**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI**

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI PAVAN KUMAR GADALE, JM

**ITA No. 1002/Mum/2016**
(Assessment Year 2011–12)

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| Diageo India P. Ltd.<br>4th Floor, Nicholas Piramal Tower<br>Peninsula Corporate Park,<br>Ganpatrao Kadam Marg,<br>Lower Parel,<br>Mumbai-400 013<br>**(Appellant)** | Vs. | DCIT<br>RG 6(2)(2)<br>Aayakar Bhavan,<br>MK Road,<br>Mumbai-400 020<br>**(Respondent)** |

**PAN No. AAACI 3378 L**

**ITA No. 2858/Mum/2016**
(Assessment Year 2011–12)

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| DCIT<br>RG 6(2)(2)<br>Aayakar Bhavan,<br>MK Road,<br>Mumbai-400 020<br>**(Appellant)** | Vs. | Diageo India P. Ltd.<br>4th Floor, Nicholas Piramal Tower<br>Peninsula Corporate Park,<br>Ganpatrao Kadam Marg,<br>Lower Parel,<br>Mumbai-400 013<br>**(Respondent)** |

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| **Assessee by** | : | Shri Nishant Thakkar &<br>Shri Hiten Chande, ARs' |
| **Revenue by** | : | Ms. Vatsalaa Jha, CIT DR |

**Date of hearing:** 05.07.2022
**Date of pronouncement :** 25.08.2022

**O R D E R**

**PER PRASHANT MAHARISHI, AM:**

01. ITA No. 1002/Mum/2016 is filed by Diageo India Private Limited ( The Assessee/ Appellant) for A.Y. 2011-12 against the assessment order passed under Section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (The Act) dated 23rd February, 2016 by the Dy. Commissioner of Income Tax, Circle 6(2)(2), Mumbai (The learned AO) in pursuance of direction issued by the learned Dispute Resolution Panel-1 dated 31st December, 2015 raising following grounds of appeal:-

*"Based on the facts and circumstances of the case, Diageo India Private Limited (hereinafter referred to as the Assessee) respectfully craves leave to prefer an appeal against the final order dated 23 February 2016 passed by Deputy Commissioner of Income-tax-6(2)(2) (AO) under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (the Act) in pursuance of the directions issued by Dispute Resolution Panel-1 (DRP), Mumbai dated 31 December 2015 under section 253 of the Act on the following grounds:*

*On the facts and in the circumstances of the case and in law, the AO/ Transfer Pricing Officer (TPO), based on directions of DRP has;*

*General*

*1. erred in assessing total income of the Assessee at Rs 49,01,28,881/- as against returned income of Rs 2,46,19,280/-.*

*TRANSFER PRICING GROUNDS*

*TRANSFER PRICING ADJUSTMENT ON ACCOUNT OF ADVERTISEMENT AND SALES PROMOTION EXPENSES*

*2. erred in making an adjustment to the total income of the Assessee to the extent of Rs. 35,82,41,000/- by holding that the Assessee provides brand promotion services to its overseas associated enterprises.*

*Not an international transaction*

*3. erred in holding that the AMP expenditure incurred by the Assessee is an international transaction as per provisions of Section 92B of the Act by alleging existence of an arrangement or understanding between Assessee and AES for incurring AMP expenses*

*Reference to TPO is without jurisdiction*

*4. erred in making a reference to the learned TPO without recording a finding that he considers it 'necessary or expedient' to do so as required under section 92CA(1) of the Act, hence the reference made by the learned AO to learned TPO suffers from jurisdictional error*

*Brand Contribution received to be added to Assessee's segment wise margins*

*5. erred in reallocating brand contribution received by the Assessee between manufacturing. and distribution segment on ad-hoc basis, without appreciating that actual brand contribution was*

*considered by the Assessee for the respective segments*

*Inappropriate selection of comparables*

*Manufacturing segment*

*6. erred in adopting adhoc filter and thereby rejecting following comparables who have incurred AMP expenses of less than 10% of turnover, while computing adjustment for manufacturing segment*

*i. Lilasons Industries Ltd*

*ii. Vidhyachal Distilleries Ltd*

*iii. Empee Distilleries Ltd*

*iv Mohan Rocky Springwater Breweries Ltd*

*v. John Distilleries*

*vi. Khoday India Ltd*

*7. erred in rejecting Mount Shivalik Industries Ltd on account of diminishing returns and functional difference from Assessee*

*8. erred in rejecting Grover Vineyards Ltd on the basis that the company is incurring persistent operating losses*

*9. erred in rejecting comparables (in the remand report) which were initially accepted by the TPO while analyzing the benchmarking of international*

*transactions for the manufacturing segment under Transactional Net Margin Method*

*10. erred in not considering the following additional comparables*

*i. Bacardi Martini India Ltd, and*

*ii. Pemod Ricard India Private Limited*

*+/-5 percent benefit*

*11. Benefit given as per section 92C of the Act for adjustment of +/- 5% to international transactions, if the same is within the range, should be allowed.*

*12. without prejudice to the above, erred in computing transfer pricing adjustment on total transactions pertaining to manufacturing segment without appreciating that the adjustment should be restricted to international transactions entered into with Associated Enterprises only*

*Distribution segment*

*13. erred in rejecting following comparables, while computing adjustment for distribution segment*

*i. Rajasthan State Ganganagar Sugar Mills Ltd*

*ii. Alna Trading and Exports Ltd*

*iii. Chhotabhai Jethabhai Patel Tobacco Products Co. Ltd*

*iv. DPIL Ltd*

*v. Red Peppers Ltd.*

*14. erred in rejecting comparables (in the remand report) which were initially accepted by the TPO while analyzing the benchmarking of international transactions for the distribution segment under Transactional Net Margin Method*

*Selection of new comparable*

*15. erred in selecting United Breweries (Holdings) Limited as a comparable without appreciating that it is functionally different*

*16. without prejudice to the above, erred in calculating the segmental operating margin of United Breweries (Holdings) Limited for alcoholic beverages segment at 21.13% by ignoring un-allocable operating income/ expenses while calculating the operating margin.*

*+/-5 percent benefit*

*17. Benefit given as per section 92C of the Act for adjustment of +/- 5% to international transactions, if the same is within the range, should be allowed.*

*18. without prejudice to the above, erred in computing Transfer Pricing adjustment on total transactions pertaining to distribution segment without appreciating that the adjustment should be restricted to international transactions entered into with Associated Enterprises only.*

*CORPORATE TAX GROUNDS*

*19. Disallowance of cost incurred towards capital work-in-progress erred in reducing capital work-in-progress by Rs 23,60,42,425/- and thereby restricting claim of depreciation and/or any other expense in this regard for future years*

*Disallowance on account of Bad Debts written off.*

*20. erred in disallowing an amount of Rs 1,02,41,042/- on account of bad debts written off*

*Disallowance of amount paid under the head Penalties and Fines*

*21. erred in not considering the claim of Rs 26,29,606/- (which was initially disallowed in the return of income) without appreciating that the said expenses are incurred for business purposes of the Assessee and allowable under section 37(1) of the Act.*

*Disallowance of amount paid under the head Seminar and Conference expenses*

*22. erred in disallowing an amount of Rs 3,50,307/- incurred under the head seminar and conference expenses out of total expenditure of Rs 1,08,84,484/- on account of non submission of vouchers*

*Disallowance of rent paid*

*23. erred in disallowing rent expenses of Rs 58,17,506/- out of total rent expenses of Rs 6,52,52,547/–*

*Addition on account of AIR Mismatch*

*24.. erred in making addition of Rs 53,13,704/-on account of AIR Mismatch.*

*Disallowance of royalty*

*25. erred in making disallowance of royalty of Rs 8,47,42,952/- paid to Diageo North America without appreciating that the same is incurred for business purposes of Assessee.*

*Disallowance of expenses incurred for Liaison office ('LO') in Srilanka*

*26. erred in disallowing expenses of Rs 8,03,090/- incurred for LO in Srilanka without appreciating that the same was incurred for business purposes of the Assessee and allowable under section 37(1) of the Act.*

*Levy of interest under section 234A of the Act*

*27. erred in levying interest under section 234A of the Act without appreciating that the return of income was filed before due date of filing of return of income as per section 139(1) of the Act*

*Levy of Interest under section 234B of the Act*

*28. erred in levying interest under section 234B of the Act*

*Initiation of penalty proceedings*

*29. erred in initiating penalty proceedings under Section 271(1)(c) of the Act for various proposed disallowances / additions.*

