for benchmarking of "Project Management Services" in Assessment Year 2012-13 value of which has been taken at Nil, inter alia that :-

> ***"1. General***
>
> ***1.1. That on the facts and. in the circumstances of the case and in law, the Ld. AO erred in passing the impugned assessment order dated October 03, 2017 pursuant to the directions of the Hon'ble Dispute Resolution Panel (Hon'ble DRP) thereby computing the total income of the appellant at Rs.1,380,032,000 as against returned loss of Rs. 62,390,267; and***
>
> ***1.2. That the assessment order passed by the Ld. AO pursuant to the directions of Hon'ble DRP is based on surmises and conjectures, and, without considering the facts and arguments submitted by the appellant during the course of assessment proceedings.***
>
> ***2. Transfer Pricing***

2.1. That on facts and circumstances of the case and in law, the Ld. AO) Transfer Pricing Officer (,Ld. TPO')/ 'Hon'ble DRP' has erred in making transfer pricing adjustments to the extent of Rs.394,552,611 in respect of the international transactions, alleging that the same to be not at arm's length in terms of the provisions of sections 92C(1) and 92C(2) of the Act, read with Rule 10D of the Income-tax Rules,1962 (,Rules');

2.2. That on the facts and circumstances of the case and in law, the Ld. AO / Ld. TPO/ Hon'ble DRP has erred by not satisfying any of the conditions prescribed under section 92C(3) of the Act while making transfer pricing adjustments and has erred by not accepting the transfer pricing documentation maintained by the Appellant in the manner as contemplated under the Act and Rules;

2.3. That on the facts and circumstances of the case and in law, the Ld. AO / Ld. TPO/ Hon'ble DRP has made substantial errors in the facts and conclusions as stated in the Transfer Pricing ('TP') Order based on which the arm's length price of the international transaction has been determined;

2.4. That on the facts and circumstances of the case and in law, the Ld. AO / Ld. TPO has grossly erred in not providing the Appellant with an opportunity to show cause the proposed TP adjustments and thereby disregarding the principles of natural justice;

2.5. That on the facts and circumstances of the case and in law, the Ld. AO / Ld. TPO/ Hon'ble DRP has erred in making an adjustment to the extent of Rs. 39,138,666 in respect of international transaction pertaining to availing of Technical Services from its Associated Enterprise ('AE') alleging the same to be not at arm's length. In doing so:

2.5.1. The Ld. Ld. AO / Ld. TPO/ Hon'ble DRP has erred in law and on facts, by determining the arm's length price for payment for availing Technical Services as 'Nil' and not acknowledging the fact that the services were actually received by the Appellant.

2.5.2. The Ld. AO / Ld. TPO/ Hon'ble DRP has erred in law and on facts by not appreciating the rationale, back-up information/ explanation as provided / submitted by the Appellant during the course of the assessment proceedings.

2.5.3. The Ld. AO / Ld. TPO/ Hon'ble DRP has erred in law and on facts by questioning the commercial expediency/wisdom of the Appellant for availing such services.

2.5.4. The Ld. TPO has erred in law and on facts by ignoring the provisions of Rule 10B while applying 'Other Method' in

determining the arm's length price for receipt of Technical Services.

2.5.5. The Ld. TPO / Hon'ble DRP has erred in law and on facts by not sharing the relevant material / information relied upon to apply the 'Other Method' as most appropriate method for benchmarking the transaction of receipt of Technical Services.

2.5.6. The Ld. AO / TPO has erred in law and on facts by not appreciating the fact that the subject transaction has been benchmarked using Comparable Uncontrolled Price ('CUP') method;

2.6. That on the facts and circumstances of the case and in law, the Ld. AO/Ld.TPO/Hon'ble DRP has erred in making an adjustment of Rs.355,413,945 in respect of international transaction pertaining to availing of Project Management Services from its AE alleging that the same to be not at arm's length. In doing so :

2.6.1. The Ld. AO / Ld. TPO / Hon'ble DRP has erred in law and on facts, by determining the arm's length payment for availing Project Management Services as 'Nil' and no acknowledging the fact that the services were actually received by the Appellant.

2.6.2. The Ld. AO / Ld. TPO / Hon'ble DRP has erred in law and on facts by not appreciating the rationale, back-up documentary evidence/explanation as provided by the Appellate during the course of the assessment proceedings.