*The above grounds of appeal are mutually exclusive and without prejudice to one another. The Assessee craves leave to add/ alter/ amend/ delete/ withdraw any or all of the grounds at or before the hearing of the appeal so as to enable the Income tax Appellate Tribunal to decide the appeal according to law"*

02. ITA No. 2858/Mum/2016 is filed by the Dy. Commissioner of Income Tax, Circle 6(2)(2), Mumbai (The learned AO) aggrieved with the direction of learned Dispute Resolution Panel has preferred this appeal raising following grounds of appeal:-

*"1. On facts and circumstances of the case and in lave, the Hon'ble DRP was not justified in coming to the conclusion that, under certain methods there would be no justification for making any transfer pricing adjustments if the overall profits at the entity level are higher, disregarding that:–*

*a. the newly enacted provision of section 92, as contradistinguished from the pre-amended provision, makes a departure from "profit determination to "Price" determination*

*b. the Law as enacted in India mandates determination of price of international transaction.*

*c. as per Indian transfer pricing law, compensation for functions performed, being AMP services rendered to the AE needs to be benchmarked separately.*

*d. international commentaries and practice largely disapprove of comparison of overall profits at entity level.*

*2. On facts and circumstances of the case and in law, the Hon'ble DRP was not correct in reaching to a conclusion that where the tested party is engaged in a single line of business, there is no prohibition from applying the Transactional Net Margin Method (TNMM) at the entity level.*

*3. On facts and circumstances of the case and in law, the Hon'ble DRP was not justified in holding that set off a higher price in one transaction with lower price in another is permissible when the Indian T.P. law does not provide for such set off in cases where there is no material on record to suggest that any such set off was contemplated by the transacting parties, disregarding that wherever such set off is intended at any other place, the I.T. Act has provided explicit stipulation for the same.*

*4. On facts and circumstances of the case and in law, the Hon'ble DRP was not justified in reaching to a conclusion that different transactions can be bundled up and Arm's Length Price may be determined as of a packaged transaction particularly when the assesses failed to lead the primary*

*information in this regard as provided for under Rule 10D of the IT Rules to substantiate that such transactions are closely linked as mandated in Rule. 10A(d).*

*5. On facts and circumstances of the case and in law, the Hon'ble DRP was not justified in holding that the "Bright Line Test" was not mandated in law and hence impermissible without considering the fact that BLT was not used as a method to determine the price but only as an economic tool to arrive at the cost of services rendered to the foreign enterprise by the Indian entity and the TPO has the mandate to determine" such "cost" as a primary step in ALP determination as provided under the Rules.*

*6. On facts and circumstances of the case and in law, the Hon'ble DRP was not justified in giving a finding that economic ownership of an intangible can be accepted, if pleaded, disregarding the fact that Indian tax laws have not so far recognized economic ownership as forming the basis of taxation.*

*7. On facts and circumstances of the case and in law, the Hon'ble DRP was not justified in not appreciating the distinction made by Revenue between normal expenses incurred for selling a product and the expenses incurred for penetration of the market brand promotion, creation and development of marketing intangibles, which remain, the function of the foreign supplier / legal owner of the brand and not of the Indian entity.*

*8. On facts and circumstances of the case and in law, the Hon'ble DRP was not justified in holding that trade discounts are in the nature of selling expenses and hence should be out of the purview of AMP expenses disregarding the Revenue's proposition, that this cannot be so when Trade Discounts emanate from the overall strategy of the A.E.to penetrate the market or to promote the brand.*

*9. The appellant prays that the direction of the Hon'ble DRP-1 on the above grounds be set aside to the file of the AO or confirm the order of the AO.*

*10. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

03. At the time of hearing, the assessee drew our attention that vide letter dated 6th October, 2016, assessee has raised additional ground of appeal nos. 30-33 as under:-

*"30. Erred in not granting entire relief of advertising expenditure of ₹1,54,35,000/- on brands owned by Appellant as against granting relief only to the extent of ₹33,35,000/-.*

*31. erred in reallocating the balance advertising expenses of ₹1,21,00,000/- (which were incurred on brands owned by the Appellant) to manufacturing and distribution segment (brands owned by AEs) in sales ratio;*

*Sales related expenses to be excluded from total AMP expenses.*

*32 erred in considering selling expenses of ₹1,76,91,000/- as advertising expenses without appreciating that the same were incurred for effective completion/enhancement of sales of the Appellant;*

*33. erred in not reducing selling expenses of ₹43,27,33,345/- from advertisement expenses while computing AMP adjustment as same were shown under advertising expenses in annual accounts."*

04. The assessee also submitted letter dated 16th march, 2021 raising 4 additional ground of appeal, serial nos. 34 to 37 as under:-

*"34. Without prejudice to the other grounds, should be directed to consider Comparable Uncontrolled Price (CUP) method to compute Arms Length Price of AMP expenses.*

*Incorrect computation of AMP/ Sales ratio of the Applicant in manufacturing and distribution segment.*

*35.Without prejudice to the other grounds, erred in not reducing the amount of selling expenses from total AMP expenditure as per ratio laid down by Hon'ble Delhi High court in case of Sony Ericsson Mobile Communications India Pvt. Ltd (374 ITR 118) and to only consider advertisement expenses for computing Amp expenditure and distribution segment.*

*36. <u>without prejudice to the other grounds,</u> erred in not reducing the amount of brand contribution from total AMP expenditure, while determining AMP/ Sales ratio of Assessee for benchmarking manufacturing and distribution segment.*

*37. <u>Without prejudice to the other grounds,</u> the Appellant relies on the alternate set of comparable companies for the distribution segment, furnished before Hon'ble ITAT vide additional evidence dated 23 September, 2016. ”*

05. The assessee also submitted an application for admission of additional evidences starting from page nos. 3084 to 3120. The assessee also filed the additional evidences by letter dated 31st may, 2017 containing page nos. 3015A to 3123, the assessee submits that these are supporting evidences. Assessee submits that assessee has availed ERP implementation support services in respect of which simple invoices were submitted and now, the copies of the bank statements were given to show that the payments are made to various parties.

06. The brief facts of the case shows that assessee is a company engaged in the business of manufacturing and marketing of various international and national brands of alcoholic beverages for domestic as well as export market. It filed its return of income on 22nd November, 2011 at a total income of ₹ 2,46,19,280/-. As the assessee has entered into 12 international transactions as per from no.3CEB, these international transactions were referred to the Transfer Pricing Officer for

determination of arm's length price. The learned Transfer Pricing Officer noted that the key business activities of the assessee are of manufacturing and marketing of various brands of alcohol. Assessee has obtained license to manufacture several products and also to manufacture them assessee imports raw materials over and above domestic purchase of such raw materials.

07. The learned Transfer Pricing Officer noted that since A.Y. 2006-07 to 2010-11, there are transfer-pricing adjustment in case of assessee with respect to advertisement, marketing, and promotion expenses [ AMP Expenses] . He referred to the order of the learned Transfer Pricing Officer for A.Y. 2010-11 where the Transfer Pricing Officer made an adjustment of Rs. 14.91 crores on account of expenses and further, computed mark up of Rs. 2.02 crores on such expenses. The learned Dispute Resolution Panel confirmed the action of the learned Assessing Officer. Therefore, for this year also, the learned Assessing Officer issued show cause notice to the assessee. The reply was considered however, he held that 80% of the expenses are related to AMP of foreign brand. He also noted that assessee has received ₹51.94 crores from its Associated Enterprises for brand contribution. Assessee also stated that there are manufacturing and trading [ distribution] divisions of the assessee. The learned Transfer Pricing Officer stated that 27.66% of the AMP expenditure is related to manufacturing segment and 8.70% is related to distribution segment. He selected 10 comparables whose AMP expenditure to sales is average at 3.11% for

manufacturing segment and selected five comparables for distribution segment whose [ AMP expenses to sales ] PLI was 0.23%. Accordingly, he found that there are excess advertisement expenditure in manufacturing and distribution segment of ₹ 65,84,63,406/- and ₹ 8,62,14,944/- distribution segments. Accordingly, he determined the excess of AMP expenditure of ₹ 74,46,78,350/-. He further computed the margin at the rate of 1.66% by selecting seven comparable companies and reached at margin of ₹7,86,35,595/-. Thus, the total Transfer Pricing Adjustment of ₹ 82,33,13,945/- was made as per order dated 22nd January, 2015 under Section 92CA(3) of the Act.

08. The draft assessment order was passed by making above transfer pricing adjustment. The learned Assessing Officer

a. made an addition of capital work in progress of ₹ 28,06,80,061/- with respect to SAP implementation expenses .

b. disallowed of debts of ₹1,02,41,42,000/- and

c. Disallowed penalties and fines of ₹12,50,000/-,

d. Disallowed seminar and conference expenses of ₹21,76,897/-,

e. Disallowed rent of ₹62,72,836/-,

f. Addition on account of AIR mismatch of ₹53,13,704/-

g. disallowance of royalty expenditure of ₹8,47,42,952/- and

h. disallowance of liaison office in Srilanka of ₹8,03,090/- was made.

09. Accordingly, draft assessment order determined the total income of the assessee at ₹95,87,33,346/- against the return income of ₹2,46,19,280/-.

010. Assessee preferred the objection before the learned Dispute Resolution Panel. The learned Dispute Resolution Panel reduced the addition on account of transfer pricing adjustment of AMP expenditure to ₹35,82,41,000/- and deleted the disallowance with respect to penalties and fines under Section 37(1) of the Act. All other disallowance were confirmed.

011. Accordingly, the assessment order under Section 143(3) read with section 144C(13) of the Act was passed on 17th February, 2016 determining the total income of the assessee at ₹49,01,28,881/- against the return of income of ₹2,46,19,280/-. The assessee is aggrieved raised 37 grounds and learned Assessing Officer is aggrieved by the direction of the learned Dispute Resolution Panel with respect to reduction in transfer pricing adjustment.

012. At the time of hearing, the learned Authorized Representative submitted that in assessee's own case for A.Y. 2010-11, the transfer pricing adjustment with respect to AMP expenditure have already been decided. He submitted that as per paragraph no. 42 of the order, the coordinate bench remitted the issue to the file of the learned Assessing Officer with certain direction and then determine the Arm's Length Price. The co-ordinate Bench categorically held that AMP expenditure is an international transaction. The learned Authorized Representative submitted that ground nos. 2 to 18 and

additional ground raised on 16th March, 2021 and 6th October, 2016, all relates to transfer pricing additions which are covered by the order of ITAT in assessee's own case for A.Y. 2010-11. He therefore, submitted that all these grounds are also required to be sent back to the learned Assessing Officer.

013. The learned Departmental Representative also agreed with the above submission. He submitted that AMP expenditure is established as an international transaction and therefore, learned Transfer Pricing Officer was directed to determine the Arm's Length Price as per direction.

014. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also considered the decision of co-ordinate Bench in assessee's own case for A.Y. 2010-11 in ITA Nos. 1228 and 1813/Mum/2015 dated 19th December, 2019. Both the parties have confirmed that there is no change in the facts and circumstances. The co-ordinate Bench has held in paragraph no. 13-42 as under:-

> *"13. On this issue learned DRP observed that majority of assessee's objection on this are covered by the previous learned DRP order. Hence, it held that there can be no dispute that excessive India AMP expenses is incurred to benefit the AE brands on global basis.*
>
> *14. Learned DRP further held that the TPO has rejected the segmental data on the ground that the assessee has not been able to submit supporting documents and vouchers and hence, allocation is without any basis. It also observed that as noted by the TPO that segmental results have been audited three years after the close of relevant financial year*

*and that the auditors have merely done arithmetical verifications to confirm the allocations. Hence, it did not find any infirmity in the action of the TPO. Learned DRP further directed the TPO to verify the actual working provided by the assessee and delete the double disallowance if any.*

*15. On the issue of exclusion of AMP expenses incurred on the brands owned by the assessee it noted the contention of the assessee that it owned two brands which viz. 'Sharkooth' and 'Nilaya'. It noted the assessee's submission that the assessee maintained brand-wise ledger accounts of AMP expenses and hence even in the absence of all vouchers, such audited accounts may be accepted. It also noted the assessee's submission that the issue is covered in favour of the assessee by several orders in earlier years. Further learned DRP referred to the order of earlier Panel for A.Y. 2009-10 and observed that only that part of AMP expenses claimed for own brands has not been considered for TP analysis for which vouchers have been produced by the assessee. That there is no dispute that the assessee has not produced vouchers of Rs. 1.05 crores and used for own brands. Therefore it held that these expenses cannot be considered to be incurred for own brands. Accordingly, following the learned DRP direction for A.Y. 2009-10 assessee's objection was rejected.*

*16. As regards objection of exclusion of sales promotion expenses, learned DRP noted that DIPL had incurred total selling expenses of Rs. 25.96*

*crores. Further, TPO considered only Rs. 24.08 crores as selling expenses and held the balance Rs. 1.87 crores as advertising expenses. The assessee submitted that the said expenses of Rs. 1.87 crores should be considered as selling expenses. However, learned DRP rejected this contention.*

*17. As regards amount recovered from AEs, learned DRP accepted the contention and directed the TPO to reduce the brand contribution received from AMP expenses while computing the AMP adjustment for distribution segment.*

*18. Against this order assessee is in appeal before us.*

*19. Learned counsel of the assessee submitted that the Transfer Pricing officer has stated that assessee has incurred excess AMP expenditure as compared to comparables and therefore AMP is held to be international transaction. That the TPO applied the bright line test to determine the existence of international transaction. That dispute resolution said that the reimbursement of expenses by the AE to the extent the benefit is derived by the AE is itself indicator that expenses incurred for the AE. However it is assessee's submission that the DIPL has incurred AMP expenses on its own business for increasing sales. He submitted that the same is not an international transaction. He further submitted that even if some benefit occurs to others, no adverse inference against the assessee can be taken . He further submitted that amendment to the agreement*

*dated 29/11/2010 was made between assessee and Diego Brand PV whereby the assessee receives a contribution which is in the nature of payment from the brand owners, not as a consideration for rendering the service but the consideration is made to ensure that assessee earns arm's-length return for its activities. The learned counsel of the assessee contended that the contribution by the AE was aimed at ensuring that the assessee achieves arm's-length margin of 5% in the manufacturing segment and 3% margin in the distribution segment. In this regard the learned counsel of the assessee placed reliance upon ITAT decision in assessee's own case for assessment year 2008 – 09 and assessment year 2009–10. Furthermore, learned counsel of the assessee referred to the decision of Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd supra. Learned counsel further submitted that bright line test is not a prescribed method under the income tax act. For this proposition he also placed reliance upon several case laws. Accordingly it is the submission of the assessee that there is no agreement arrangement or and understanding between the assessee and its AE. Further bright line test is not a prescribed method and it cannot be used to infer the existence of an international transaction. Further the impugned AMP adjustment doesn't fall under any of the prescribed methods under the act read with rule. Hence, adjustment made on account of AMP expenses deserves to be deleted.*

*20. Furthermore, it is the submission of the assessee that no separate AMP adjustment is warranted under the TNMM approach. Hence, it is said that even if AMP is considered to be an international transaction, bundled transaction approach should be adopted and the TNMM analysis as performed by the assessee in its TP study should be accepted. Furthermore, it is the submission of the assessee that AMP expenditure on brands owned by the assessee is to be excluded from the total AMP expenditure. Furthermore, it is the submission of the assessee that sales related expenses are to be excluded from the total AMP expenditure. It is the submission of the assessee that assessee has incurred selling expenditure however the TPO has considered certain heads of selling expenses akin to advertisement expenditure while computing the AMP adjustment.*

*21. It is a submission of the assessee that TPO has failed to appreciate that the above heads of expenditure were also selling in nature as they do not contribute to brand promotion of the AE, but are incurred by the assessee to increase its sales. Furthermore, assessee has submitted that certain expenses which have been treated as advertising expenses in the profit and loss account are actually in the nature of selling expenses.*

*22. In this regard assessee has placed reliance upon ITAT order for assessment year 2007 in assessee's own case wherein relief of selling expenses has been granted while computing AMP adjustment. Assessee*

*has further placed reliance upon several case laws in support of the above proposition*

*23. Per contra learned departmental representative referred to the definition of international transaction in the provisions of the act. Referring to the above he submitted that to construe the AMP expenditure as an international transaction at least there should be one enterprise who is a non-resident and there should be a mutual agreement between the parties for allocation apportionment or to contribute any cost or expenses incurred in connection with benefit or services or facility.*

*24. Learned departmental representative submitted that the mutual agreement as required in the provision of the act does exist in the present case he referred to the amendment dated 29.11 .2010 with effect from 1 April 2009 to the agreement dated 19.9 .2016 between DIPL and overseas associated enterprises under:-*