2.6.3. The Ld. AO / Ld. TPO / Hon'ble DRP has erred in law and on facts by questioning the commercial expediency/wisdom of the Appellant for availing such services and ignoring that these services were directly utilized for provision of services to third parties;

2.6.4. The Ld. AO / Ld. TPO/ Hon'ble DRP has erred in law and on facts by ignoring the provisions of Rule 10B while applying the 'Other Method' methodology in determining the arm's length price for availing Project Management Services;

2.6.5. The Ld. AO / Ld. TPO/ Hon'ble DRP has erred in law and on facts by not sharing the relevant material/ information relied upon to apply 'Other Method' as most appropriate method for benchmarking the transaction of availing of Project Management Services.

Corporate Tax

3. Addition on account of advertisement expenses – Rs.28,479,838

3.1 The Ld. AO and the Hon'ble DRP has erred on facts and in law in confirming a disallowance of INR 28,479,838 on an adhoc basis being 30% of total advertisement expenses of Rs.94,932,796, without appreciating that the advertisement expenses have been incurred wholly and exclusively for the purpose of Appellant's business and it is irrespective of any benefit to any group company or to a third party;

3.2 The Ld. AO and the Hon'ble DRP erred on facts and in law in holding that the advertisement expenses have been incurred for creation of the brand of the group and thus is capital in nature;

3.3 Without prejudice to the above, the Ld. AO and the Hon'ble DRP erred in ignoring the fact that the advertisement expenses have already been recovered from the AEs at an agreed mark-up and therefore, based on the judgements of jurisdictional Tribunal, no disallowance of the advertisement expenses can be made;

3.4 Without prejudice to the above, the Ld. AO and Hon'ble DRP erred in not allowing depreciation at the rate of 25 percent of the advertisement expenses allegedly held as capital in nature.

4. Addition on account of provision for customer claims – Rs.1,010,856,249

4.1 The Ld. AO and the Hon'ble DRP erred on the facts and in law in confirming disallowance towards provision for customer claims of Rs 1,010,856,249 without appreciating that the amount provided by the Appellant is in relation to actual delays/defaults occurred as per the terms of the contract entered between the Appellant and its customers and thus, is an ascertained liability;

4.2 The Hon'ble DRP erred on the facts and in law in holding that such provision is an unliquidated damages made unilaterally on estimated basis and has not been computed on scientific basis, thereby completely ignoring the complete details furnished by the appellant providing details of customers, basis of calculation, period of delay, workings, copy of agreements, ;

4.3 Without prejudice to above, the Ld. AO and the Hon'ble DRP erred on the facts and in law in making disallowance of the provision under section 40(a)(ia) of the Act by holding that the provision for customer claims is compensation in the form of interest paid to customers and tax should have been deducted under section 194A of the Act;

5. Addition on account of advances written off – Rs.8,533,563

5.1 The Ld. AO and the Hon'ble DRP erred on facts and in law in confirming the disallowance of advances written-off amounting to Rs 8,533,563 on surmises and conjectures without appreciating that the expenditure was incurred wholly and exclusively for the purpose of business;

5.2 The Hon'ble DRP has erred on facts and in law in holding that the advances in the nature of security deposit are a liability to be discharged by employees and thus, the amount borne by the Appellant should be part of perquisites taxable in the hands of employees on which tax should have been deducted at source;

5.3 The Hon'ble DRP erred in ignoring the details filed by the Appellant and in holding that the necessary details were not filed by the Appellant without appreciating that such details or explanations were never asked from the Appellant;

6. That on the facts and circumstances of the case and in law, the Ld. AO and the Hon'ble DRP erred in levying interest under section 234A, 234B and 234C of the Act.

7. That on the facts and circumstances of the case and in law, the Ld. AO and the Hon'ble DRP erred in initiating penalty proceedings under section 271(1)(c) of the Act."

3. Briefly stated the facts necessary for adjudication of the issue at hand are : Huawai Technologies Co. Ltd. (HTCL) is one of the China's largest private sector telecom company for the year 2012 established in 1988 with Headquarter at Shenzhen Special Economic Zone in China for providing total solutions for mobile telecoms products and networks. Its projects and solutions ranged from complete telecoms solutions, network planning and design to manufacturing and management. HTCL has also Research & Development (R&D) support management across the world including in the USA, Sweden and Russia as well as in China.

4. Huawei Telecommunications (India) Company Pvt. Ltd., the taxpayer was incorporated on 23.07.2002 under the Indian Companies Act, 1956 being a subsidiary of Huawei Technologies Cooperatief U.A. which holds 90.11% of the total equity shareholding of the taxpayer. Huawei Tech Investment Co. Ltd., Hong Kong (HTICL) holds the balance 9.89% of the total shareholding of the taxpayer. The taxpayer was into the business of distribution of telecom equipment and provision of technical services, such as, installation, commissioning, integration and other services related to its customers in India. The taxpayer also provided business support services to its Associated Enterprises (AEs).