> *"9A. The licensee will incurred various AMP expenses on its own account in relation to its sales of the licensed products within the territory, and the licensor may bear by way of contribution a portion of the AMP expenditure. Such contribution shall be made in such form and quantum as may be agreed by the parties each year. Each of the licensee and licensor will contribute to AMP expenditure in the manner aforementioned for the anticipated benefits that*

*such expenditure will bring to each of their businesses."*

*25. Referring to the above learned departmental representative submitted that all the parameters which are necessary as per the provision of section 92B to consider whether AMP is an international transaction or not are existing in the present case. He further submitted that the dispute resolution panel has also rightly held that the reimbursement of AMP expenses by the AE to the extent the benefits is derived by the AE, is itself an indicator that AMP expenses are incurred by the AE. He further submitted that the argument of the assessee that the reimbursement of AMP expenses from the AE to ensure the arm's-length return for its manufacturing and distribution activities is without any basis. In this regard he again referred to the amended clause and submitted that the argument of the assessee is not at all in consonance with the language of the above said clause. His admitted that this is purely an assumption. Further suomoto fixing a 5% margin without any TP analysis for all the years itself shows that assessee's intention of not following the TP provisions. He submitted that the assessee first fixes its own margin at 5% and then tries to find out most appropriate method and comparable which suits its design and this is not in accordance with law.*

*26. The learned counsel thereafter submitted that once it is proved that the AMP expenditure is an international transaction then arm's length price has*

*to be determined by the assessee as well as TPO. The learned departmental representative submitted that the TPO has adopted bright line test as a tool to find out the ALP of the AMP. However the learned departmental representative conceded that BLT was negated by Hon'ble Delhi High Court in the case of M/s. Sony Ericsson Mobile Communications India Ltd. However he submitted that the decision came much after the present issue was decided by TPO and DRP. Learned AR submitted that even though BLT was negated in the said case the issue was set aside to find out the ALP of AMP based on the directions given by the Hon'ble court. Learned departmental representative reiterated that the assessment proceeding was not annulled by the Hon'ble High Court and the matter was remitted back to the lower authorities. Hence, learned departmental representative submitted that this issue may be set aside to the TPO with a direction to follow the principle enumerated by the High Court.*

*27. The learned departmental representative further submitted that even though the BLT was negated the ALP of AMP expenses has to be computed as per the principle as enumerated by the Hon'ble Delhi High Court in the case of M/s. Sony Ericsson Mobile Communications India private limited, Luxottica India Eyewear Private Limited and Heinz India private limited as the facts are similar to this case.*

*28. As regards the assessee's argument that no separate ALP has to be determined for AMP expenses*

*under aggregation of TNMM as profit margin of the assessee is more than the comparables, he referred to ITAT decision in the case of M/s. BMW India Ltd vide para 15 of the said order. Referring to the above he submitted that the argument of the assessee cannot be accepted.*

*29. As regards the AMP expenses incurred by the assessee towards its own brand, the learned departmental representative submitted that the same may be allowed subject to the quantum computed by the TPO. As regards the sales related expenses learned DR submitted that the principal as narrated by the Hon'ble Delhi High Court in the case of MS Sony Ericsson Mobile Communications India private limited and others are applicable to the case.*

*30. Referring to the distribution segment the learned AR made the same argument as above. In this regard he referred to clause 7.1 as under:-*

> *"The distributor will incur various AMP expenses on its own account in relation to its sales of products within the territory and the company shall bear by way of contribution at least 50% of the AMP expenditure incurred by the distributor. Such contribution may be made in such for and quantum as may be agreed by the parties. The distributor and each of the company will contribute to the AMP expenditure in the manner aforementioned for the*

*anticipated benefits such expenditure will bring to each of their businesses."*

*31. The learned DR submitted that the decision of ITAT in the case of BMW India is squarely applicable to the assessee's case. He submitted that the assessee argued that decision is not applicable to the assessee's case as the assessee's majority income is from the manufacturing segment. Learned departmental representative submitted that this factor is important only if there is no brand contribution/reimbursement of AMP or no understanding between the associated enterprises to incur the AMP expenses. He submitted that in the present case on the basis of facts and legal principle the existence of international transaction in respect of AMP expenses is already elaborated above. Hence he prayed that the matter made the remitted back to the TPO to apply the principle animated by the Hon'ble Delhi High Court in the case of measures Sony Ericsson Mobile complication India private limited.*

*32. In rejoinder learned counsel of the assessee submits that the marketing policy is merely a guidance for the marketing activities to be undertaken by DIPL and to adhere to the marketing code of conduct. He submitted that assessee company is into alcohol industry which has certain restrictions on the marketing and advertisement office product. Accordingly DIAGEO group has worldwide formulated a set of guidelines to market alcoholic products in a certain responsible way. He*

*submitted that the said code of conduct doesn't prove nor substantiate that DIPL had rendered any services to its AE under the head AMP expenses or that it is directing DIPL to incur AMP expenses. Further there were no contractual obligation on DIPL to perform/incur AMP expenses on behalf of the AE. Learned counsel submitted that to qualify as an international transaction within the scope of section 92(B) following essential ingredients are required that the transaction should be between 2 or more associated enterprises either or both of home are non-residents.*

*33. That the transaction should be 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, loss on of the associated enterprises.*

*34. He submitted that the AMP expenses therefore enhancing sale of alcoholic beverages products manufactured distributed by DIPL in the domestic market was in the business interest of the DIPL to the same.*

*35. Learned counsel of the assessee further submitted that decision of BMW India is not applicable to the present case. Referring to the same he submitted that there is neither any binding obligation on DIPL to incur AMP expenses not does it render any service to the AE.*

*36. The learned counsel of the assessee further more submitted reliance upon the Delhi High Court decision in the case of Whirlpool of India Ltd 381 ITR 154, wherein the Delhi High Court has observed that it is not discernible that there was any obligation to incur an extent of AMP expenses to build the brand of foreign AE.*

*37. Lastly the learned counsel of the assessee submitted that even if AMP expenditure is held to be an international transaction, since assessee's margin under TNMM has been accepted to be at arm's-length by the TPO no separate adjustment for AMP can be made hence matter need not be remanded back to the TPO for a 2nd innings*

*38. The learned departmental representative has made a submission that issue of intensity adjustments in AMP expenses has been considered by ITAT in detail in recent judgement of ITAT in the case of Luxottica India eyewear private limited. He submitted that the guidance on the issue is available in the judgement of ITAT.*

*39. We have carefully considered the submissions, the case laws and perused the records. We find that all the decisions which have been claimed by the learned counsel of the assessee to be in his favour are based on the premise that there was no agreement between the parties to incur the AMP expense. It was also found that there was no arrangement or obligation between the parties to*

*incur those expenditure. However in the present case we find that this plank miserably fails. Even the decision of ITAT in assessee's own case for earlier year doesn't help the assessee as subsequently there was an amendment in the agreement between the parties. These amendment have already been mentioned in the above said submissions. Even at the sake of repetition we may mention the amendment with regard to the manufacturing segment and the distribution segment which reads as under:-*

> *"9A. The licensee will incurred various AMP expenses on its own account in relation to its sales of the licensed products within the territory, and the licensor may bear by way of contribution a portion of the AMP expenditure. Such contribution shall be made in such form and quantum as may be agreed by the parties each year. Each of the licensee and licensor will contribute to AMP expenditure in the manner aforementioned for the anticipated benefits that such expenditure will bring to each of their businesses."*
>
> *"The distributor will incur various AMP expenses on its own account in relation to its sales of products within the territory and the company shall bear by way of contribution at least 50% of the AMP expenditure incurred by the distributor. Such contribution may be made in such for and quantum as may be agreed by the parties. The distributor and each of the*

*company will contribute to the AMP expenditure in the manner aforementioned for the anticipated benefits such expenditure will bring to each of their businesses.*

*40. From the above it is amply clear that in the present case there is a mutual agreement in existence between the assessee and its AE to incur AMP expenses and further that agreement is also existing to allocate or apportion or to contribute the AMP cost or expense. The agreement also clarifies that the level of AMP expense allocation or apportionment contribution is based on the benefit received. Thus when there is an agreement that the overseas associated enterprise will share the AMP expense of the assessee when benefitted, undoubtedly the AMP expense becomes an international transaction and the TPO cannot be debarred from examining the said international transaction with respect to the arms length price. This becomes amply clear from the fact that the overseas associated enterprise has also contributed a sum of Rs.65,05,000 towards its contribution to the AMP expense incurred by the assessee. The contention of the learned counsel of the assessee that the sum has been paid not by way of any expense having been incurred by the assessee towards AMP expense of the overseas associated enterprise but to enable the assessee to meet certain rate of return of income. The submission is not at all acceptable. Firstly this is not emanating out of the agreement. It is only an*

*explanation carved out by the assessee. The claim of the learned counsel of the assessee that the contribution is meant to ensure that the assessee has a margin of 5% income in the manufacturing segment and 3% margin in the distribution segment is at best a self-serving statement. Moreover as pointed out by the learned department representative this claim itself shows that assessee is having scant regard to the Transfer Pricing mechanism. It shows that assessee has a predetermined margin and thereafter went around finding comparables to justify the same. This is totally in constraint of the Transfer Pricing laws and jurisprudence. On this plank itself this explanation fails. Further it defies logic that overseas AE will pay gratuitous sum to the assessee, without any benefit to itself.*

*41. Once it is established that there is an agreement and arrangement of the assessee incurring AMP expenses on behalf of the overseas enterprise and getting reimbursement of the same the next question arises of determination of arm length price. In this regard it is the submission of the learned counsel of the assessee that the TNMM method applied by the assessee takes care of this. However we note that identical argument was submitted in the case of BMW Ltd supra. In our considered opinion the ratio arising out of the decision of BMW is also applicable in the present case. We may grainfully refer to the ITATs adjudication in the said case as under:-*

*"3. We have heard the rival submissions and perused the relevant material on record. The learned Sr. counsel submitted at the outset that there is no international transaction of AMP expenses in the instant case and as such there can be no question of determining its ALP. For bolstering this proposition, he relied on the judgment of Hon'ble Delhi High Court in Maruti Suzuki India Ltd vs. CIT & Another (2016) 381 ITR 117 (Del). The learned Sr. AR submitted that the TPO considered only the higher amount of expenditure incurred by the assessee vis-a-vis other comparable companies for drawing an adverse inference of there being an international transaction of brand promotion by the assessee for its AE. This was countered by the ld. DR, who strongly refuted the assertion of there being no international transaction of AMP expenses and the consequential determination of its ALP.*

*4. We have gone through the relevant material on record and are not convinced with the submission advanced on behalf of the assessee that the treatment of AMP expense as an international transaction by the TPO is based only on excessive expenditure. It is found that the TPO has referred to other materials to support his conclusion of the existence of an international transaction of AMP expenses. He referred to the agreement dated 1.1.2006*

*between the assessee and BMW Germany and also reproduced relevant clauses of the same on page 13 of his order.*

*Clause 2.2 of the Agreement deciphers the responsibility of the assessee in the Contract Territory Contract (India). Relevant parts of the clause are as under:-*

*"2.2. Responsibility in the Contract Territory BMW India represents the interests of BMW AG in the Contract Territory. It is responsible for the sales promotion and the full utilization of the market potential for the Contract Goods in the Contract Territory. ..... Furthermore, BMW India undertakes the following functions in the Contract Territory in accordance with the laws of the contracting territory. ..... Performance of an adequate advertisement and sales promotion as well as public and media relation. ....."*

*5. Clause 3 of the Agreement is also material for our purpose, which has been equally taken note of by the TPO as well in his order. Relevant parts of clause 3 read as under :-*

*"3.1. Responsibilities for Sales and Advertising The BMW India will establish and supervise in the Contract Territory an efficient BMW distribution network for sales, service and parts supply according to the recommendations of BMW. To this end, BMW India will, in its own*

*name, enter into dealer contracts in accordance with law of the Contracting Territory."*

*6. On going through clause 2.2 of the Agreement, it becomes palpable that the assessee represented the interest of BMW AG in India and is responsible for the sales promotion in India. Later part of the clause stipulates that the assessee undertook certain functions in India, which include "performance of an adequate advertisement and sales promotion as well as public and media relations." Clause 3 of the Agreement refers to the responsibilities of the assessee for advertising. It provides in no unambiguous terms that the assessee will meet its responsibility for the promotion of sales .... and undertook for applying its best efforts and adequate resources towards effective sales promotion and advertising Clause 3.6 of the Agreement stipulates that the assessee "will establish and supervise ..... an efficient BMW distribution network for sales .... according to the recommendations of BMW. A close scrutiny of the above clauses of the Agreement makes it abundantly clear that the assessee was assigned and it accepted the duty to perform advertisement and sales promotion and also assumed responsibility for deploying adequate resources towards effective sales promotion and advertisement of the goods in India. It is not a case where the assessee on its own*

*volition took up such a huge advertisement, marketing and promotion of the brand owned by its AE. In fact, it was the `responsibility' of the assessee and it `undertook' the function of `performance of an adequate advertisement and sales promotion' pursuant to the Agreement dated 1.1.2006 with BMW AG. Thus it is apparent that the assessee was under a binding obligation to advertise and promote the brand of its AE.*

*7. The assessee's Transfer pricing study report, as referred on page 13 and 14 of the TPO's order, also mentions that "BMW India ensures that it follows the global guidelines provided by BMW Group in terms of the usages of BMW banners, specifications for release of print advertisement in terms of font size, page layout etc.' It is thus clear that not only the Agreement between the assessee and BMW AG but also the assessee's own acknowledgment in the TP study report are flawless pointers to the fact that it carried out AMP functions as a duty assigned by its AE, to be discharged strictly in accordance with the global guidelines provided by the BMW Group.*

*8. There is another interesting aspect of the matter. One of the reported international transactions is "Reimbursement of expenses (Amount received)" amounting to Rs. 67,21,54,60/-. On being pointed out to give the*

*nature of such Reimbursement of expenses received, the learned AR took us through page 47 of the paper book, which is a part of the assessee's Transfer Pricing study report, reading as under:-*

*"Clause IV- Reimbursement of expenses from BMW Group Under Class IV transactions, reimbursement of expenses by BMW Group to BMW India is included. During the year, such reimbursements were primarily on account of BMW Service Inclusive Package / normal warranty claims raised by BMW India on BMW Group and certain marketing and promotion expenses incurred by BMW India on behalf of BMW Group. These expenses were subsequently reimbursed by BMW Group to BMW India...."*

*9. It is evident from the above extract of the Transfer Pricing Study report that the assessee received reimbursement of certain marketing and promotion expenses incurred by BMW India on behalf of BMW Group. A further detail of such reimbursements has been given in the Tax Audit Report of the assessee, whose relevant part is as under:-*

*Reimbursement of marketing / business promotion / other expenses*

*Ultimate Holding Company 16,869,213*

*Ultimate Holding Company (333, 945)*

*Fellow Subsidiaries 378, 197*

*Fellow Subsidiaries (545, 780)*

*10. The learned AR stated that the assessee received reimbursement of marketing and promotion expenses to the tune of Rs.3,33,945/- from its AE. This shows that the asessee's holding company reimbursed AMP expenses only to the tune of Rs. 3.33 lac as against enormous amount spent by the assessee for promotion of the brand owned by its AE pursuant to the agreement dated 1.1.2006. Factum of the existence of an Agreement obliging the assessee to undertake advertisement and brand promotion in accordance with the global guidelines and the AE reimbursing AMP expenses, albeit, to a very nominal extent, goes a long way to establish the existence of arrangement between the assessee and its AE for promoting BMW brand in India.*

*11. Reliance of the learned Sr. AR on the judgment in the case of Maruti Suzuki (Supra) to fortify his point of view of there being no international transaction of AMP expenses, is misconceived. In that case, the existence of international transaction was negatived by the Hon'ble Delhi High Court on the ground that the Revenue could not demonstrate any*

*international transactions of ALP expenses except for showing higher amount of AMP expenses incurred by that assessee vis- à-vis other independent parties. Adverting to the facts of the instant case, we find that apart from such higher AMP expenses, the TPO has elaborately referred to the relevant clauses of the Agreement between the assessee and its AE along with the TP Study report, showing the responsibility of the assessee to perform "adequate advertisement and sales promotion" in accordance with the global guidelines of the BMW Group for the use of BMW brand and further the AE also acknowledging such service of the assessee but reimbursing a minuscule part of expenses incurred by the assessee on advertisement marketing and promotion. It is further relevant to note that the judgment in the case of Maruti Suzuki (Supra) is based on a manufacturing company performing advertisement and promotion. In contrast, the assessee is engaged not only in the sale of manufactured goods but also the traded goods. Profit and loss accounts of the assessee shows Sale of manufactured goods at Rs. 624.66/- crore and those of traded goods of Rs.611.87 crore. Thus, it is manifest that the volume of assessee's business from trading and manufacturing is almost equal and it is not a case of manufacture alone as was there in the case of Maruti Suzuki (Supra). It is, ergo, vivid*