5. During the year under consideration, the taxpayer entered into international transactions with its AEs as under :-

S. No.	Description of the transactions	Amount (Rs.) Paid/Payable	Amount (Rs.) Received/ Receivable
1	Provision of business support services	-	2,085,914,472.00
2	Import of telecommunication equipments	483,717,622.00	-
3	Purchase of fixed assets	267,802,270.00	-
4	Purchase of spare parts	205,640,341	
5	Availing of technical services	39,138,666	-
6	Reimbursement of expenses	-	80,886,384.00
7	Recovery of Operational loss	-	529,610,988
8	Return of goods and spares parts	-	70,417,186
9	Availing of Project Management Services	355,413,945	-

6. The taxpayer challenged the benchmarking of two international transactions mentioned at Sl.Nos.5 & 9 qua availing of technical services and availing of project management services by AO/DRP/TPO by filing present appeals. Ld. TPO declining the contentions raised by the taxpayer proceeded to benchmark the transactions qua technical services and project management services by applying the benefit test claimed to be an internationally accepted method.

7. Ld. TPO also observed that in arm's length situation, one would pay fee for management and technical services only if the use of technology will give him greater economic benefit but, in the instant case, despite the use of intangibles, the margin of the taxpayer is lower than the comparables which clearly shows that the techniques or branding has not provided any benefits to the services and thereby determined the Arm's Length Price (ALP) of this transaction at Nil as no independent person in similar circumstances would pay any such charges.

8. AO also disallowed 30% of the advertisement expenditure towards public relation service, promotion activities, commercial advertisement, sponsorship, print media, media monitoring and analysis etc. by treating the same as capital expenditure to the tune

of Rs.2,84,79,838/- & Rs.90,74,855/- in AYs 2012-13 & 2013-14 respectively. AO also made disallowance of Rs.101,08,56,249/- & Rs.12,86,11894/- in AYs 2012-13 & 2013-14 respectively on account of provision made by the taxpayer for customer claim u/s 37 or 40(a)(ia) of the Act. AO also made addition of Rs.85,33,563/- & Rs.61,60,172/- in AYs 2012-13 & 2013-14 respectively on account of advances written off.

9. The taxpayer carried the matter before the ld. Disputes Resolution Panel (DRP) by way of objections who has upheld the order passed by the TPO/AO. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeals.

10. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the Revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1 OF
ITA NO.7509/DEL/2017 (AY 2012-13)
ITA NO.7510/DEL/2017 (AY 2013-14)

11. Ground No.1 of AYs 2012-13 & 2013-14 is general in nature, hence needs no specific adjudication.

GROUNDS NO.2 TO 2.6.5 OF
ITA NO.7509/DEL/2017 (AY 2012-13)

GROUNDS NO.2 TO 2.5.6 OF
ITA NO.7510/DEL/2017 (AY 2013-14)

12. The taxpayer in order to benchmark its international transactions qua availing of technical services and availing of project management services applied Comparable Uncontrolled Price (CUP) method as Most Appropriate Method (MAM) which has been rejected by the TPO/DRP who have applied the benefit test and determined the arm's length value of technical services and project management services at nil, which is now under challenge before the Tribunal.

13. Undisputedly, the Revenue has been accepting the arm's length value of the international transactions qua receipt of technical services and project management services since AY 2004-05 onwards and has not drawn any adverse inference therein. It is also not in dispute that there is no change in the business model/ function performed and risk assumed qua the transaction in question by the taxpayer during the years under consideration.

14. Ld. TPO in order to benchmark international transactions qua intra-group services availed from AEs in respect of technical services for AYs 2012-13 & 2013-14 and benchmarking of project management services for AY 2012-13 considered both the

transactions jointly and proceeded to conclude that the taxpayer has not established "cost benefit" analysis for availing the services in respect of ex-pats vis-à-vis independent employees. At the same time, as is evident from page 11 of the TP order under the heading "Findings on the basis of above", ld. TPO proposed to apply CUP as the MAM but all of sudden in order to make adjustment applied "other method" for benchmarking and re-determining the ALP of the transaction as Nil, as is evident at page 16 of the TP order.

15. Before the ld. DRP, the taxpayer has raised objections challenging the impugned order passed by the TPO which have been disposed off.