*that the ratio laid down in Maruti Suzuki (Supra) is not applicable due to differentiation in the facts of the extant case.*

*12. It is further relevant to note that the Tribunal in assessee's own case for immediately preceding assessment year, namely, 2009-10 has decided such issue against the assessee vide its order dated 21.10.2014 in ITA No. 385/Del/2014. It is also worthwhile to mention the learned AR's contention that the Tribunal for the assessment year 2008-09 decided such issue in assessee's favour by its order dated 16.8.2013. We find from the Tribunal order for the later A.Y. 2009-10, which was also decided at a later point of time, that the Tribunal took a conscious decision of the existence of an international transaction of AMP expenses requiring determination of ALP, after duly considering its order passed for the A.Y. 2008-09. Though the tribunal decided this issue in favour of the assessee for the A.Y. 2008- 09, it was candidly admitted by the ld. AR that, on an appeal preferred by the Revenue against the tribunal order for such earlier year, a substantial question of law has been admitted by the Hon'ble High Court. In view of the foregoing discussion, we reject the assessee's contention and hold that the authorities below were justified in treating AMP as an international transaction.*

*13. Next comes the question of determination of ALP of the international transaction of AMP expenses. It is seen that the TPO applied bright line test to find out the value of international transaction and then determined the ALP of AMP expenses. The Hon'ble Delhi High Court in Sony Ericson Mobile Communications (India)Pvt. Ltd. vs. CIT (2015) 374 ITR 118 (Del) and other judgments has held that bright line test cannot be applied for determining the ALP of AMP expenses. The Hon'ble High Court in Sony Ericson Mobile Communications (supra) has restored the matter of determination of its ALP for a fresh determination in the light of guidelines laid down in such a case. It considered the distribution and the brand promotion activities as inter- connected transactions and harped on their aggregation. Crux of the relevant observations of the Hon'ble High Court, which is crucial for our purpose, can be summarized as under :-*

> *Inter-connected international transactions can be aggregated and section• 92(3) does not prohibit the set-off [Paras 80 & 81]; Ø AMP is a separate function. An external comparable should perform similar AMP functions. [Paras 165 &166] ;*
>
> *Bright line test cannot be applied to work out non-routine AMP expenses for• benchmarking [Para 194(x)];*

*ALP of AMP expenses should be determined preferably in a bundled manner• with the distribution activity [Paras 91, 121 & others] ;*

*For determining the ALP of these transactions in a bundled manner, suitable• comparables having undertaken similar activities of distribution of the products and also incurring of AMP expenses, should be chosen [Paras 194(i), (ii), (viii) & others]; If no comparables having performed both the functions in a similar manner are available, then, suitable adjustment should be made to bring international transactions and comparable transactions at par [Para 194 (iii)] ;*

*If adjustment is not possible or comparable is not available, then, the TNMM• on entity level should not be applied [Paras 100, 121, 194(iii) & (vi)] ;*

*In the above eventuality, international transaction of AMP should be viewed• in a de-bundled manner or separately [Paras 121& 194(xi)] ;*

*In separately determining the ALP of AMP expenses, the TPO is free to• choose any other suitable method including Cost plus method [Para 194(xiii)];*

*In so making a TP adjustment on account of AMP expenses, a proper set• off/purchase price adjustment should be allowed from the other transaction of distribution of the products [Para 93] ;*

*Selling expenses cannot be considered as part of AMP expenses [Paras 175• & 176 of the judgment].*

*14. With the foregoing understanding of the ratio decidendi of the judgment of the Hon'ble Delhi High Court in the case of Sony Ericsson (supra), which is probably the only judgment that has laid down the mechanism for determining the ALP of AMP expenses in an elaborate manner, let us examine the facts of the case. The assessee applied TNMM as the most appropriate method. Since the profit margin declared by the assessee was favourably comparable with the average margin of the comparables, the assessee claimed that no adjustment should be made on account of AMP expenses because such expenses stood subsumed in the overall operating profit.*

*15. We are unable to countenance such a point of view of the assessee for deletion of the addition towards AMP expenses on the plain logic of the assessee's profit margin being favourable with that of comparables. This is a fallacious argument. It is pertinent to note that*

*the TPO examined and got satisfied with the assessee's profit margin vis-à-vis the comparables only qua the international transactions of manufacturing/distribution functions. He separately determined the ALP of AMP expenses, albeit, without examining the AMP functions carried out by the assessee and the comparables. Manner of determination of the ALP of the distribution activity and AMP activity has been set out by the Hon'ble High Court to be conducted, firstly, in a bundled manner by considering the distribution and AMP functions performed by the assessee as well as the probable comparables. If probable comparables having performed both the functions are not available, then to determine the ALP of AMP expenses in a segregated manner. As such, it becomes immensely important to separately examine the distribution and AMP functions undertaken by the assessee as well as probable comparables. It is vital to highlight the difference between AMP expenses and AMP functions. Whereas AMP functions are the means by which AMP activity is performed, AMP expenses is the amount spent on the performance of such means (functions). To put it simply, an examination of AMP functions carried out by the assessee and the probable comparables is sine qua non in the process of determination of the ALP of the international transaction of AMP spend, either in*

*a segregate or an aggregate manner. What Their Lordships have held is to bundle the distribution activity with the AMP activity, being two separate but connected international transactions, for the purposes of determination of the ALP of both these international transactions in a combined manner. The argument of the assessee that since the profit margin of the comparables is much less than the assessee and hence no separate addition should be made for AMP functions, if taken to a logical conclusion, will make the AMP spend as a non-international transaction, which, in our considered opinion, is not appropriate in the given facts. Once AMP expense has been held to be an international transaction, it is, but, natural that the functions performed by the assessee under such a transaction need to be compared with similar functions performed by a comparable case. If AMP functions performed by the assessee turn out to be different from those performed by a probable comparable company, then, an adjustment is required to be made so as to bring AMP functions performed by the assessee as well as the comparable, at the same pedestal. If we concur with the contention of the assessee that the addition on account transfer pricing adjustment of AMP expenses be deleted without any examination of the AMP functions carried out by the assessee as well as comparables, this will*

*amount to snatching the tag of international transaction from AMP expenses, which admittedly exists in facts and circumstances of the present case. What Their Lordships in Sony Ericsson (supra) have held is that the distribution activity and AMP expenses are two separate but related international transactions. It is only for the purposes of determining their ALP that these two should be aggregated. The process of such an aggregation does not take away the separate character of the AMP expenses as an international transaction. An analysis and examination of the manufacture/distribution and AMP functions carried out by the assessee must be necessarily done in the first instance, which should be then compared with similar functions performed by some comparables. If the manufacture/distribution and AMP functions performed by the assessee turn out to be different from those performed by probable comparables, then, a suitable adjustment should be made to the profits of the comparable so as to counterbalance the effect of such differences. If however differences exist in such functions, but no adjustment can be made, then, such probable comparable should be dropped from the list of comparables. If, in doing this exercise, there remains no company doing comparable manufacture/distribution and AMP functions, then, both the international*

*transactions are required to be segregated and then examined on individual basis by finding out probable comparables doing such separate functions similarly. For the international transaction of AMP spend, this can be done by, firstly, seeing the AMP functions actually performed by the assessee and then comparing it with the AMP functions performed by a probable comparable. If both are found out to be similar, then the matter ends and a comparable is found and one can go ahead with determining the ALP of such a transaction. If the AMP functions performed by the two entities are found to be different, then adjustment is required to be made in the case of a probable comparable, so as to make it uniform with the assessee. The assessee may have possibly done, say, four different AMP functions as against the probable comparable having done, say, only three. In such a scenario, again the adjustment will be warranted. In another situation, the AMP functions performed by the assessee and probable comparable may be similar but with varying standards, which will also call for an adjustment. Crux of the matter is that the AMP functions performed by the assessee must be similar to those done by the comparables, in the same manner as such functions are compared in any other international transaction. However, in computing ALP of AMP spend, the adjustment*

*or set off, if any, available from the distribution function, should be made. Essence of the judgment in the case of Sony Ericson Mobile (supra) is that the two international transactions of Distribution and AMP should be examined on the touchstone of transfer pricing provisions, but on an aggregate basis. Determining the ALP of two transactions in an aggregate manner postulates making a comparison of both the functions of manufacture/distribution and AMP carried out by the assessee with the comparables, so that surplus from the manufacture/distribution activity could be adjusted against the deficit, if any, in the AMP activity. The Hon'ble High Court has no where laid down that the AMP functions performed by the assessee should not be compared with those performed by the comparable parties. On the contrary, it turned down the contention raised by the ld. AR urging for not treating AMP as a separate function, which is apparent from the extraction from para 165 of the judgment : `On behalf of the assessee, it was initially argued that the TPO cannot account for or treat AMP as a function. This argument on behalf of the assessee is flawed and fallacious for several reasons. There are inherent flaws in the said argument'. It held vide para 165 of the judgment that : `An external comparable should perform similar AMP functions.' Thus it is manifest that*

*comparison of AMP functions is vital which cannot be dispensed with. The alternative prescription of the judgment is that if ALP of both the transactions of Distribution and AMP cannot be determined in a combined manner, then the ALP of AMP functions should be separately done. The stand of the assessee urging the consideration of profit on an entity level without making comparison of AMP functions done by the assessee as well as the comparable, will render this alternative approach incapable of compliance. Canvassing such a view amounts to treating AMP spend as a non-international transaction, which is patently incapable of acceptance.*

*16. We summarize the legal position from the judgment in Sony Ericsson (supra) that the distribution and AMP functions are two separate international activities, which need to be compared with uncontrolled transactions. Because of their intertwinning, it is only for the purposes of determining their ALP that both these transactions can be aggregated in first instance, so that the surplus from one could be adjusted against the deficit from the other in an overall approach. It does not mean that because of aggregation, the AMP expense transaction sheds its character of a separate international transaction and hence the AMP functions should not be matched with the AMP*

*functions carried out by probable comparables. If suitable comparables can be found having performed both distribution and AMP functions, then, their ALP should be determined on aggregate basis. If, however, there is some difference in the distribution or AMP functions performed by the assessee vis-à-vis the probable comparables, then an attempt should first be made to iron out such difference by making a suitable adjustment to the profit margin of comparables. If such an adjustment is not possible, then such probable comparable should be eliminated. If, by making a comparative analysis of the distribution and AMP functions jointly, there remains no comparable case performing such distribution and AMP functions, then, the international transaction of AMP should be segregated and their ALP be determined separately by applying a suitable method. However, in so determining the ALP of such an international transaction of AMP expenses on separate basis, a proper set off, if any, available from the distribution activity, should be allowed.*

*17. Adverting to the facts of the instant case, we find that the assessee did not separately report the international transaction of AMP expenses. Even under the transfer pricing analysis done by it on entity level, there is no identification of AMP functions, what to talk of*

*comparing such functions with the other comparables in a combined or separate approach. The TPO treated the AMP spend as a separate international transaction. He segregated routine AMP expenses incurred by the assessee for his business from the non-routine AMP expenses by treating such nonroutine AMP expenses leading to the creation of marketing intangible for its AE. Then he applied a mark-up of 11.05% to determine the ALP of this transaction. There is no attempt to find out the mark-up of comparables by analyzing the AMP functions carried out by the assessee vis-à-vis the comparables. To put it straight, neither the assessee nor the TPO have followed the prescription of the judgment in the case of Sony Ericsson (supra) for benchmarking.*

*18. Further, we note that no detail of the AMP functions performed by the assessee is available on record. Similarly, there is no reference in the order of the TPO to any AMP functions performed by comparables. In fact, no such analysis or comparison has been undertaken by the TPO. The assessee has also failed to draw our attention towards any material divulging the AMP functions performed by the assessee as well as comparables. As such, it is not possible to determine the ALP of*

*AMP expenses at our end, either in a combined or a separate approach.*

*19. Since the orders of the authorities below are not in conformity with the ratio laid down in Sony Ericsson (supra) as discussed above and further necessary details for doing this exercise at our end are also not available, we set aside the impugned order and send the matter back to the file of the TPO/AO for determining the ALP of the international transaction of AMP spend afresh in accordance with the manner laid down by the Hon'ble High Court in Sony Ericson Mobile (supra).”*

*42. In our considered opinion the ratio arising out of the above said case law is fully applicable on the facts of the case. Hence, following the aforesaid case law we remit the issue to file of the assessing officer to follow the direction of the ITAT as above and determine the arm length price in this regard. As regards to the other adjustment in this regard being claimed by the assessee, the same are consequential. The AO shall consider the same afresh and decide as per law. The ld. Counsel of the assessee claimed that the TPO should not be given second innings. We find the same is not tenable in light of facts and case laws referred hereinabove.”*

015. As it is submitted that there is no change in the facts and circumstances of the case , this decision should be applied to the facts of the present case. In that decision coordinate bench

has held that there exists and international transaction on account of excess spending of AMP expenses , agreement and reimbursement received from AE . Therefore such international transaction needs to be benchmarked, hence, the matter was restored to the file of the ld AO/ TPO. Hence, we set aside the whole issue back to the file of the learned Assessing Officer/ Transfer Pricing Officer for determination of Arm's Length Price of international transition of excess AMP spend of the assessee. Accordingly, ground no. 2 to 18 and 30 to 37 are allowed with above direction.

016. On the other issues, the learned Authorized Representative submitted that assessee would like to contest grounds no. 19,20,24,25 and 27 only. Other grounds as ground no. 21,22,23 and 26 are not pressed and hence dismissed.

017. Ground number 19 of the appeal relates to the direction of the learned assessing officer on capital work in progress shown by the assessee amounting to ₹ 236,042,425/–. The brief facts of the case shows that the assessee has shown a capital work in progress at schedule 6 of the fixed assets amounting to ₹ 281,966,744/–. The assessee was asked to submit the details of the same. As per submission dated 26 March 2015 assessee has given a brief of capital work in progress and stated that these expenses have been incurred towards implementation of SAP [ Enterprises Resources Planning software [ ERP] ] and are in nature of personnel cost and group recharge for hardware cost. However, the learned assessing officer has stated that company has simply given the breakup of the amount incurred on the head capital work in progress and further the details submitted are not tallying with the amount shown in the balance sheet. The amount shown in the balance

sheet was ₹ 281,966,744/– however the assessee has given the details of the amount of ₹ 280,680,061/–. The learned assessing officer further stated that assessee has not submitted the item wise breakup of expenses incurred Under the each head, therefore he inferred that the amount remains unsubstantiated in absence of supporting documents. The learned AO held that the amount would not be allowed to the assessee as deduction and depreciation or any other amortization in this regard will be disallowed in any of the future years in which it is claimed.

018. The assessee aggrieved with that filed an objection before the learned dispute resolution panel who gave a direction to allow project cost expenditure to the extent third party bills has been submitted by the assessee. It was noticed that assessee has submitted bill of ₹ 60,541,462/– are not drawn on assessee but on the associated enterprise of the assessee and the associated enterprises in turn has drawn debit note/ company invoices on assessee. Therefore, it was disallowed. AO noted that assessee has submitted the third party bills to the extent of ₹ 44,637,636/– from third-party vendors and accordingly the relief was granted to that extent. Accordingly ₹ 236,042,425/– was not allowable to the assessee and the same was proscribed and depreciation and or any other expenses in this regard would be disallowed in the any of the future years in which assessee claims that. Precisely ld AO held that in future claim of depreciation on this sum should be disallowed.

019. The learned authorised representative submitted that as per ground number 19 the assessee has challenged the above finding of the learned assessing officer. He submitted that agreement is placed at page number 1630 of the paper book.

He further stated that as assessee has not claimed any deduction or allowance during the year , observation of the learned assessing officer are incorrect/ unwarranted.

020. The learned departmental representative supported the orders of the lower authorities.

021. We have carefully considered the rival contention and perused the orders of the lower authorities. The fact shows that in this year the assessee has shown a capital work in progress and has not claimed any deduction. Therefore, the question of making any disallowance or addition on that account does not arise in this year. However when the assessee makes capitalization of the capital work in progress into fixed assets, the learned assessing officer has every right to examine the actual cost of the asset, when it is put to use an the use for business purpose for allowability of the depreciation. Therefore, at present, the findings of the learned assessing officer are premature. Accordingly, ground number 19 of the appeal is allowed.

022. Ground number 20 of the appeal is with respect to the disallowance of bad debt of Rs 1,02,41,042/–. As per schedule 21 of the financial statement the assessee has claimed bad debt of ₹ 10,241,042/–. The learned assessing officer asked the assessee to furnish the details with respect to the bad debt claimed and when the income in this respect was offered in the earlier assessment year. The assessee was also asked to justify the claim. Assessee did not submit any detail and therefore the claim of the bad debt was disallowed.