16. Ld. AR for the taxpayer contended inter alia that the TPO has returned his finding without providing sufficient opportunity of being heard qua both the transactions i.e. technical services and project management services; that ld. DRP while confirming the "benefit test" for availing technical services has not considered the relevant evidence and no separate findings have been returned on the issue of benchmarking of "project management services"; that in the alternative, ld. DRP erred in holding that availing of intra-group services are allowable u/s 37 of the Act without appreciating that no such findings have been returned in the draft

order passed by the AO and no separate show-cause notice was issued to the taxpayer to decide this issue.

17. Perusal of the order passed by the TPO/DRP/AO goes to prove that the ld. DRP passed the order without providing opportunity of being heard to the taxpayer because when the taxpayer has specifically raised the issue that initially TPO proposed application of CUP method as MAM for benchmarking the international transactions in question but abruptly applied other method without providing opportunity of being heard and determined the ALP of transaction in question at nil.

18. Even plethora of evidence brought on record by the taxpayer has not been considered by the TPO as well as ld. DRP qua payment for technical services received on the basis of USD 1600 per man-month on actual time spent by the relevant personnel nor the copy of technical services agreement between taxpayer and HTCL has been examined.

19. So far as question of determining ALP of project management services is concerned, ld. DRP has not returned any separate finding on this issue rather considered the same on the basis of reasoning given qua intra-group services. When we examine para 10.6.2 of objections raised before the ld. DRP by the taxpayer available at running page 189 of the appeal set, the

taxpayer has specifically explained the international transactions as under :-

> **"The facts of the international transaction are as follows :**
>
> **Huawei India had entered into a contract with a third party in Nepal for rendering specialized Network Services. However, Huawei India approached Huawei China for assistance since Huawei China already had working relationships in Nepal.**
>
> **Huawei China was already dealing with third party customers in Nepal and therefore, it had the relationship with third party sub-contractors in Nepal for rendering services to its customers. Thus, Huawei China assisted Huawei India by delivering services to the customer through the sub-contractors.**
>
> **To conclude, Huawei India sub-contracted the assignment to Huawei China and Huawei China ensured that the services were delivered through the sub-contractors in Nepal."**

20. However, findings of the ld. TPO given in para 10.6.3 go to prove that the contentions raised by the taxpayer has not been taken into account rather issue has been decided on the basis of surmises that no independent entity would pay for such services without any cost benefit analysis and that the taxpayer has not furnished any evidence as to the cost benefit analysis. These contentions have not been taken into consideration by the ld. DRP even. The taxpayer has also brought on record benefits derived by the taxpayer from the receipt of such services. Even, the said contract agreement between taxpayer and HTCL, which is available at page 164 of the paper book, has not been considered.

21. Identical question as to applying "benefit test" and commercial expediency by the ld. TPO/DRP/AO in benchmarking of "technical services" and "project management services" at nil has been decided by the **coordinate Bench of the Tribunal in Danisco India (P) Ltd. vs. DCIT (2020) 120 taxmann.com 224 (Delhi-Trib.)** by following other cases decided by the Tribunal in identical facts and circumstances of the case viz. **Emerson Climate Technologies (India) Ltd. vs. DCIT (2018) 90 taxmann.com 125 (Pune-Trib), Dresser Rand India (P) Ltd. vs. Addl.CIT** and also by relying upon the decision rendered by **Hon'ble Delhi High Court in case of Hive Communication Pvt. Ltd. in Income-tax Appeal 306/2011** and reached the conclusion that in such like circumstances ld. TPO in order to benchmark the transaction has to determine *"whether the price paid by the assessee for the services availed is what an independent enterprise would have paid for the same services and the analysis done by the TPO in the nature of services and the benefits arising to the assessee on availing such services was beyond the scope of transfer pricing provisions.*"

22. Hon'ble High Court of Delhi in case of **Hive Communication Pvt. Ltd.** (supra) also held that, *"legitimate business needs of the company must be judged from the view point*

of the company itself and must be viewed from the point of view of a prudent businessman and it is not for the AO to dictate what the business needs of the company should be." Hon'ble High Court also held that, *"the term "benefit" to a company in relation to its business has a very wide connotation and it was difficult to accurately measure these benefits in terms of money separately."*

23. Hon'ble Delhi High Court in case of **CIT vs. Cushman and Wakefield India (P) Ltd. (2015) 60 taxmann.com 168 (Delhi) judgment dated 07.05.2015** has held that, *"the court first notes that the authority of TPO is to conduct transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits."*

24. So, following the decisions rendered by the Hon'ble High Court and coordinate Bench of the Tribunal, as discussed in the preceding paras, we are of the considered view that it is beyond the jurisdiction of ld. TPO to determine the benchmarking of technical services and project management services by applying the "benefit test" and "commercial expediency test" rather his jurisdiction is limited to determine the ALP of transactions with the standpoint of a businessman and not by sitting on the chair of the businessman. Moreover, in the instant case, assessee has brought on record plethora of evidence for availing of the technical services and

payment made for technical services received on the basis of USD 1600 per man-month on actual time spent by the relevant personnel, copy of technical services agreement between the taxpayer and the Huawei, China and also brought on record invoices filed on sample basis for availing technical services, but all these documents have not been examined by the TPO/DRP rather benchmarked the technical services/project management services availed of by the taxpayer from its AE at nil by mechanically dealing with the issue by applying the benefit test and commercial expediency test and has not provided opportunity of being heard to the taxpayer at the time of abruptly applying the other method.

25. So, in the given circumstances, we are of the considered view that this issue is liable to be remitted back to the TPO to decide afresh by examining all the evidences brought on record by the taxpayer and to decide the issue in the light of the decisions discussed in the preceding paras and by following the rule of consistency as in the earlier years i.e. in AY 2004-05 onwards, TPO himself has accepted availing of technical services at arm's length price as determined by the assessee. Needless to say that TPO is to decide the issue afresh by providing an opportunity of being heard to the taxpayer. Consequently, Grounds No.2 to 2.6.5 of ITA No.7509/DEL/2017 (AY 2012-13) and Grounds

No.2 to 2.5.6 of ITA NO.7510/DEL/2017 (AY 2013-14) are determined in favour of the taxpayer for statistical purposes.

GROUNDS NO.3 TO 3.4 OF
ITA NO.7509/DEL/2017 (AY 2012-13)
ITA NO.7510/DEL/2017 (AY 2013-14)

26. The taxpayer challenging the disallowance of Rs.28,479,838/- & Rs.90,74,855/- being 30% of the total advertisement expenses of Rs.94,932,796/- & Rs.30,249,518/- for AYs 2012-13 & 2013-14 respectively by declining its contentions that these advertisement expenses have been incurred wholly and exclusively for the purpose of taxpayer's business and not for any benefit to any group company or to a third party.

27. The taxpayer challenged the disallowance of advertisement expenses on the grounds inter alia that AO has no jurisdiction to examine commercial expediency; that expenses are not in the nature of capital expenditure; that disallowance on ad hoc basis is not sustainable. However, ld. DRP proceeded to confirm the disallowance made by the AO on the ground that the taxpayer operates in a segment where there are only 3 – 4 players at global level and that there are only 3 – 4 customers in Indian market and that the case of taxpayer is that of a limited suppliers and limited buyers; that the activity of the taxpayer after sale of equipment i.e. installation & commissioning, post commissioning maintenance

services, upgradation etc. are monopolistic which can only be done by the taxpayer requiring any kind of advertisement/promotion etc. Since equipment belongs to brand of AEs but, at the same time, it can also not be presumed that all these expenses are only for the benefit of business of the taxpayer.

28. Bare perusal of the findings returned by the ld. DRP goes to prove that disallowances of advertisement expenses have been made on the basis of guesswork/ad hoc basis merely on the basis of assumptions and presumptions as ld. DRP itself recorded the finding that, *"However it can also not be presumed that all these expenses are only for the benefit of business of the taxpayer"*. So, disallowance made by the AO and confirmed by the ld. DRP is not sustainable.

29. The taxpayer has categorically brought on record the bifurcation of the advertisement expenses at page 221 & 204 of the paper book for AYs 2012-13 & 2013-14 respectively. It is the settled principle of law that to examine the question whether an expenditure was wholly and exclusively incurred for the purpose of business, reasonableness of the same has to be examined from the standpoint of the businessman and not of the Revenue Department. Even otherwise, ad hoc disallowance of expenditure on account of incidental third party benefit is not permissible.

30. Hon'ble Supreme Court in case of **SA Builders Ltd. vs. CIT 289 ITR 26 (SC)** has held that, "*the expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurred for the purpose of business. Such expenditure may not have been incurred under legal obligation, but yet it is allowable as business expenditure if it was incurred on grounds of "commercial expediency".* So, we are of the considered view that commercial expediency of an expenditure incurred by a businessman has to be examined from the perspective of business person and not from the perspective of a tax authority.

31. Hon'ble Supreme Court in case of **Empire Jute Company Ltd. vs. CIT 124 ITR 1 (SC)** lay down the principle for determining whether an expenditure incurred is in the nature of revenue or capital held as under :

> ***"There may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may break down. What is material is to considered the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular fact and circumstances of a given case."***

32. Hon'ble Delhi High Court in case of **CIT vs. Spice Distribution Ltd. (2015) 229 taxman 400 (Delhi)** decided the

issue as to whether advertisement expenses are capital or revenue in nature in favour of the taxpayer by returning following findings:-

> ***"The Tribunal has rightly noticed and referred to the decision of the Delhi High Court in CIT v. Pepsico India Cold Drink Ltd. [2012J 207 Taxman 5/21 taxmann.com 165 wherein, the judgment of the Supreme Court in Madras Industrial Investment Corpn. v. CIT [1997] 225 ITR 802/91 Taxman 340 (SC) was 'examined and it was observed that the Assessee is entitled to claim deferred revenue expenditure but the Assessing Officer cannot treat the revenue expenditure as deferred revenue expenditure. The reason is that the Act itself does not have any concept of deferred revenue expenditure. Even otherwise, there are a number of decisions that the advertisement expenditure normally is and should be treated as revenue in nature because advertisements do not have long lasting effect and once the advertisements stop, the effect thereof on the general public and customer diminishes and vanished soon thereafter. Advertisements do not leave a long lasting and permanent effect in the sense that the product or service has to be repeatedly advertised. Even otherwise advertisement expense is a day to day expense incurred for running the business and improving sales. It is noticeable that every year, the respondent-Assessee has been incurring substantial expenditure on advertisements. The Assessing Officer, in the assessment order, had referred to the fact that similar additions were also made in the Assessment Year 2008-09. Keeping in view the nature and character of the respondent-Assessee's business, every year expenditure has to be incurred to make and keep public informed, aware and remain in limelight. This requires continuous and repeated publicity and advertisements to remain in public eye, to do business by attracting customers. It is an expenditure of trading nature. The aforesaid aspect has been highlighted by the Delhi High Court in CIT v. Salora International Ltd. [2009] 308 ITR 199 (Delhi) and CIT v. Casio India Ltd. [2011] 355 ITR 196 [2012] 20 taxinann.com 449(Del)."***

33. Similarly, findings returned by the AO and confirmed by the ld. DRP that advertisement expenses incurred by the taxpayer will increase the brand image of the group company of Huawei Technology and disallowed the advertisement expenses to the tune

of 30% is also not sustainable. Hon'ble Supreme Court in case of **Sassoon J. David and Co. P. Ltd. vs. CIT 118 ITR 261 (SC)** held that, *"the fact that somebody other than the assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of deduction under section 10(2)(xv) of the Act if it satisfied otherwise the tests laid down by law."*

34. Similarly, Hon'ble Supreme Court in case of **J.J. Enterprises vs. CIT 254 ITR 216 (SC)** held the disallowance of any expenditure on ad hoc basis not sustainable by returning following findings :-

> ***"In its principal order, the Tribunal had concluded that the addition was unsustainable because it had been made 'on the basis of pure guess work'. The revenue moved the High Court under section 256(2) of the Income-tax Act, 1961, and the High Court called for a reference on the basis that the question was a question of law. -We are unable to agree with the High Court. In the first place, the Tribunal has held that the addition had been made on the basis of pure guess work and this is a matter of fact in respect of which the Tribunal's conclusion is final. In the second place, there was no question of remanding the matter to the Assessing Officer for re-examination of the same question."***

35. So in view of the matter and following the decisions rendered by the Hon'ble Supreme Court and Hon'ble High Court discussed in the preceding paras, we are of the considered view that disallowance of 30% of the advertisement expenses by the AO and confirming the same by the ld. DRP is not sustainable for the

reasons inter alia that commercial expediency of any expenditure incurred by the taxpayer has to be examined with businessman standpoint and not with the perspective of tax authority; that advertisement expenses are revenue in nature; that merely because of the fact that advertisement expenditure incurred by the taxpayer has benefited the third party, the same cannot be disallowed; and that disallowance of any expenditure on ad hoc basis is not permissible in law, hence ordered to be deleted. Consequently, grounds no.3 to 3.4 of ITA No.7509/DEL/2017 & 7510/DEL/2017 for AYs 2012-13 & 2013-14 respectively are determined in favour of the taxpayer.

GROUNDS NO.4 TO 4.3 OF
ITA NO.7509/DEL/2017 (AY 2012-13)
ITA NO.7510/DEL/2017 (AY 2013-14)

36. The taxpayer challenged disallowance/confirmation of Rs.1,010,856,249/- & Rs.128,611,894/- for Assessment Years 2012-13 & 2013-14 respectively on account of provision for customer claim on the ground that the amount provided by the taxpayer pertaining to actual delays/defaults occurred as per the terms of the contract entered between the taxpayer and its customers and as such is an "ascertained liability". The taxpayer has raised specific objections before the ld. DRP, available at paves 256-274 and 217-234 for AYs 2012-13 & 2013-14

respectively, and also brought on record evidence in the form of credit-memo in relation to liquidated damages and details of liquidated damages, chart showing trend and utilization of provision of customer claims from AYs 2010-11 to 2014-15 and extract of audited financials for AYs 2010-11 to 2016-17 to show the details of provision of customer claims and extract of contract entered into between the taxpayer and customer claims from pages 6 to 26 of the convenience paper book.

37. Ld. AR for the taxpayer contended that AO/DRP have erred in making/confirming the disallowance towards provision of customer's claim without appreciating the fact that amount provided by the taxpayer is in relation to the actual delays/defaults occurred as per the terms of the contract entered into between the taxpayer and its customers, thus is an ascertained liability and relied upon the decision of coordinate Bench of the Tribunal in **DCIT vs. Nokia Siemens Networks India Pvt. Ltd. in ITA No.3202/Del/2014 order dated 31.01.2018.**

38. We have perused the order passed by the Tribunal in case of **Nokia Siemens Networks India Pvt. Ltd.** (supra) wherein the identical issue has been examined by returning following findings:-

> ***"8. In the present case from page no. 136 of the assessee's paper book, it is noticed that total provision for liquidated damages was of Rs. 19,66,51,910/- out of which Rs. 2,04,52,238/- were utilized and credited / written back, the remaining amount of Rs. 17,61,99,672/-***

was the actual amount of the damages which were accounted for in the profit and loss account. In the instant case, the learned CIT(A) categorically stated that when the payments were actually made, the accounts were adjusted with reference to any remission or waiver that the company may get in respect of damages payable for the late delivery and the same was brought to tax u/s 41 (1) of the Act by crediting the liquidated damages accounts. Therefore, the impugned amount was not only the provision but the actual amount of the liquidated damages pertaining to the period of delay falling within the previous year relating to the assessment year under consideration. The learned CIT(A) categorically stated that the assessee was following this method consistently. We, therefore, do not see any valid ground to interfere with the factual findings given by the learned CIT(A) and accordingly do not see any merit in the ground raised by the Department."

39. Hon'ble Supreme Court in case of **Rotork Controls India P. Ltd. vs. CIT (2009) 314 ITR 62 (SC)** decided the identical issue as under :-

"Held, reversing the decision of the High Court, that the valve actuators, manufactured by the assessee, were sophisticated goods and statistical data indicated that every year some of these were found defective; that valve actuator being a sophisticated item no customer was prepared to buy a valve actuator without a warranty. Therefore, the warranty became an integral part of the sale price; in other words, the warranty stood attached to the sale price of the product. In this case the warranty provisions had to be recognized because the assessee had a present obligation as a result of past events resulting in an outflow of resources and a reliable estimate could be made of the amount of the obligation. Therefore, the assessee had incurred a liability during the assessment year which was entitled to deduction under section 37 of the Income-tax Act, 1961.

The present value of a contingent liability, like the warranty expense, if properly ascertained and discounted on accrual basis can be an item of deduction under section 37. The principle of estimation of the contingent liability is not the normal rule. It would depend on the nature of the business, the nature of sales, the nature of the product manufactured and sold and the scientific method of accounting adopted by the assessee. It would also depend upon the historical trend and upon the number of articles produced.

A provision is a liability which can be measured only by using a substantial degree of estimation. A provision is recognized when : (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation, and (c) a reliable estimate can be

made of the amount of the obligation. If these conditions are not met, no provision can be recognized.

The principle is that if the historical trend indicates that a large number of sophisticated goods were being manufactured in the past and the facts show that defects existed in some of the items manufactured and sold, then provision made for warranty in respect of such sophisticated goods would be entitled to deduction from the gross receipts under section 37."

40. So, following the decision rendered by the coordinate Bench of the Tribunal and proposition laid down by the Hon'ble Supreme Court, provision for customer claim is a liability which can be used only by using a substantial decree of estimation. When the taxpayer has brought on record ample evidence in the form of credit memo in relation to liquidated damages and details of liquidated damages, chart showing trend and utilization of provision of customer claims from AYs 2010-11 to 2014-15 and extract of audited financials for AYs 2010-11 to 2016-17, to show that the details of customer claims and extract of contract entered into between the taxpayer and the customer claims, available from pages 6 to 26 of the convenience paper book, this provision has to be measured by using substantial decree of estimation. Moreover, historical trend brought on record by the taxpayer also shows the actual use of provision for customer claim.

41. Hon'ble Supreme Court in case of **Rotork Controls India P. Ltd.** (supra) held that a provision is recognised :

(a) ***an enterprise has a present obligation as a result of a past event;***

(b) ***it is probable that an outflow of resources will be required to settle the obligation, and***

(c) ***a reliable estimate can be made of the amount of the obligation.***

42. Evidence brought on record by the taxpayer shows that aforesaid conditions have been fulfilled and as such, provision made qua the amount provided by the taxpayer pertaining to actual delays and defaults occurred in terms of the contract entered into between the taxpayer and its customers is to be considered as "ascertained liability". So, AO/DRP have erred in making disallowance on account of provision for customer claims. So, it is ordered to be deleted subject to verification of data brought on record by the taxpayer as discussed in the preceding paras. Consequently, grounds no.4 to 4.3 of ITA No.7509/DEL/2017 & 7510/DEL/2017 for Assessment Years 2012-13 & 2013-14 respectively are determined in favour of the taxpayer.

GROUNDS NO.5 TO 5.3 OF
ITA NO.7509/DEL/2017 (AY 2012-13)
ITA NO.7510/DEL/2017 (AY 2013-14)

43. The taxpayer challenged the disallowance/confirmation of advances written off to the tune of Rs.85,33,563/- &

Rs.61,60,172/- for AYs 2012-13 & 2013-14 by AO/DRP on the ground that without appreciating the fact that expenditure was incurred wholly and exclusively for the purpose of business. Ld. DRP confirmed this disallowance made by the AO on the ground that the companies generally held the salaries or allowances for such kind of settlements when the employees leave the companies and the company is under no obligation to pay the payments and if any such payment has been made by the employees, then it must form part of perquisite of the employees for claiming deduction by the company. Since the taxpayer has not been able to provide complete details of these amounts, the employees on whose behalf these amounts have been paid, it cannot be considered as liability of the employer.

44. AO has primarily made disallowance on the ground that taxpayer has failed to furnish any evidence to support the claim of the expenditure. When we examine pages 30 to 47 & 48 to 75 for AYs 2012-13 & 2013-14 respectively of the convenience paper book, the taxpayer has given complete details of the advances written off.

45. It is contended by the ld. AR for the taxpayer that once the advance has been written off in the books of account, it is sufficient to claim the deduction of the advances written off u/s 37

of the Act and taxpayer is not required to prove that the advances written off is irrecoverable as per section 37(1) of the Act.

46. Hon'ble Supreme Court in case of **TRF Ltd. vs. CIT (2010) 323 ITR 397 (SC)** held that, *"After 1st April, 1989 it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee."*

47. The taxpayer has given complete detail of advances given at page 30 of the convenience paper book in tabulated form. So, in view of the matter, we are of the considered view that let this issue go back to AO to verify the facts if these advances were given for business purposes and decide afresh in the light of findings returned hereinbefore by providing opportunity of being heard to the taxpayer. Consequently, grounds no.5 TO 5.3 of ITA No.7509/DEL/2017 & 7510/DEL/2017 for Assessment Years 2012-13 & 2013-14 respectively are determined in favour of the taxpayer for statistical purposes.

GROUND NO.6 OF
ITA NO.7509/DEL/2017 (AY 2012-13)
ITA NO.7510/DEL/2017 (AY 2013-14)

48. Ground No.6 of ITA No.7509/DEL/2017 & 7510/DEL/2017 for AYs 2012-13 & 2013-14 respectively being consequential in nature needs no specific findings.

GROUND NO.7 OF
ITA NO.7509/DEL/2017 (AY 2012-13)
ITA NO.7510/DEL/2017 (AY 2013-14)

49. Ground No.7 of ITA No.7509/DEL/2017 & 7510/DEL/2017 for AYs 2012-13 & 2013-14 respectively being premature needs no specific findings.

50. In view of ground-wise findings returned in the preceding paras, written submissions filed by the ld. DR for the Revenue and case laws relied upon, which have been made part of the judicial file are not applicable to the facts and circumstances of the case.

51. In view of findings returned in the preceding paras, both the appeals being ITA No.7509/DEL/2017 & 7510/DEL/2017 for AYs 2012-13 & 2013-14 respectively are allowed for statistical purposes.

Order pronounced in open court on this 24th day of February, 2021.

Sd/-	**sd/-**
(R.K. PANDA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 24th day of February, 2021
TS

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A).
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.