023. Before the learned dispute resolution panel also assessee merely stated that the above sum has been written off as there

is a remote possibility of recovery of such amount. The learned dispute resolution panel therefore confirmed the action of the learned assessing officer.

024. The learned authorised representative submitted the details of additional evidence submitted before us at page number 3112 – 3114. The assessee has submitted the details of write off of 131 parties stating their permanent account number in most of the cases and stated that the same may be allowed.

025. The learned departmental representative vehemently supported the orders of the lower authorities and submitted that assessee has failed to substantiate the claim of the bad debts with respect to the several conditions mentioned therein that whether these have been accounted for as income of the assessee in earlier year or not. He submitted that mere write off is not the only condition for allowability of it.

026. We have carefully considered the rival contention and perused the orders of the lower authorities. Before the lower authorities, the assessee did not submit any information. Therefore, the addition was confirmed. Even in the form of additional evidences before us, the assessee has merely submitted the name of the parties, the amount, and the permanent account number of some of the parties. For the claim of the bad debt, the assessee should have shown that these amounts have been included in income of the assessee in earlier years. The assessee has failed to show the same. Therefore, we do not find any infirmity in the orders of the lower authorities in confirming the disallowance of the bad debt. Accordingly, ground number 20 of the appeal is dismissed.

027. Ground number 24 is with respect to mismatch in annual information return. During the assessment proceedings the learned AO asked the assessee to reconcile the AR information as per 26 AS with the books of accounts. The assessee furnished reply wherein no specific reconciliation was given. The learned AO further held that the information furnished by the assessee is incomplete and does not contain entry wise explanation of the amount credited in the books of accounts therefore the learned assessing officer presumed that assessee has nothing to offer in this regard. The AO further noted that transaction to the extent of ₹ 28 lakhs is being an unexplained term deposit with the Standard Chartered bank under different transactions IDs between 6/8/2010 to 31/3/2011 and further an amount of ₹ 2,513,704/– is being payment made to hotels and restaurants. Therefore, in the draft assessment order the same was added.

028. The assessee filed an objection before the learned dispute resolution panel who confirmed the addition to the extent of ₹ 2,513,704/– and with respect to the term deposit of ₹ 28 lakhs the DRP give direction to the learned assessing officer to verify the same. If on verification, the same is found to be correct the addition required to be deleted. The learned assessing officer verified the same and found that the deposits of ₹ 28 lakhs do not refer to the deposit with the same bank branch and further the dates do not tally. Accordingly, the addition of ₹ 28 lakhs and ₹ 2,513,704/– being payment made to hotels and restaurants were added to the total income of the assessee.

029. The learned authorised representative reiterated the submissions made before the learned dispute resolution panel.

030. The learned departmental representative supported the orders of the lower authorities.

031. We have carefully considered the rival contention and perused the orders of the lower authorities. We find that the first addition that was made by the learned assessing officer is with respect to the deposit of ₹ 28 lakhs with the Standard Chartered bank for which the assessee has submitted the copy of the letter issued to the Standard Chartered bank by the office of the Commissioner of Central Excise New Delhi directing the release of the fixed deposits of the assessee. Further, the assessee has stated that the payment made to hotels and restaurants were for the bona fide business expenses of the assessee and therefore the disallowance/addition with respect to the same could not have been made. Assessee has also submitted a certificate to this effect. We find that merely because there are difference between the AIR and the books of account, the addition cannot be made but it is the first trigger point for making further investigation and obtaining the details from the assessee to justify the difference. If the assessee can reconcile such difference and even otherwise satisfy the learned assessing officer, that such addition is unwarranted, the addition is not required to be made. As the learned assessing officer as well as the learned DRP has made the addition merely on the basis of the difference between form No 26 As and failure of assessee to reconcile it with the books , we set-aside this ground of appeal back to the file of the learned assessing officer with a direction to the assessee to satisfy the learned assessing officer by producing the relevant details that there is no mismatch between income offered by the assessee as well

as items reported in AIR. If the learned assessing officer is satisfied with the same, the addition deserves to be deleted. Therefore, the learned assessing officer may verify the information furnished by the assessee and decide afresh in accordance with the law. Accordingly, ground number 24 of the appeal is allowed with above direction.

032. Ground number 25 is with respect to the disallowance of royalty u/s 37 (1) of the act amounting to ₹ 84,742,952/–. The brief facts of the case shows that the learned assessing officer asked the assessee to furnish the information about the royalty paid to Diageo North America and why shame should not be disallowed u/s 37 (1) of the act. The assessee did not furnish the information to the AO. However, the learned assessing officer found that royalty in the earlier year was also paid to the same party under intellectual property license agreement for use in commercial exploitation of the trademark, copyrights and expertise in respect of one of the brand 'Smirnoff" at the rate of 1% on net domestic sales. This agreement was entered into on 21st of January 2008 and was effective from 1 April 2006. Due to assessee's economic conditions assessee obtained however letter by the above company for a period from 1 April 2006 to 30 June 2008. For assessment year 2010 – 11, the assessee submitted an agreement whereby the royalty percentages are increased from 1% to 5% with effect from 1 July 2008. The assessee was asked to justify why the royalty payment should not be disallowed for the reason that assessee was duly able to carry out its business activities without any payment of royalty in the earlier assessment years. The assessee stated that the royalties were not made for the earlier

year because of the economic conditions and the poor sales of the brand and therefore the assessee obtained royalty waiver from the owner of the brand. When the sale started improving, the assessee has started paying royalty to assessee to enterprise is. Assessee also submitted the figures of last three years of sale suggesting that it has substantially increased. The learned assessing officer noted that even for the year ended on 31st of March 2008 the sales have substantially increased however; no royalty was paid in the said financial year. Therefore he disallowed ₹ 84,742,952 u/s 37 (1) of the act for the reason that assessee has failed to establish the expenditure was incurred wholly and exclusively for the purposes of its business.

033. The objection before the learned dispute resolution panel was dismissed. Therefore, in the final assessment order such addition was made.

034. The learned authorised representative submitted that this issue arose in the case of the assessee for assessment year 2010 – 11 and matter reached before the coordinate bench. The coordinate bench vice is order dated 19/12/2019 in para number 43 – 44 has dealt with the whole issue and remitted the matter back to the file of the learned assessing officer for fresh consideration. He further stated that in that order the coordinate bench held that the assessing officer is not authorised to consider the benefit test and make the disallowance u/s 37 (1) of the act.

035. The learned departmental representative vehemently supported the order of the learned lower authorities.

036. We have carefully considered the rival contention and perused the orders of the lower authorities. The identical issue arose in case of the assessee for assessment year 2010 – 11 before the coordinate bench and it was decided in ITA number 1228/2015 dated 19/12/2019 para number 43 wherein the issue was set aside to the file of the learned assessing officer. Therefore with similar direction we also set-aside ground number 25 of the appeal. Accordingly, this ground is allowed with above direction.

037. Ground number 27 of the appeal is with respect to the charging of interest u/s 234A of the income tax act. Assessee submits that the return of income was filed by the assessee on 22/11/2011 whereas the due date for filing of the return of income was 30/11/2011 and therefore no interest u/s 234A of the act should have been charged, as there is no delay in filing of return of income. Apparently, if the assessee has filed the return of income within the due date prescribed u/s 139 (1) of the act, interest u/s 234A cannot be levied. Therefore, the learned assessing officer is directed to delete the interest charged under that Section. Ground number 27 of the appeal is allowed.

038. In the result, appeal filed by the assessee is partly allowed.

039. Coming to the appeal of the learned assessing officer, which is on the issue of transfer pricing adjustment with respect to advertisement marketing and promotion expenditure. This issue has been dealt with by us in the appeal of the assessee wide ground number 2 – 18 as well as the additional ground number 30 – 37, wherein the issue was set aside to the file of the learned assessing officer holding that the excess incurring

of the advertisement marketing and promotion expenditure is an international transaction and it is required to be benchmarked. As these grounds in the appeal of the learned assessing officer are connected with those grounds of appeal of the assessee, we also set them aside to the file of the learned assessing officer.

040. Accordingly, appeal filed by the learned assessing officer is allowed for statistical purposes.

Order pronounced in the open court on 25 .08.2022.

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| Sd/- | Sd/- |
| (PAVAN KUMAR GADALE) | (PRASHANT MAHARISHI) |
| (JUDICIAL MEMBER) | (ACCOUNTANT MEMBER) |

Mumbai, Dated: 25.08.2022
*Sudip Sarkar, Sr.PS*
Copy of the Order forwarded to :

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai