

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I": NEW DELHI
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**ITA Nos. 462 AND 2409/Del/2022
(Assessment Years: 2017-18 & 2018-19)**

Tupperware India Private Ltd, 204-206, Tolstoy House, 15 Tolstoy Marg, Connaught Place, New Delhi (Appellant)	Vs.	ITO, National Faceless Appeal Centre (NFAC), Delhi (Respondent)
PAN: AA ACT3770D		

Assessee by :	Shri Rohit Tiwari, Adv Ms. Tanya, Adv Ms. Shivani, Adv
Revenue by:	Shri S. K. Jadav, CIT DR
Date of Hearing	20/01/2025
Date of pronouncement	17/04/2025

O R D E R

PER M. BALAGANESH, AM

1. Assessee M/s. Tupperware Aker Powergas Pvt. Ltd. (hereinafter referred to as 'assessee') by filing the present appeal sought to set aside the impugned order dated 13.01.2022 for AY 2017-18 and 31.07.2022 for AY 2018-19 passed by the Assessing Officer (AO) inconsonance with the order passed by the Dispute Resolution Panel (DRP) dated 23.11.2021 and 07.06.2022 and order passed by Transfer Pricing Officer (TPO) under section 92CA(3) under section 143(3) read with section 144C(3) read with section 144B of the Income Tax Act, 1961 (for short 'the Act') qua the assessment

year 2012-13. Identical issues are involved in both these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.

ITA No. 462 /Del/2022 - Assessment Year 2017-18 - Assessee Appeal

2. The assessee has raised the following grounds of appeal:-

"1 . hat assessment order passed by the Learned Assessing Officer ("Ld. AO") under section 143(3) read with section 144C of the act pursuant to the directions of Learned Dispute Resolution Panel ("Ld. DRP") is bad in law and void-ab- initio as it is not in conformity with the provisions of section 144C of the Act.

2. That on the facts and circumstances of the case and in law, the Ld. AO erred in passing the impugned assessment order thereby making an adjustment of Advertisement, Marketing and Promotional expenses both on substantive as well as protective basis which is not in consonance with the provisions of the Act.

3. That on the facts and circumstances of the case and in law, the Ld. AO erred in following the directions of Ld. DRP and thereby erred in assessing the returned income of the Appellant from INR 539,664,200 to INR 1,669,927,005.

TRANSFER PRICING GROUNDS:

4. That the Ld. DRP/Ld. AO/ Additional Commissioner of Income Tax, Transfer Pricing Officer- 3(2)(1) ("Ld. TPO") have erred in proposing an addition of INR 928,242,653 holding that the Appellant's international transactions do not satisfy the arm's length principle envisaged under the Act.

5. That the Ld. DRP/Ld. AO/ Ld. TPO have erred in undertaking adjustment on account of Advertisement, Marketing and Promotion ("AMP") expenses and payment of royalty (on substantive basis) amounting to INR 510,510,213 by:

5.1. not appreciating the characterization of the Appellant, that it functions in the capacity of a licensed manufacturer and is entitled to appropriate share of residual profit/loss arising in the business;

5.2. not appreciating that in the case of an entrepreneurial entity, if the payment of royalty is demonstrated to be at arm's length and appropriate share of residual profits reside in India having regard to the functional, asset and risk analysis of

the Appellant, the question of any adjustment on account of AMP expenses does not arise;

5.3. not appreciating that the Appellant is the economic owner of marketing intangibles commensurate with the functions performed in India;

5.4. not appreciating that the Appellant incurs such expenses on its own account for selling its products in India and derives adequate risks / rewards thereof;

5.5. not appreciating the fact that AMP expenses incurred by Appellant is not an international transaction;

5.6. not appreciating that in the absence of a 'transaction' as envisaged under section 92F of the Act between Appellant and its AE for brand promotion or for establishing a marketing intangible, the Ld. TPO had no jurisdiction to propose an adjustment on account of AMP expenses;

5.7. not providing any reason/documentary evidence to demonstrate that the AMP expenses incurred by the Appellant constitute an international transaction; and

5.8 not appreciating that in case any incidental benefits arise to the associated enterprise ("AE") on account of incurring AMP expenses, these do not constitute intra-group services so as to constitute an international transaction;

5.9. not appreciating the contribution profit split analysis ("CPSM") and Residual Profit Split Method ("RPSM") furnished by the Appellant during assessment proceedings;

5.10. selecting an inappropriate set of comparable companies for the purposes of determining routine return for application of Residual Profit Split Method ("RPSM"); and

5.11 determining the weightage of split for application of RPSM on an adhoc basis, thus violating the fundamental principle of transfer pricing.

5.12. incorrectly considering an arbitrary amount incurred by the Appellant together on alleged AMP expenses and payment of royalty,

5.13. including sales and distribution expenses as part of AMP expenditure, and ignoring the Ld. DRP's directions pronounced in this regard in Appellant's own case for AY 2013-14;

5.14, not considering the amount of royalty as disclosed in Form No. 3CEB and Transfer Pricing Documentation and instead, considering the amount disclosed in the financial statements, which is inclusive of service tax paid to the Government of India under reverse charge.

6. That the Ld. DRP/Ld. AO/Ld. TPO have erred in proposing adjustment on protective basis amounting to INR 374,498,064 for excessive AMP expenses applying Bright Line Test ("BLT"). In doing so, Ld. DRP/Ld. TPO/Ld. AO have erred by:

6.1. not appreciating that BLT has been expressly rejected by several judicial pronouncements of Hon'ble Delhi High Court,

6.2. not appreciating that such adjustment has no statutory mandate; and

6.3. arbitrarily applying a mark-up of 15.61% on the alleged AMP expenses.

7. That the Ld. AO has grossly erred in including the protective addition of INR 374,498,064 to the final adjustment amount, without appreciating that such inclusion has been rejected by several judicial pronouncements.

8. That the Ld. DRP/Ld. AO/Ld. TPO have erred in undertaking adjustment, on a without prejudice basis, on account of payment of royalty by rejecting the transfer pricing documentation maintained by the Appellant and determining arm's length royalty rate as 2% of the sales. In doing so, Ld. DRP/Ld. AO/Ld. TPO have erred:

8.1. in assuming that 'no benefit' has been conferred on the Appellant from the use of trademarks and know-how for which royalty was paid by the Appellant;

8.2. in not giving due cognizance to the information and documents submitted by the Appellant during the course of proceedings;

8.3. by disregarding the economic analysis performed by the Appellant, thereby rejecting the comparable agreements selected by the Appellant in the transfer pricing documentation; and

8.4. by arbitrarily determining the royalty rate of 2% based on the fresh search undertaken by the Ld. TPO during the course of proceedings by adopting the methodology similar to that adopted by the Appellant in the transfer pricing documentation.

9. That on the facts and circumstances of the case and in law, the Ld. DRP/Ld. AO/Ld. TPO have erred in undertaking an adjustment on account of payment of management service fees. In doing so, the Ld. DRP/Ld. AO/Ld. TPO have rejected the transfer pricing documentation maintained by the Appellant in respect of payment of management service fees and arbitrarily determined arm's length price as 'Nil' by applying Comparable Uncontrolled Price Method ("CUP") Method in contravention of the provisions of Rule 10B of the Income Tax Rules ("the Rules"), thereby resulting in an adjustment of INR 42,784,366.

10. That on the facts and circumstances of the case and in law, the Ld. DRP/Ld. AO/Ld. TPO have erred by challenging the commercial / business wisdom of the Appellant in relation to payment of royalty and payment of management service fees.

11. That on the facts and circumstances of the case and in law, the Ld. DRP/Ld. AO/Ld. TPO have erred in enhancing the income of the Appellant by INR 450,010 by imputing interest on receivables from the AEs. In doing so, Ld. DRP/Ld. AO/Ld. TPO have erred in:

11.1. re-characterizing the amount of overdue receivable as a deemed loan and treating it as a separate international transaction;

11.2. not appreciating the fact that arm's length price determination for outstanding receivables is subsumed within the arm's length price determination of the principal international transaction itself; and

11.3. ignoring the judicial pronouncement of Hon'ble Delhi High Court in the case of Kusum Healthcare Private Limited (ITA No. 765/HC/Del/2016).

CORPORATE TAX GROUNDS:

12. That the Ld. AO has erred in disallowing the provision for warranty created, while computing the income of the Assessee under minimum alternate tax provisions, by considering the same to be unascertainable in nature which is akin to a contingent liability as defined in section 115JB explanation 1(c) of the Act.

13. That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270A of the Act.

3. The Ground Nos. 1 to 4 raised by the assessee are general in nature and does not require any specific adjudication.

4. We have heard the rival submissions and perused the materials available on record. The assessee is a private limited company engaged in the business of manufacturing and distribution of moulded plastic kitchenware products carrying out manufacturing activities from its plant located at Dehradun. The return of income for the assessment year 2017-18 was filed by the assessee on 30-11-2017 declaring total income of Rs 53,96,64,200/-. Pursuant to the international transactions entered by the assessee with its Associated Enterprises (AEs) covered under section 92CA of the Act, the learned AO referred the matter to learned Transfer Pricing Officer (TPO) for determination of Arm's Length Price (ALP) of the international transactions. As per the Transfer Pricing documentation, the assessee earned an operating margin of 15.65%. The comparables have earned a working capital adjusted margin of 4.15% (35th percentile) to 10.29% (65th percentile) with a median of 8.18%. Accordingly, the transactions of assessee was held to be at arm's length by the assessee in the transfer pricing documentation.

5. During the course of TP assessment proceedings, the learned TPO requested for various information/ documents which were filed from time to time. The Learned TPO issued show-cause notice to the assessee wherein adjustments on account of alleged Advertising, Marketing and Promotion (AMP) expenses was proposed to be made by him. The assessee filed its factual and legal submissions qua the proposed adjustment of AMP expenses. The Learned TPO ignored the contentions of the assessee and made transfer pricing adjustment of AMP expenditure which stood confirmed up to the level of Learned DRP and ultimately got culminated in the final

assessment order also by the Learned AO. The Learned TPO held that AMP expenses incurred by the assessee are significantly higher than that of comparable companies and applied Bright Line Test (BLT) by charging a markup of 15.61% for alleged brand building services provided to the AEs. The Learned TPO applied Residual Profit Split Method (RPSM) for the alleged international transaction of AMP expenditure. The assessee before the Learned DRP also submitted that AMP expenditure per se cannot be construed as an international transaction and hence there is no need to separately benchmark the same. The assessee also relied on the decision of Hon'ble Jurisdictional High Court in the case of Maruti Suzuki India Ltd vs CIT in ITA No.110/2014 and ITA 710 /2015 wherein the Hon'ble High Court held that onus is to prove that a particular international transaction arising from AMP expenses is on the revenue authorities and not on the assessee .

6. The Hon'ble High Court held that the onus to demonstrate that AMP expenses incurred by the tax payers constitute an international transaction would rests upon the revenue authorities. The existence of international transaction would have to be established by the revenue authorities without application of bright line test, based upon documentary evidence of an arrangement between the assessee and its AEs.

7. The Id TPO made substantive addition for AMP expenses and payment of royalty by using RPSM in the sum of Rs. 510510213/- and protective addition for AMP expenses by using BCT in the sum of Rs. 37,44,98,064/-.

8. Both parties before us mutually agreed that the very same issue was subject matter of detailed adjudication in assessee's own case by this Tribunal in earlier year and order is awaited thereon. Both the parties

mutually agreed with the arguments advanced by both the sides may be adopted for the years under consideration, also as the entire facts are identical and the behaviour of the revenue authorities in treatment of the issue is also identical with earlier years. Accordingly, we proceed to decide the issue of AMP expenses by following the coordinate bench decision of this Tribunal in ITA No. 9728/Del/2019 for AY 2015-16 and ITA 670/Del/2011 for AY 2016-17 dated 12.03.2025 wherein, it was held as under:-

“7. AMP expenses issue. The Ld. Counsel for the appellant has mentioned that AMP expenses issue is covered by grounds no. 4, being general and ground no. 5 and ground no. 6 of the Appeal. He pointed out that during course of TP assessment proceedings, the ld. TPO held that AMP expenses incurred by the Appellant are significantly higher than that of comparable companies and applied BLT by charging a mark-up of 19.12% for alleged brand building services provided to the AE. The DRP upheld the view of the TPO in characterizing AMP expenses as an international transaction. Further, the TPO proceeded to apply RPSM for the alleged international transaction of AMP and payment of royalty.

8. Ld. Counsel has submitted that primarily the case of assessee is that AMP is not an international transaction. It is submitted that the AMP expenses are incurred by the Appellant in the course of carrying on its business in India. Such AMP expenditure are neither incurred at the instance of overseas AEs, nor there any mutual agreement or understanding or arrangement as to allocation or contribution towards reimbursement of any part of AMP expenditure incurred by the Appellant for the purpose of its business. In absence of any understanding, arrangement, etc., no ‘transaction’ or ‘international transaction’ could be said to be involved with respect to such AMP expenditure incurred by the domestic enterprise, which may be covered within the ambit of Transfer Pricing Regulations.

9. The Ld. Counsel highlighted that the alleged AMP expenses incurred by the Appellant do not constitute an international transaction under the provisions of the Act since section 92B of Act does not list incurrence of AMP expense as an international transaction. Hence, the same is not required to be disclosed in the Form 3CEB and benchmarked in the TP Study maintained by the Appellant.

10. He furthermore, submitted that AO/TPO have brought no record or any material evidence to establish how the expenditure incurred by the Appellant had contributed to the promotion of the brand name. The Ld. Counsel relied heavily upon the decision of Hon’ble Delhi High Court in case of Maruti Suzuki India Ltd Vs CIT (ITA 110/2014 & ITA 710/2015), in which, accordingly to him, the Hon’ble High Court, has cast the onus to prove an international transaction arising from AMP expense, upon the Revenue authorities. It is contended that the Hon’ble High Court has held that the onus to demonstrate that an AMP expense incurred by a taxpayer constitutes an international transaction would rest upon the Revenue

authorities. The existence of an international transaction would have to be established by the Revenue authorities without application of bright line test, based upon documentary evidence of an arrangement between the Appellant and its AEs. The relevant extracts of the Hon'ble High Court decision in this regard, as relied by Ld. Counsel is reproduced below:

“..the very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not at ALP, an adjustment has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed price of such transaction and thereafter ask as to whether it is an ALP.”

11. Then referring to Para 44 and Para 61 of the decision in Maruti Suzuki ruling (*supra*), it is submitted that the Hon'ble High Court has laid that in the absence of existence of any agreement, understanding or arrangement between the Company and its AE for the expenditure to be incurred on AMP, it cannot be presumed that an international transaction exists. We consider it appropriate to reproduce the observations relied here below;

“61. The submission of the Revenue in this regard is: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for the same has been paid or remains payable or there is a mutual agreement to not charge any compensation for the service or benefit." Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to Section 92F (v) which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means' part and the 'includes' part of Section 92B (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC.

12. The Ld. Counsel for appellant further relied the decision in case of Sony Ericsson Mobile Communications India Pvt. Ltd. (ITA No. 16/2014 and connected matters) wherein, accordingly to him, the Hon'ble High Court ruled that value of a brand depends upon the nature and quality of goods and services sold or dealt with. Treating brand building as equivalent to or direct resultant of advertisement and sales promotion would be largely incorrect. It is contended that the Hon'ble High Court further has held that the taxpayers do not undertake advertisement with a purpose to increase the value of brand but to increase sale and thereby

earn higher profits. In this respect, the relevant part of decision as relied is reproduced as under:

“105. There is a line of demarcation between development and exploitation. Development of a trademark or goodwill takes place over a passage of time and is a slow ongoing process. In cases of well recognised or known trademarks, the said trademark is already recognised. Expenditures incurred for promoting product(s) with a trademark is for exploitation of the trademark rather than development of its value. A trademark is a market place device by which the consumers identify the goods and services and their source. In the context of trademark, the said mark symbolises the goodwill or the likelihood that the consumers will make future purchases of the same goods or services. Value of the brand also would depend upon and is attributable to intangibles other than trademark. It refers to infrastructure, know-how, ability to compete with the established market leaders. Brand value, therefore, does not represent trademark as a standalone asset and is difficult and complex to determine and segregate its value. Brand value depends upon the nature and quality of goods and services sold or dealt with. Quality control being the most important element, which can mar or enhance the value.

106. Therefore, to assert and profess that brand building as equivalent or substantial attribute of advertisement and sale promotion would be largely incorrect. It represents a coordinated synergetic impact created by assortment largely representing reputation and quality. There are a good number of examples where brands have been built without incurring substantial advertisement or promotion expenses and also cases where in spite of extensive and large scale advertisements, brand values have not been created. Therefore, it would be erroneous and fallacious to treat brand building as counterpart or to commensurate brand with advertisement expenses. Brand building or creation is a vexed and complexed issue, surely not just related to advertisement. Advertisements may be the quickest and effective way to tell a brand story to a large audience, but just that is not enough to create or build a brand. Market value of a brand would depend upon how many customers you have, which has reference to brand goodwill, compared to a baseline of an unknown brand. It is in this manner that value of the brand or brand equity is calculated. Such calculations would be relevant when there is an attempt to sell or transfer the brand name. Reputed brands do not go in for advertisement with the intention to increase the brand value, but to increase the sales and thereby earn larger and greater profits. It is not the case of the Revenue that the foreign AEs are in the business of sale/ transfer of brands.”

Unquote (Emphasis supplied)

13. It is further submitted that the appellant incurs such expenses on its own account for selling its products and derives adequate risks/ rewards thereof.

These expenses are essential for the Appellant to devise the margin and incentive schemes for its direct selling partners in order to increase the market reach of Tupperware products and drive the sales in India, thereby remaining competitive in the market.

14. *On a without prejudice basis, it is pleaded before us that the Appellant has earned higher profits than the comparables and any profit earned on account of AMP expenses incurred by the Appellant by way of economic exploitation of the trademark/ brand in India already stands captured in the profit and loss account for the Appellant company and the same has been duly offered to tax and hence there was no logic to compute or make any Transfer Pricing Adjustment on this account. It is submitted by Ld. Counsel that in the case of an entrepreneur, once all transactions are at arm's length, there is no need to test the AMP expense separately. As per the contentions of the Appellant, the TP study demonstrates that the international transactions have been undertaken at arm's length. Comparing individual element cost, i.e., of AMP expenses would amount to comparison or reconstruction of profit and loss account of Tupperware India to make it identical – cost-to-cost, to that of the comparable companies which is not the intent of transfer pricing regulations. The Appellant functions as an entrepreneur, once payment of royalty as well as import of raw material is demonstrated to have been undertaken at arm's length, the issue of AMP expense would be a misnomer.*

15. *It is next contended for the assessee that incidental benefits (if at all any) to the AE, do not constitute intra-group services. Ld. Counsel has submitted that any AMP activity undertaken by the Company primarily benefits the Company and AE is only benefitted in the form of increased royalty, which has been separately demonstrated to be at arm's length.*

16. *Ld. DR has countered it by submitting that assessee admits of supporting the global market strategy of the foreign AE thus benefits the brand owned by the said AE. It was further submitted that case of assessee is not of mere distributor but a manufacturer. The judgment of Delhi Benches in the case of BMW India (P) Ltd. Versus DCIT, Gurgaon [2017]88 taxmann.com 26 (Delhi-Trib) was relied to contend that AMP as distinct transaction is liable to be tested for ALP. It was submitted that TPO has extensively examined the conduct of assessee to establish the concert action. As with regard to reliance of Ld. AR on the decision of Maruti Suzuki (supra) it was contended that was a case of local brand and no distributive function.*

17. *We have given thoughtful consideration to the claim of assessee that in the case of assessee AMP expenditure is not an international transaction. It is pertinent to mention that in assessee's own case for AY 2013-14 and 2014-15 the co-ordinate bench has held that application of Bright Line test is not sustainable for examining ALP of AMP expenditure. However, the question as to if AMP expenditure of assessee is at all an international transaction was left open in AY 2013-14, vide ITA No. 7580/DEL/2017 order dated 1.08.2022 and relevant part of decision in para 10.2 and 11 are reproduced below:*

“10.2 Based on the above, it is amply clear that BLT as an approach is not permissible for undertaking any addition on account of AMP expenses incurred by the assessee. We, therefore, set aside this issue to the file of the Ld. AO/ TPO to decide it afresh in light of the decisions of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. (supra) and Sony Ericsson Mobile Communications India Pvt. Ltd. (supra) after giving reasonable opportunity of hearing to the assessee.

11. Before us, the assessee has prayed that if the AMP adjustment is determined at Rs. NIL by application of jurisdictional High Court decisions (supra) the issue whether this is an international transaction would become academic and thus the assessee will not press this ground. However, leave may be granted to the assessee to argue this issue in the subsequent assessment years if so required. We have no objection and allow the assessee to argue on this issue in future.”

18. It is relevant here to understand as to how the issue was dealt by the DRP, and for sake of convenience the relevant part of the DRP order is reproduced below;

“DRP Directions:

2.21 This is a legacy issue arising since AY 2013-14, and the DRP has confirmed the proposed adjustment.

2.2.2 The assessee is manufacturer and distributor of molded plastic kitchenware products under the brand name of the AE, i.e. "Tupperware". The assessee has objected to treatment of AMP expenses as International transaction and adjustment of ALP on this count. This issue has been recently examined in detail by the ITAT as also Hon'ble Delhi High Court in Sony Ericsson Mobile Co Pvt. Limited (ITA 16/2014- [2015] 55 taxmann.com 240 (Delhi)) and other cases and such transactions have been held to be International transactions and subject to TP provisions. The TPO has held it to be an International transaction in view of clear and unambiguous ownership of the Brand by the AE and the promotional activities undertaken result in a clear benefit to the AE as the assessee is just a transit point for the product towards the end user. The assessee is not subject to the related risks of a brand owner producer. This panel has also considered the order of the TPO, who has discussed it in details in para 32 to 35.08 pages-101 to 136 of the TP order.

2.2.3 The assessee seeks relief relying on the judgment of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Limited [ITA No. 110/ 2014 and ITA 710/2015]. This ruling is in different context as it involves a different entity with an entirely different functional and risk profile. The interlacing of AMP function in such a different risk profile cannot be the basis of deciding applicability of the ruling in case of the assessee. The panel is not able to agree with the assessee on this count. This spending results in extending the reach of the marketing intangible owned by the

AE's. The AE is the ultimate beneficiary as the intangibles owned by it are gaining in value due to the marketing efforts of the assessee. The assessee is in effect creating marketing intangibles in favour of the assessee by the AMP efforts that it carries out in the Indian sub-continent. The TPO has considered the AMP expenditure for promotion of the brand name. This resulted in creation of marketing intangible of the AE in India by the assessee and has not implied that the AMP is for the use of brand name. The TPO has examined and analysed the Promotion of brand and creation of marketing intangible for benchmarking the international transaction in relation to AMP expenditure. The short facts are that the assessee incurred expenses on account of AMP.

2.24 The assessee failed to show that the AMP expenditure done by them was compensated by the AE through a set-off in any other trade off transaction. The onus to show any such setoff is on the assessee but the assessee has failed to establish any such setoff. The assessee argued that its overall results have been accepted by the TPO therefore, the AMP transaction cannot be separately examined. This argument is unacceptable. The TPO was justified in benchmarking the AMP expenses as a separate transaction.

2.2.5 The conduct of the assessee, in brand promotion per the displays and other promotional activities apart from various functional innovations etc, clearly point to the existence of the AMP transaction. The assessee had submitted that the International Transaction because the AMP spend could not be viewed as such in the absence of agreement/arrangement/understanding to incur AMP expenses or excessively incur AMP expenses, AMP expenditure incurred by the assessee does not result in an international transaction. Mere absence of a formal agreement doesn't help the case of the assessee, whereas the conduct has the transaction written all across. In such a scenario, it does not help the case of the assessee as the assessee indeed undertakes the AMP action resulting in promotion of the brand. The TPO concluded that the Assessee incurs. excessive AMP expenditure; by this act the assessee renders a service to the AE. Such service is in the form an international transaction and calls for a higher remuneration on the part of the Assessee. The absence of adequate compensation is also concluded by the TPO. The fact that year after year the assessee has been carrying out high intensity of AMP activities is itself proof that there exists an arrangement between the Assessee and the AE that compels the Assessee to carry out this level of expenditure. Here we may refer to clause (v) of Section 92F which defines 'transaction'. The same is reproduced below:

(v)"transaction" includes an arrangement, understanding or action in concert -

(A) whether or not such arrangement, understanding or action is formal or in writing; or

(B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding.]

2.2.6 In this regard, mere absence of explicit agreement or non-furnishing of an agreement does not really establish the case of the assessee. Conduct and its nature whether 'collusive' or 'independent' has to be considered and it should form the fundamental test of determination of the nature of transaction in the ambit of International transaction. The existence of International Transaction in respect of AMP spend by the assessee is to be seen through the prism of 'conduct of the Parties' and the 'Ownership of IRPs' and their usages. The assessee carries out activities that significantly enhance the brand value/ Marketing.

2.2.7 The above contentions are meant to indicate that the assessee is required to carry out ad campaigns to promote its products. But the assessee has not specifically responded to the findings of the TPO about excess expenditure on AMP that results in buildup of the intangible heft. The assessee submission indicate to existence of an arrangement so structured so as to benefit the AE through rub off impact of the AMP spend but absolving the AE of any obligations to pay up for the benefits. Though the AE retains the ownership and control over the IPRs the assessee carries out activities that significantly enhance the brand value/ Marketing. The jurisprudence referred to by Ld AR though presented very meticulously, is clearly distinguishable on facts of each case

2.2.8 It is seen that the parent AE not only owns the Intangibles but also controls further development and growth of its intangibles This factum clearly demonstrates that the AE has ingeniously segregated the functions of Intangible management and product related operational aspects to reduce exposure to routine business risks and to protect and enhance margins through Intangibles. The study of these indicates clear delineation of the functions pertaining to the intangibles and the increase in volumes/turnover. The assessee furnished a set of comparables to the TPO for examining under TNMM. The TPO has accepted the same for comparability analysis. The panel upholds the action of the TPO in the above terms subject to the final direction.

2.2.9 As regards the contention of the assessee that the said AMP is not an international transaction, while in Sony Ericsson Mobile Communications India (P.) Ltd. v. Commissioner of Income-tax -III [2015] 55 taxmann.com 240 (Delhi) the Hon'ble Delhi High Court has disapproved the bright line test for finding out the cost/value of international transaction, which is the first variable under the TP provisions, the Hon'ble Court has held that the TPO has authority to examine and determine the international transaction of AMP spend. The Hon'ble High Court has observed and held as under in this regard:

"3..... the assessed were engaged in distribution and marketing of imported and branded products, manufactured and sold to them by the foreign AEs

resident abroad. Intangible rights in the brand-name/trademark/trade-name were owned by the foreign AEs. There is no dispute or lis that the assessed are AEs who had entered into controlled transactions with the foreign AEs. It is also uncontested that the controlled international transactions can be made subject matter of the transfer pricing adjustment in terms of Chapter X of the Income Tax Act..

43 where an assessee has failed or not furnished a report in respect of an international transaction, a specific reference for the said transaction under sub-section (1) is not required. It is sufficient, if arm's length pricing issue of any international transaction has been referred to the TPO.....

52. The contention that AMP expenses are not international transactions has to be rejected...

53. We also fail to understand the contention or argument that there is no international transaction, for the AMP expenses were incurred by the assessed in India. The question is not whether the assessed had incurred the AMP expenses in India. This is an undisputed position. The arm's length determination pertains to adequate compensation to the Indian AE for incurring and performing the functions by the domestic AE. The dispute pertains to adequacy of compensation for incurring and performing marketing and 'non-routine' AMP expenses in India by the AE.... DRA

56. Chapter X of the Act being a specific statutory provision has to be given effect to and in view of the said provisions arm's length price can be determined. The arm's length procedure prescribed in Chapter X, once applicable has to be given full application. As noticed above and subsequently, provisions of Chapter X are applicable to international transactions between two related enterprises. The purpose of determination of arm's length price is to find out the fair and true market value of the transaction and accordingly the adjustment, if required, is made. The said exercise has its own object and purpose."

2.2.9.1 Further, we find that the issue of AMP adjustment is pending before the Hon'ble Supreme Court for final decision. According to Taxsutra/Taxmann, the Hon'ble Supreme Court has admitted the Department's SLP in several cases involving AMP, in respect of a distributor as also a manufacturer-distributor, where the Hon'ble Delhi High Court has decided the issue against the Revenue."

19. The relevant conclusions of the TPO, as considered vital by the DRP to sustain order of TPO to hold the AMP expenditure to be international transaction, have been culled out in para 2.2.10 of the order of DRP and same are also worthy to be reproduced herein below:-

"2.2.10 The TPO, in the TP order, has made detailed discussion on the treatment of the AMP spend as international transactions basis facts of the case and the legal position related thereto, not repeated for sake of brevity.

The TPO has made certain pertinent and noteworthy observations, which inter alia are,

- The taxpayer had incurred INR 373427630/- on account of AMP expenditure which represents 7.85% of its sales,
- The taxpayer does not have any agreements for use of trademarks and patent owned by the parent entity. The said trademarks/formulations (intellectual property) was owned by the taxpayer's US based AE ie. M/s Tupperware Brands Corporation US. This implied that third parties could be granted licenses to use the trademarks. Therefore, it is clear that any creation of marketing intangible by the taxpayer could be utilized by third party manufacturers licensed by M/s Tupperware Brands Corporation US also;
- Hence, the benefit of AMP expenditure incurred by the taxpayer was not found to be exclusively for its own purpose. Accordingly, the benefit of the AMP expenditure is inuring to the US based AE as the latter clearly retained the rights to pass on the benefit of developed marketing intangibles to third-party manufacturers as per its own wish:
- The taxpayer was asked to provide its global advertisement policy along with global transfer pricing policy... to provide if there is any correspondence between the marketing head of the taxpayer and that of the foreign parent AE... to provide a certificate that the AE does not associate, involve or approve the procedure/process of relating to advertising and marketing and the basis of adoption of common theme for the advertisements. In its reply, the taxpayer submitted that an advertisement conceptualized by it is within the global best practices as shared by the AEs on a time to time basis. The rationale being since the foreign AE is the legal owner of the brand, the advertisement must adhere to the standards of the foreign AE. The taxpayer also contended that the strategy for advertisement and marketing in India have been conceptualized and determined by the AE in USA;
- During the TP proceedings for A.Y. 2014-15, following observations were made:

On page 3 of the show cause reply submitted in this office on 04.10.2016, assessee himself admits that one among the major functions of the assessee is the implementation of global direct selling/ marketing policy. Assessee in its submissions has admitted stated many times that policy formulation and brand promotion is the work done by AEs. Since, it is clear from that assessee Implements the global marketing strategy formulated by AEs, there can be no denial in the fact that assessee is contributing to the brand promotion of the brands owned by AES

- 8.2 On page 16 of the TP study submitted by the assessee, assessee himself admits to the fact the assessee provides support in the

implementation of the global marketing policy. This function read along with other functions clearly indicates towards the steps taken by Tupperware India to promote the brand name owned by AEs (Extract of the same has been reproduced in the TP order at pages-36 & 37 of TP order)

- *12.1 The "Tupperware" brand and the trademark, copyrights etc is owned by Tupperware Group As per the information available from the website of Tupperware India, it is seen that the brand Tupperware is always displayed. It is also seen that the AEs undertake functions relating to formulation of marketing strategy and brand building for their global operations. The Tupperware Group also has a separate sales and marketing team that is responsible for formulation of marketing strategy and distribution of products in the Indian market. Therefore, it appears that the AEs bear significant business and entrepreneurial risks of product acceptability in the market. On the other hand, the Assessee does not own any interest in the intangible and is only a manufacturer and seller of "Tupperware" products in India.*
- *12.2 Tupperware has taken worldwide initiatives to protect its brand name. The taxpayer has further added that the AE(s) has knowledge and resources required for legal protection of the brands and protecting the brand from infringement is extremely critical for the business and the registration of brands with AE has benefitted the Taxpayer since it is absolved of the responsibility of protection of the brands*
- *The above facts indicate the absence of independence of choice of theme, application of mind and decision making while selecting the advertisements.*
- *There is sufficient evidence that it is discharging marketing function, function of market development including adding value to the intangibles of its AE and is not merely engaged in dealing of plastic products.*
- *The above-mentioned analysis of the facts clearly substantiate that the taxpayer is promoting brand of the AE in India. For this it is required to maintain a trained sales force, maintain full distribution ad sales presence etc. The taxpayer is also required to undertake advertising promotion and merchandising programs for products for which it has only a limited, non-exclusive and non-transferable authorization to use names trademarks etc. Unless the licensing agreement states that Indian company has exclusive, long term rights for usage of brand in India, the excessive non-routine AMP spend actually adds to the brand value of foreign AE which can withdraw the license at any point of time. Agreeably, the routine AMP spend will also give some incidental benefit to the brand owner but at the same time it is for promoting domestic sales. In an uncontrolled environment, if an Indian company does incur non-routine AMP spend it will ask for a compensation from foreign AE for the services rendered by it for maintaining, enhancing and promoting its brand*

- *Assessee employed a sales force which, along with the marketing is responsible for both identifying and developing new business opportunities in domestic market thereby helping in market penetration.*
- *The above analysis of the taxpayer that substantiates the sales promotion and marketing expenditure is to promote the AE brand and corresponding marketing intangible in India.*
- *Accordingly the marketing function carried out by the assessee is required to be considered while carrying out the benchmarking of the international transactions*
- *Taxpayer has incurred excessive non-routine AMP spend of Rs 37.34,27,630 as compared to other comparable companies This exercise was conducted only to find out if any International Transaction in marketing intangible has happened due to extra AMP spend The very fact that assessee has excessively spend on AMP activity proves that substantial services were rendered to the AE for which it should have been compensated*
- *The taxpayer is not only creating marketing intangibles for the AEs but also maintaining and expanding the scope of the existing brand owned by AE*
- *In an independent party scenario, the entity developing the brand would seek the remuneration for the efforts and risks being undertaken for developing the brand. Since the taxpayer has not denied the fact that the brand has been developed in India with its own efforts, in a third party scenario the risks and rewards for the brand development should also lie with the taxpayer.*

2.2.11 To benchmark the transaction related to AMP spend and to determine the cost of AMP spend, the TPO adopted segregated approach. The TPO has, inter alia, observed as under

- *In this case, the assessee and comparables are undertaking different levels of AMP functions. The difference in the routine AMP spend of assessee and comparables would not have similar effect on their respective margins. In the absence of data related to value of brand, value of marketing intangible created and incidental benefits to assessee and AE, ALP of non-routine AMP spend cannot be accurately calculated if the transactions are aggregated. Therefore, TNMM cannot be applied considering the facts of the case and accordingly. AMP transaction is being benchmarked separately using segregation approach.*
- *It is important to clarify that TPO has used the comparables only for the purpose of determining non-routine AMP spend. This does not mean that comparables have been accepted at entity level using bundled approach. Therefore, non-routine AMP expense is treated as a separate international transaction for ALP determination.*

2.2.12 In view of the DRP directions in the assessee's case for AYs 2013-14 and 2014-15 and the above factual and legal position, the panel holds 'the AMP spend and lack of suitable compensation by the AE' as an International transaction based on the facts of the case and in agreement with the findings of the TPO, and therefore the TPO's action of treating the said excess AMP spend as international transaction and making adjustment thereto is upheld."

20. As this issue of AMP expenses goes to the root of other grounds on merits about benchmarking and correct comparables as should be applicable, we proceed to determine it first and we find that assessee had not reported any international transaction related to this disputed AMP expenses. No benchmarking has been carried out in this regard. After going thoroughly with the ld. TPO order as sustained by DRP, we find that not a word is discussed on the basis of any fact or evidences in the form of any agreement between the assessee or its AE, no document in the form of any invoice or work order of the AMP expenses, nothing from the financials of the assessee or AE, the business module or customer base targeted, segmental sales etc. forms basis of discussion as to what is the nature of products and services which assessee is manufacturing or trading, so as to question, if AMP expenses were to be compensated by the AE.

21. It is pertinent to mention that assessee is in manufacturing and trading of consumer or house hold product used in kitchen and is not some niche area of technology or products. The customer base is households which is localized and market potential is based on numerous individual, local and personal preferences. This necessitates to bring on record on the basis of some material that AMP expenses were integral part of assessee's business functions to create some marketing intangibles benefiting the brand of AE in the other markets or to other customers where the similar products are sold by the AE or any of its affiliates. However, no such exercise is done by TPO and the DRP merely relied the order of TPO, on first principles as to in which cases AMP as separate transaction should be examined for its ALP. We are of considered view that the AMP expenses cannot be alleged to be excessive or for creating any brand for AE or adding to its worth on the basis of theoretical principles without establishing on the basis of material and evidences that expenditure does not commensurate to the functions carried out and risk assumed by the assessee to its manufacturing or distribution business.

22. We are of considered view that AMP necessarily does not result in brand building. The Hon'ble High Court in the Sony Ericsson Mobile Communications India (P.) Ltd. case (supra), vide para 106 as reproduced earlier in para 12 has held that advertisement may not be the only tool for brand building. Hence, it cannot be held that AMP necessarily leads to brand building.

23. Thus in our considered view ld. Tax authorities should establish on facts that the gross margin remuneration is adjusted to AMP expenses to benefit the AE. The AMP expenditure is not unilateral and out of some discernible arrangement

which is reflected in concert action between the assessee and AE. A mere allegation is made of foreign AE being a beneficiary but nothing on that account is available in impugned orders in terms of any overt act of either of the assessee or its AE.

24. *Further we are of the considered view that since Bright Line Test method is used for protective adjustment and Residual Profit Split Method for substantive adjustments, so that shows that the ld. TPO has not found anything from the transactions between the assessee and AE or specific heads of expenditures incurred by the assessee, or specific transactions of AMP expenses of assessee with independent entities, which will establish as evidence of necessity of some compensation from the AE. It is only on the basis of examination of the quantum of AMP expenses the opinion of benefit to AE, has been drawn, which certainly is not sustainable, where the law is that onus is on Revenue to establish existence of an international transaction.*

25. *Then as far as the contention of department is concerned that since the assessee is buying the moulds from its AE the expenditure on AMP is benefiting the AE. We are of the considered view that indeed the assessee is making purchase of moulds but that is a input to manufacturing for which there is no dispute that price paid to the AE is at arms length. So that does not add anything to the brand of the AE. On that basis no inferences can be drawn about the benefits of to the brand of AE.*

25.1 *The identification of customers in India is at the discretion of the assessee. Thus, it is assessee's marketing and sales team which is executing the policy of the assessee company with regard to identification of customers, medium of advertisement and promotional activities, discounts and the same is independent and without any understanding or an arrangement with the AE. The fact of implementation of global direct selling marketing policy by the assessee in itself cannot be a basis to hold that the same benefits the foreign AE. International brands have their own marketing, selling and advertisement parameters to be followed throughout the world and as the owners of reputed brands the foreign AE have an inherent right to see that their affiliates in developing markets do not resort to any selling or marketing policy which is not according to the standards set. It has taken years of strategic costs for the foreign brand to create the brand so requiring Indian entity to follow the minimum of standards cannot be equated with a concert action to build the brand further. It is incorrect to say that the assessee is just a transit point of the products towards the end user and the assessee is not subject to the related risks of a brand owner producer. Therefore, the assessee should be compensated for the AMP expenses. In the case before us, the assessee is not merely a mediator or an intermediary, but, admittedly, has its own manufacturing activity. Therefore, even if the brand is owned by the foreign AE, the assessee carries a risk of its own in the local market. We find that the ld. tax authorities have repeatedly observed that mere absence of a formally agreement does not help the assessee whereas the 'conduct' has the transaction written all across.*

25.2 We are of the considered view that merely on the basis of high intensity of AMP activities no presumption can be drawn so as to impute existence of an international transaction by an artificial component of 'conduct' which is not otherwise supported by any evidence. Conduct as a basis of imputing an element of concert action so as to invoke the provisions of the Act, to allege there is a 'implied transaction', should be on the basis of some 'overt act' of both the AEs, which is not pointed out at all. The ld. DR's contention on the basis of judgement of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India (P) Ltd. (supra) that the TPO has authority to examine and determine the international transaction of AMP spend cannot be extended so as to draw a conclusion on the basis of the 'conduct' alone whereby the conduct is not reflected by any concerted action.

25.3 The rights, if any, with the US based AE to extend benefit of its marketing intangibles to third party manufacturers as per its own wishes also does not establish a case of the tax authorities without any enquiry being conducted in that regard. The benefit derived is by the assessee in terms of quantum of sales. There is nothing to show that even without these AMP expenses the assessee would have procured the same quantum of sales from same set of customers and market, so as to allege that some excessive AMP expenses were for benefit of the AE for which assessee should have been compensated.

26. Thus we find substance in the contention of ld. AR that in the absence of any 'understanding', 'arrangement' or 'action in concert', the AMP expense cannot be held as an international transaction as per Section 92B read with Section 92F(v) of the Act. Reliance in this regard is rightly placed by him on the decision of Hon'ble Delhi High Court in the case of Maruti Suzuki (supra), wherein the Hon'ble Delhi High Court held that even if the word 'transaction' is given its widest connotation, it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' as regards AMP spend for brand promotion. The relevant extract is provided below for ready reference.

"59. Nevertheless, there is no specific mention of AMP expenses as one of the items of expenditure which can be deemed to be an international transaction. For this purpose, Section 92B(i) read with Section 92(1) becomes significant. Under Section 92B(1) an 'international transaction' means-

(a) a transaction between two or more AEs, either or both of whom are non-resident

(b) the transaction is in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, incomes or losses of such enterprises, and

(c) shall include a mutual agreement or arrangement between two or more AEs for allocation or apportionment or contribution to the any cost or

expenses incurred or to be incurred in connection with the benefit, service or facility provided or to be provided to one or more of such enterprises.

.....

61. *The submission of the Revenue in this regard is: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for the same has been paid or remains payable or there is a mutual agreement to not charge any compensation for the service or benefit." Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to Section 92F (v) which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means' part and the 'includes' part of Section 92B (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC."*

27. *Thereafter, the Hon'ble High Court went on to hold that in the absence of there being an international transaction involving AMP spend with an ascertainable price, neither the substantive nor the machinery provisions of Chapter X of the Act are applicable to the transfer pricing exercise. Thus, the inevitable conclusion is that Chapter X as a whole does not permit such an adjustment. The relevant extract is reproduced below:-*

"76. As explained by the Supreme Court in CIT v. B.C Srinivasa Setty (1979) 128 ITR 294 (SC) and PNB Finance Ltd vs. CIT (2008) 307 ITR 75 (SC) in the absence of any machinery provision, bringing an imagined international transaction to tax is fraught with the danger of invalidation. In the present case, in the absence of there being an international transaction involving AMP spend with an ascertainable price, neither the substantive nor the machinery provision of Chapter X are applicable to the transfer pricing adjustment exercise."

28. *Further, the reliance placed by the Ld. TPO on the judgment of Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT ([2015] 55 taxmann.com 240 (Delhi) while benchmarking the AMP expenses as a separate international transaction seems erroneous. As in a subsequent judgment of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. (supra), the existence of an international transaction was discussed in light of judgement of Sony Ericsson (supra) wherein it was held as under:-*

"47. As regards the submission regarding the BLT having been rejected in the decision in Sony Ericsson is concerned, the Court notes that the decision in Sony Ericsson Mobile Communications India (P.) Ltd. (supra)

expressly negated the use of the BLT both as forming the base and determining if there is an international transaction and secondly for the purpose of determining the ALP. Once BLT is negated, there is no basis on which it can be said in the present case that there is an international transaction as a result of the AMP expenses incurred by MSIL. Although the Revenue seems to contend that the BLT was used only to arrive at the quantum of the TP adjustment, the order of the TPO in the present case proceeds on the basis that an international transaction can be inferred only because the AMP expenses incurred were significantly higher than what was being spent by comparable entities and it was also used for quantifying the amount of the TP adjustment. Consequently, the Court does not agree with the submission of the learned Special counsel for the Revenue that de hors the BLT, which has been rejected in the Sony Ericsson Mobile Communications India(P.) Ltd. (supra) judgment, the existence of an international transaction on account of the incurring of the AMP expenses can be established.

.....

51. The result of the above discussion is that in the considered view of the Court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL. Secondly, the Court is of the view that the decision in Sony Ericsson Mobile Communications India(P.) Ltd. case (supra) holding that there is an international transaction as a result of the AMP expenses cannot be held to have answered the issue as far as the present Assessee MSIL is concerned since finding in Sony Ericsson to the above effect is in the context of those Assesseees whose cases have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding AMP expenses.”

29. Further, the reliance of ld. AR on the decision of Hon’ble Delhi High Court’s in the case of Bausch & Lomb Eyecare (India) Pvt. Ltd. (ITA 643/2014) is also relevant wherein the Hon’ble High Court distinguished between a ‘function’ and a ‘transaction’ and held that AMP expenditure is not an international transaction. The relevant extracts are reproduced below for ready reference:-

“61. There is merit in the contention of the Appellant that a distinction is required to be drawn between a ‘function’ and a ‘transaction’ and that every expenditure forming part of the function cannot be construed as a ‘transaction’. Further, the Revenue’s attempt at re-characterising the AMP expenditure incurred as a transaction by itself when it has neither been identified as such by the Appellant or legislatively recognised in the Explanation to Section 92 B runs counter to legal position explained in CIT v. EKL Appliances Ltd. (supra) which required a TPO ‘to examine the ‘international transaction’ as he actually finds the same.”

64. In the absence of any machinery provision, bringing an imagined transaction to tax is not possible. The decisions in CIT v. B.C. Srinivasa

Setty (1981) 128 ITR 294 (SC) and PNB Finance Ltd. v. CIT (2008) 307 ITR 75 (SC) make this position explicit. Therefore, where the existence of an international transaction involving AMP expense with an ascertainable price is unable to be shown to exist, even if such price is nil, Chapter X provisions cannot be invoked to undertake a TP adjustment exercise.”

30. *It is also pertinent to add that subsequent to the decision in the case of Maruti Suzuki India Ltd. (supra) which is a manufacturer, the Hon'ble jurisdictional High Court has passed judgment specific to Distributor as well. Reliance in this regard is placed on the decision of Moet Hennessy India (P.) Ltd. (2023) 146 taxmann.com 551 (Delhi) wherein it was held as under:-*

“13. We are also unable to agree with submission of the learned counsel for the Revenue that in the judgment of Maruti Suzuki India Ltd. (supra) and Bausch & Lomb Eyecare (India) (P.) Ltd. (supra), the findings of this Court with respect to absence of international transaction emanated from the fact that the assessee therein were a manufacturer in addition to being a seller.

14. The issue with respect to deletion of transfer pricing adjustment on account of AMP expenses, determined on BLT method, by the ITAT is squarely covered by the decisions of this Court in the case of Maruti Suzuki (supra) and Bausch & Lomb Eyecare (India) (P.) Ltd. (supra). We are, therefore, not inclined to frame any substantial question of law on this issue. The facts and law have been correctly assessed by the ITAT and we therefore, do not find any merits in the appeal and the accordingly, the same are dismissed”

31. *Then we find that DRP has specifically mentioned that the issue of AMP adjustment is pending before the Hon'ble Supreme Court for final decision. DRP observed “According to Taxsutra/Taxmann, the Hon'ble Supreme Court has admitted the Department's SLP in several cases involving AMP, in respect of a distributor as also a manufacturer-distributor, where the Hon'ble Delhi High Court has decided the issue against the Revenue.” However, now, Hon'ble Supreme Court has dismissed the Revenue's SLP finding no international transaction involving AMP expenses in case of Whirlpool India. The issue there in also have in its background the claim of Revenue department that excess AMP expenses incurred by an Indian associated enterprise lead to creation of “marketing intangibles”, adds to the brand value and expands brand identity and image for the foreign associated enterprise so the same amounts to a transaction where a service is being performed by the Whirlpool India for its AE. Hence Revenue claimed that Indian AE should then be compensated for this on an arm's-length basis, given that such expenses come under the ambit of “international transactions” subject to transfer pricing. However, Whirlpool India argued that such costs are incurred wholly to build the business in India and part of its independent functions so shouldn't be subject to transfer pricing. The decision of the Hon'ble Supreme Court in Whirlpool India Case (SLP(C) 29270/2016 order dated 20/11/2024 has recognised the cardinal principles covering this issue that there should be concrete evidence to establish international transactions. The Hon'ble Delhi High Court in case of Whirlpool of India Ltd vs DCIT 381 ITR 154 has*

held that there should be some tangible evidence on record to demonstrate that there exists an international transaction in relation with incurring of AMP expenses for development of brand owned by the AE. In our considered opinion, in the absence of such demonstration, there is no question of undertaking any benchmarking of AMP expenses. The relevant findings of the Hon'ble High Court in the case of Whirlpool of India Ltd [supra] read as under:-

"32. Under Sections 92B to 92F, the pre-requisite for commencing the TP exercise is to show the existence of an international transaction. The next step is to determine the price of such transaction. The third step would be to determine the ALP by applying one of the five price discovery methods specified in Section 92C. The fourth step would be to compare the price of the transaction that is shown to exist with that of the ALP and make the TP adjustment by substituting the ALP for the contract price.

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34. The TP adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE.

35. It is for the above reason that the BLT has been rejected as a valid method for either determining the existence of international transaction or for the determination of ALP of such transaction. Although, under Section 92B read with Section 92F (v), an international transaction could include an arrangement, understanding or action in concert, this cannot be a matter of inference. There has to be some tangible evidence on record to show that two parties have "acted in concert".

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37. The provisions under Chapter X do envisage a 'separate entity concept'. In other words, there cannot be a presumption that in the present case since WOIL is a subsidiary of Whirlpool USA, all the activities of WOIL are in fact dictated by Whirlpool USA. Merely because Whirlpool USA has a financial interest, it cannot be presumed that AMP expense incurred by the WOIL are at the instance or on behalf of Whirlpool USA. There is merit in the contention of the Assessee that the initial onus is on the Revenue to demonstrate through some tangible material that the two parties acted in concert and further that there was an agreement to enter into an international transaction concerning AMP expenses.

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39. *It is in this context that it is submitted, and rightly, by the Assessee that there must be a machinery provision in the Act to bring an international transaction involving AMP expense under the tax radar. In the absence of any clear statutory provision giving guidance as to how the existence of an international transaction involving AMP expense, in the absence of an express agreement in that behalf, should be ascertained and further how the ALP of such a transaction should be ascertained, it cannot be left entirely to surmises and conjectures of the TPO.*

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47. *For the aforementioned reasons, the Court is of the view that as far as the present appeals are concerned, the Revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between WOIL and Whirlpool USA. In the absence of that first step, the question of determining the ALP of such a transaction does not arise. In any event, in the absence of a machinery provision it would be hazardous for any TPO to proceed to determine the ALP of such a transaction since BLT has been negated by this Court as a valid method of determining the existence of an international transaction and thereafter its ALP."*

32. *Thus we are of the considered view that on the basis of AMP expenditure quantum alone assessee cannot be said to have benefitted the AEs' brand. Brands are not product or services centric, but, more of customer centric. In exercise of brand building or enhancement, it is essential to establish as to how the AMP expenses generated awareness of the brand which was more useful to the foreign AE than to help the assessee in procuring its share of market. The AO was, thus, required to establish that the AMP expenses were not for tearing into the local market alone, but, were made at the instance of foreign AE for enhancement and creating a brand value beyond the local market. In the absence of any such facts coming out of a concerted action of the assessee with its foreign AE, or in absence of independent inquiry on the basis of nature of product, services or retail brands catered by the assessee the AO cannot draw any presumption on the basis of AMP expenses quantum or sales that the expenses must have resulted into any benefit to the AE. Therefore, we are inclined to accept the case of assessee that in the given facts and circumstances, the Id. Tax authorities were unable to demonstrate that AMP expenses incurred by the assessee were in any way beneficial to the brand of foreign AE requiring TP adjustment. Thus this issue is decided in favour of the assessee and as a consequence of same the grounds no. 5 and 6 are decided in favour of assessee."*

9. Respectfully following the same the ground Nos. 5 to 7 raised by the assessee are hereby allowed.

10. Ground Nos. 9 and 10 raised by the assessee are challenging the transfer pricing adjustment on account of payment of management service fee.

11. We have heard the rival submission and perused the material available on record. During the course of TP assessment proceedings the Ld. TPO held that the assessee could not submit any evidence that management support services had actually been received and also failed to demonstrate the need for such services. The ALP was held to be 'Nil'. Further, the Ld. DRP upheld the findings of the Ld TPO.

12. The Id DR upheld the findings of the Id TPO. The assessee submitted that the Id TPO issued show cause notice dated 18.01.2021 asking to produce benefit derived out of payment made for management services. The assessee submitted the detailed response vide letter dated 22.01.2021. The TPO proceeded to determine the ALP of payment of management service as Nil by apply Comparable Uncontrolled Price (CUP) method in contravention of provision of Rule 10B of the Rules and undertake AN adjustment amounting to Rs. 4,27,84,366/-. Both the parties before us fairly agreed that this issue is covered by the decision of this Tribunal in earlier years vide order dated 12.03.2025 in assessee's own case referred supra, wherein, it was held as under:-

“35. In regard to ground No.8 is arising out of addition on account of payment of management service, fee, we find that the issue has been considered in the case of the assessee in AY 2013-14 and 2014-15 and the issue stands set aside to the file of the ld. AO with directions to the assessee to furnish certain information, etc., in support of his claim that the services were actually rendered and the benefit were derived by the assessee. The ld. representatives of both the sides submitted that there is no change in facts and circumstances and, in fact, we find that when in the final order passed by the ld. AO, the DRP directions have been followed wherein only in reference to earlier year orders the DRP had re-asserted

any directions. Accordingly, the grounds No.8 and 9 before us are also restored to the file of the ld. AO to proceed in accordance with the law as per the directions issued by the coordinate Benches in AY 2013-14 and 2014-15. The ground is sustained for statistical purposes.”

13. Respectfully following the same the ground Nos. 9 and 10 raised by the assessee are allowed for statistical purposes in the light of the some direction as reproduced supra.

14. Ground No. 11 raised by the assessee is challenging the transfer pricing adjustment on account of interest of outstanding receivables for delayed realisation from the AE beyond the stipulated period in the sum of Rs. 4,50,010/- by treating it as separate international transaction falling under the category of capital financing. This action of the ld TPO was upheld by the ld DRP and adjustment was proposed in final assessment order. The ld AR submitted if assessee is given working capital adjustment and if the same is applied on the margins of the comparable companies, then, margins earned by the assessee is more than that comparable companies. The ld AR drew our attention at page 6 of the pb giving workings thereon. It was also submitted that the assessee had applied Transactional Net Margin Method (TNMM) as the most appropriate method (MAM) for benchmarking the international transaction qua the export of finished goods to its AEs which has been accepted by the ld TPO. The ld AR placed reliance on decision of the jhc in the case of Kusum Healthcare Pvt. Ltd in ITA 765/2016 wherein, it was held that if the impact of credit period was duly fractured in as a “working capital adjustment” while determining arms length price then no separate or further adjustment for interest of receivables was warranted in the hands of the tested parties. We have gone through the said decision and the workings given by the assessee furnishing the economic analysis of the working capital

adjusted margin of the comparable companies and find that the assessee's margin are much more, hence, no separate adjustment is warranted, in respect of interest of outstanding receivables. Hence, the ground No. 11 raised by the is allowed.

15. Ground No. 12 raised by the assessee is challenging the disallowances made on account of provision of warranty expenses.

16. We have heard the rival submission and perused the material available on record. The assessee had made provision for warranty expenses and claimed the same as deduction. The Id AO in the draft assessment order considered it as a unascertained liability and disallowed the same. The Id DRP observed that the said provision is contingent in nature and hence, not allowable as deduction. This observation was absorbed by the Id AO in the final assessment order and accordingly, provision for warranty was disallowed while computing book profit u/s 115JB of the Act. The assessee pleaded that the provision of warranty made on the basis of scientific, technology estimates available with it and accordingly, ascertained liability/ warranty liability of the same both under normal provisions of the Act as well as in the computation of book profit u/s 115JB of the Act. In fact the assessee gave the basis of making the provision for warranty.

17. Actual sales for the year under consideration multiplied by actual warranty expenses for 5 years (current plus last 4 years) / sales for last 5 years). The Id AR also submitted that this provision has been made year on year in the in the same fashion and the same was duly allowed as deduction by the revenue for the past and that only for the year under consideration the same was sought to be disturbed. The Id AR also placed on record the chart showing the warranty provision criteria and actual warranty expenses incurred for 3 AY as under:-

AY	Warranty provision created	Actual warranty expenses claimed to have incurred
2015-16	1,10,53,518	1,48,90,492
2016-17	1,38,89,007	1,61,76,668
2017-18	1,83,15,530	1,92,22,270

18. The Id DR vehemently argued that the provision has been made in contingent expenses and the same as unascertained liability and accordingly liable to be added back while computing book profit u/s 115JB of the Act.

19. We find that the provision for warranty is part of sale transaction and assessee had duly admitted to the warranty clause with the customers in view of the products manufactured by the assessee. Hence, the liability for warranty expenses practically accrues on the date of sale dates to the assessee. Only quantification is contingent. Hence, the quantification had to be made based on a scientific method depending on the basis of trends and actual warranty expenses incurred by the assessee in the past viz-a-viz the provision made thereon in the respective orders for the purpose of replacement on account of manufacturing defects that arose on the products sold to the customers. The assessee being in the consumer durables industry and having provided lifetime warranty for the product sold to its customers have been receiving the warranty claims during the whole of the year from its customers which had to be honoured by it. For this purpose provision has been made and in our considered opinion the said provision has been made on the scientific basis based on the past trend and actual expenses incurred thereon. Hence, by any stretch of imagination the method adopted by the assessee cannot be considered as unscientific and cannot be treated as unascertained liability. It is not the provision made for contingent expenditure, as is evident from the aforesaid table wherein, the actual expenses had always been

higher than the provision made on account of warranty. Hence, we hold that the said provision made for warranty is duly allowable as deduction both under normal provision also computation of books u/s 115JB of the Act. Accordingly, Ground No. 12 raised by the assessee is allowed.

20. Ground No. 13 raised by the assessee is challenging the initiation of penalty proceedings u/s 270A of the Act which would be premature for adjudication at this stage and hence dismissed.

21. Ground No. 8 and 10 raised by the assessee is challenging transfer pricing adjustment made on account of payment of royalty.

22. We have heard the rival submission and perused the material available on record. Tupperware India has entered into a license agreement with Tupperware USA effective w.e.f. 01.04.2016 where Tupperware USA provides the following rights and licenses.

Non-exclusive, non-assignable, non-divisible license to use the Tupperware registered trademarks and trademark applications to sell the licensed products in the territory of India.

Non-exclusive right to use all the manufacturing and technical information, and marketing information in connection with the marketing of the licensed products.

23. The operations of Tupperware India, in its initial years, were in a development stage and took a reasonably long time to attain maturity Till such time, Tupperware India was allowed use of the licensed trademarks for its manufacturing and trading/ marketing activities without any charge. Since the operations of Tupperware India have attained maturity and are further growing, Tupperware India has developed capabilities to earn the desired

level of returns from the business by using licensed IP (owned and developed by Tupperware Group) and pay the due share of those returns to Tupperware USA. While the registered trademarks include trademarks like "Tupperware", "Tuppercraft", 425 PB Tuppertoys", and other trademarks which include the derivative "Tupper". The trademarks developed by the Tupperware Group are considered to be of material importance of Tupperware India's business. In addition to the license to use the trademarks and tradenames, Tupperware India also receives marketing information from Tupperware USA. The Appellant would like to submit that Tupperware India has been using such trademarks. marketing information for the manufacture and sale of Tupperware products since its incorporation in India. The critical benefits received by Tupperware India from the License Agreement for which it paid royalty has been detailed out in objections filed before Ld.

24. The intangibles in question are the result of meticulous efforts and significant expenditure made by the Tupperware Group for a long time. The Tupperware Group has been continuously spending on the research and development, for new products Approximately 25% of sales each year of the Tupperware Group is from new products.

25. It is pertinent to note that Tupperware® products are popular in India due to its product quality, lifetime warranty (on most products), brand value, underlying IP, its massive salesforce and unique direct selling system, which are the key value drivers for the products success in the Indian market. The significance of the above value drivers manifests in the fact that the Tupperware products are sold at a premium as compared to the competitors, and allow Tupperware India to earn a healthy profitability on an ongoing basis.

26. The assessee adopted CUP method for benchmarking the payment of royalty using royalty State data base to find the comparable agreement. The assessee selected 7 agreement as comparable agreement and calculated average royalty rate of 5.86 at arm's length price of its international transaction the copy of the license agreement entered into with the assessee with the Tupperware USA w.e.f. 01.04.2016 is enclosed and page 641 to 648 of the pb. The assessee submitted that with respect to benchmarking of royalty transaction, the Company pays a royalty fee for the use of trademarks and marketing information and manufacturing and technical know how to Tupperware USA. The rate of royalty is 9% of net sale proceeds for manufacturing segment and technical know-how and 6% of import sales te distribution segment. Based on the detailed and extensive search conducted in the TP documentation, the aggregate mean royalty rate for the comparable agreements for the use of licensed trademark, marketing information and manufacturing technical knowhow for manufacturing segment was 10.58% and the aggregate mean royalty rate for the comparable agreements for the use of marketing information and licensed trademark was 9%.

27. The assessee also submitted that before the Id TPO over view of the trade marks as know how as under:-

The operations of Tupperware India, in its initial years, were in a development stage and took a reasonably long time to attain maturity Till such time, Tupperware India was allowed use of the licensed trademarks for its manufacturing and trading/ marketing activities without any charge. Since the operations of Tupperware India have attained maturity and are further growing, Tupperware India has developed capabilities to earn the desired level of returns from the business by using licensed IP (owned and developed by Tupperware Group) and pay the due share of those returns to Tupperware USA.

28. In order to ensure identical high quality Tupperware Products, Tupperware group also provided the manufacturing know how to Tupperware group entities as quality, design, commission, look and feel etc are of utmost impossible to the Tupperware group and the Tupperware brand.

29. In this regard, the Ld. TPO has conducted a fresh search for royalty and identified three agreements, however, the final set included only one agreement basis the observation that when only trademarks or tradenames are involved, only nominal payment of 2% is sufficient.

30. Further, the Ld. TPO has wrongly alleged that only trademarks are licensed to the Appellant, whereas as per the facts of the case not only trademarks, marketing information as well as manufacturing and technical know-how have been provided by the AE. Thus, the Ld. TPO has incorrectly benchmarked the royalty by alleging that only trademarks are provided by the AE and hence the approach of the Ld. TPO should be rejected.

31. The Appellant would like to submit that the Ld. TPO has resorted to cherry picking of comparable and has not provided the detailed search process used by his office in identifying the comparable selected in the TP order. Further, the Appellant humbly submits that the Ld. TPO has not provided the Accept-Reject Matrix ('AR Matrix') for Appellant's perusal for searching the comparable agreements selected thereby violating the principles of natural justice.

32. But we find from the orders of the Id TPO that the Id TPO does not say anything about the knowhow royalty @3%. Even Id DRP does not say anything about it. The technical knowhow royalty started only from AY 2017-18 and accordingly, this being the first year of adjudication qua the same.

But no finding has been given by the lower authorities in this regard. Hence, we deem it fit and appropriate to restore this issue for technical knowhow portion alone to the file of the Id TPO for de novo adjudication in accordance with law.

33. However we find that the royalty paid for brands and marketing, this Tribunal in assessee's own case in ITA No. 7580/Del/2017 for AY 2013-14 dated 01.08.2022 with regard to determination of 2% royalty ALP by the Id TPO, as observed as under:-

"13. In the backdrop of the above factual matrix, the Ld. AR submitted that the assessee has entered into a License Agreement with Tupperware USA (copy of License Agreement at pages 165-172 of Paper Book-Convenience Compilation) for the use of Tupperware registered trademarks, trademark applications and marketing information to sell the products in India: While the registered trademarks include trademarks like "Tupperware®", "Tuppercraft", "Tuppertoys" and other trademarks which include the derivative "Tupper", the 'marketing information received by the assessee from Tupperware USA pertains to brand guidelines, product portfolio, details on products/product lines (such as guides for usage, utility, positioning ideas) including training material for sales force, sales force management guidelines, consumer flyers, marketing ideas including sharing of global best practices and successful campaign ideas, social media for advertising etc. use of social media for advertising etc.

13.1 The Ld. AR also submitted that the approach adopted by the Ld. TPO does not constitute a valid CUP as the conditions stipulated by RBI/ FIPB for royalty payments are for ease of doing business and cannot be considered as a valid CUP for transfer pricing purposes. In support thereof, the Ld. AR relied upon the decision in the case of Sara Lee TTK Limited (TS- 663-ITAT-2016(Mum)-TP) wherein the Hon'ble Tribunal has held that the purpose of the RBI/FIPB approvals is entirely different and cannot be equated with the arm's length principles.

13.2 The Ld. AR further submitted that the Ld. TPO In his fresh search conducted in the remand report identified three comparables viz. (i) Amen Wardy, Sr., Amen Wardy, Jr., USA (ii) Mikasa inc., American Commercial Inc., Mikasa Lacensing Inc., ARC International, SA, USA [] Oneida Ltd.. USA However, he included only one comparable ie. Amen Wardy, 3r: Amen Wardy, Jr., USA in the final set of comparables observing that when only trademarks or trade names are involved

only nominal payment of 2% in sufficient, The Ld. AR referred to the relevant paras of the remand report which is reproduced below.

"This office, as a further step, searched for similar royalty agreements on a public database, "Royaltystat" Though no exact comparable agreements were found, however following agreements are considered suitable for determining the royalty rates which should have been paid by the assessee to its AE:

S no.	Licensor	Licensee	Agreement type	Description of agreement in royalty stats	Royalty rates (taking nt sales as base)
1	Amen Wardy, Sr. Amen Wardy, Jr	St. John Knits, Inc	Copyright, trade name, trademark	Exclusive license to use the "St. John Home by Amen Wardy" trademarks, trade names and designs to market and distribute a line of home furnishing products and gifts, including window coverings, wall coverings, paints, floor, coverings, furniture, linens, art objects, accent pieces, architectural treatments, china, dishware, flatware, stemware, cookware, bed and bath items, and home accessories	2.00%
2.	Mikasa Inc. American Commercial Inc, Mikasa Licensing Inc, ARC International SA	TMC Acquisition on Inc, lifetime Brands, Inc	Asset Purcahse; copyrights; know-how, patent; proprietary information technology; trade name; trademark; web content	Sale of all interest in a business which designs, develops, markets, distributes and sells branded and co-branded dinnerware, giftware, stemware, barware, flatware and other products designed for decorative or utilitarian purposes, including inventory, the "Mikasa" and "Oenology" trademarks and trade names, copyrights, patents, technology, know-how, formulations, web	5.00%

				content and domain names, goodwill, marketing materials, a showroom lease, contracts, actions, and raw materials	
3	Oneida Ltd	Robinson Home Products Inc.	Copyright; know-how, patent; trademark	Exclusive patent, know-how and copyright license to use the "Oneida" trademarks to design, engineer, market, promote, manufacture, distribute, use and sell flatware, dinnerware, kitchen gadgets, tools, barware and cutlery products, and other products cookware, including bakeware, glassware, hollowware, stemware, serve ware, and storage accessories, for sale to consumers in the retail trade channel, excluding the consumer direct channel and foodservice institutional channels	8.00%
				Average	5.00%

From the aforementioned agreements, it can be noticed that only 2.00% royalty is paid in case of Amen Wardy, Sr. Amen Wardy, Ir for the payment of trademarks, tradenames and copyrights. In case of Mikasa Inc., American Commercial Inc., Mikasa Licensing Inc., ARC International, SA, S.00% royalty is payable for Asset Purchase; Copyrights, Know-how, Patent; Proprietary Information, Technology, Trade Name, Trademark, Web content and in case of Oneida Ltd., 8.00% royalty is payable for Copyrights; Know-how; Patent; Trademark. These three agreements overage out to 5.00%. These findings clearly show that when only trademarks or tradenames are involved, only nominal payment of 2.00% is sufficient. With the increase in the royalty rates, various other benefits in the name of Asset Purchase, Copyrights, Know-how; Patent; Proprietary Information, Technology etc. are provided. Thus, from these findings, it can be concluded that the royalty paid by the assessee to AE @ 5.56% does not justify the agreement type of just trademarks. Hence, TPO was justified by allowing royalty @2.00%."

13.3 The Ld AR brought to our notice detailed evidence submitted during transfer pricing assessment proceedings demonstrating receipt of marketing information/know-how for selling Tupperware products in India and submitted that this clearly shows that the royalty paid by the assessee is not only for the use of trade name / trademark but also for use of marketing information / know-how provided by Tupperware USA.

13.4 As regards the objection of the Hon'ble DRP with respect to the comparables operating in different geographical region than that of the assessee, the Ld AR submitted that in the fresh search conducted by the Ld TPO, he himself accepted royalty agreements operating in foreign jurisdictions and hence 'geographical region' filter applied by him is inappropriate. The comparables selected by the Ld. TPO have also been upheld by the Hon'ble DRP Thus, in view of approach adopted by the Ld TPO, the comparables selected by the assessee in its transfer pricing report should be accepted.

13.5 With respect to the 'product similarity' filter applied by the Ld. TPO/Hon'ble DRP, the Ld. AR submitted that royalty is paid for the use of intangibles and that it is a factor of profit generating potential of the intangibles In transactions relating to payment of royalty, similarity ought to be considered in respect of the use of intangibles, rather than the comparability of products for which license has been granted and hence the comparable selected by the assessee in the transfer pricing documentation should be accepted in the final set of comparable agreements.

14. The Ld. DR relied on the order of the Ld. TPO / Hon'ble DRP. He pointed out certain technical defects in the license agreement such as the effective date being 01.04.2012 and the signing date being 13.11.2012. He submitted that the comparables selected by the assessee are inappropriate as there is no product similarity and that the assessee has not produced any evidence to show that even marketing know-how was provided to the assessee by Tupperware USA

15. In rebuttal to the DR's contentions above, the Ld. AR submitted that the license agreement clearly shows that the marketing information which is the synonymous of marketing know-how has been provided to the assessee and that copies of all the relevant documentary evidence including the license agreement were provided to the Ld. TPO.

16. We have heard the rival submissions of the Ld Representative of the parties and perused the material available on records The Ld. TPO as well as the Hon'ble DRP has upheld CUP as the most appropriate method for benchmarking transactions with respect to payment of royalty Since the application of CUP is not disputed either by Ld. AR or DR, we hold CUP to be the most appropriate method for benchmarking the payment of royalty. The issue thus remaining for our consideration is with respect to inclusion / exclusion of comparables

16.1 We note that in the transfer pricing study report, the payment of royalty has been benchmarked by the assessee using CUP method. The benchmarking was done on the basis of the search conducted using the RoyaltyStats online database which resulted into selection of 10 comparable agreements in the final set of

comparables. However, the benchmarking analysis of the assessee was rejected by the Hon'ble DRP who proceeded to uphold the ALP. determined by the Ld. TPO at 2% of sales. The Ld. TPO in para 26 of his order dated 31.10.2016 recorded his finding as under: -

26. The assessee submitted its reply vide various submissions dated as per order sheet The same has been studied carefully and issues were discussed with the AR, After considering all the facts of the case and adequate opportunity of being heard duly provided to the Assessee including oral hearing, it was apparent that the license agreement signed by the assessee was only to transfer profit to its foreign AEs. As already discussed in earlier paragraphs that the assessee has failed to provide the comparable Royalty payment data of the Group Entities. The assessee has also not provided the CUP analysis of comparable companies in India having similar FAR as that of the assessee, which can establish that the transaction is at Arm's Length. Such comparables MANUFACTURING PLASTIC KITCHENWARE PRODUCTS need to have similar royalty transactions originating in India providing the royalty to the AEs or Non-AEs in USA where the AE of the assessee is situated. As per the conditions of allowable Royalty Payment laid down by the Reserve Bank of india and the Foreign Investment Promotion Board, in cases where the BRAND is used is around 1% to 2%, As already discussed in earlier paragraphs, the assessee has not received any technical knowhow from its AEs, rather it has used the Brand of its AE the "Tupperware" However, considering the various contentions and functions of the Assessee, and in absence of any reliable comparable analysis or the data submitted by the assessee, the undersigned is having view that royalty of 2% of the sales is justifiable in the case of the Assessee, being Arm's Length of Royalty payment, Therefore, the undersigned proposes to make an adjustment against excess royalty being paid by the Assessee Company to its foreign based AEs with the purpose of tax evasion u/s 92CA.

Computation of Arm's Length Price:

<i>Particulars</i>	<i>Amount (In INR)</i>
<i>Sales of the Assessee Company (A)</i>	<i>483,79,01,881</i>
<i>Royalty Allowable (B=A*2%)</i>	<i>9,67,58,038</i>
<i>Total Royalty paid to AE (C)</i>	<i>25,33,48,790</i>
<i>Adjustment u/s 92CA (D-C-B)</i>	<i>5,65,90,752</i>

16.2 We find force in the contention of the assessee that royalty agreements operating in different geographical regions can be applied as a filter as the Ld. TPO himself has accepted royalty agreements operating in foreign jurisdictions. While the primary objection of the Hon'ble DRP in respect of comparability analysis is that the comparable selected by the assessee are from a different geographical region (i.e. USA), we observe that the three comparables considered by the Ld. TPO in the remand report are from the same geographical location (ie. USA) and hence

in our view the objection relating to difference in geographical region does not hold good

16.3 So far as the objection of the Hon'ble DRP on the product dissimilarity is concerned, it is observed from the perusal of the description of the agreements as provided in the Royaltstat database, all the three comparables selected by the Ld TPO and the comparables selected by the assessee belong to same industry i.e. "kitchenware and home furnishing items" and hence these are valid comparables.

16.4 The License agreement which is already on record adequately proves that the payment of royalty made by the assessee is for the use of trademark as well as marketing information provided by Tupperware USA and the same is evident from the relevant clauses of the License Agreement reproduced below:-

"WHEREAS, LICENSOR and LICENSEE recognize that LICENSOR has rights that relate to marketing information and know-how that may expand the LICENSEE'S product line; and

WHEREAS, LICENSEE desires to utilize the marketing information and know-how of LICENSOR; and j

3. Rights Granted

(b) The nonexclusive right to use, in connection with the marketing of Licensed Products, all the Marketing Information provided to LICENSEE under Article 6 hereof

6. Marketing Information and Assistance

LICENSOR will furnish from time to time to LICENSEE, insofar as it is within the possession and control of LICENSOR, and insofar as LICENSOR has developed said information into formal programs or reports, commercial and marketing know-how and information and assistance (collectively, the "Marketing Information"), including without limitation marketing manuals and sales and marketing information which are necessary or desirable for the most advantageous marketing of Licensed Products. In the event that LICENSOR shall provide LICENSEE with Marketing Information specially developed for use in the Licensed Territory which required extraordinary or particularly time-consuming efforts by LICENSOR, LICENSEE Shall compensate LICENSOR for all of LICENSOR'S actual costs associated therewith, plus an additional amount calculated to cover reasonable allocable overhead expense. For the purpose of this- Agreement, time of the LICENSOR or of its designee which exceeds twenty man days per fiscal year will be considered to be extraordinary.

9. Payments

(a) In consideration of the license and rights granted hereunder, LICENSEE agrees to pay a royalty of five percent (5%) of the net sales proceeds of the Licensed Products manufactured and sold by LICENSEE in India, in connection with which LICENSEE utilizes any of the Licensed Trademarks

or the Marketing Information, or any part of anyone or more thereof. In this connection, the net sales proceeds shall be the gross sales proceeds of the Licensed Products marketed and sold under this Agreement minus the following. (1) sales discounts including any sales rebates; (2) sales returns; and (3) indirect taxes (value added tax, etc.) on sales of goods."

16.5 Coming to the issue whether the set of comparables selected by the assessee are appropriate for benchmarking the payment of royalty or not, we note that the assessee selected ten comparables in the transfer pricing study (refer para 12.2 above), however, all of them were rejected by the Ld. TPO/Hon'ble DRP. Before us, the assessee is contending inclusion of five comparables out of ten comparables selected in the transfer pricing study and inclusion of all three comparables analysed by the Ld. TPO in the remand report proceedings (refer para 13.2 above). Therefore, the assessee's submission before the Tribunal is to consider eight comparables, three of the Ld. TPO and five from the TP study which will result into the payment of royalty at ALP. The assessee submitted a chart of eight comparables which showing the arithmetic mean for royalty rate at 6% viz a viz. 5.56% paid by the assessee to Tupperware USA which is reproduced below.-

S no	Licensor	Royalty rates	Industry	Product	Geography
1.	Amen Wardy, Sr. Amen Wardy, Jr	2.00%	Kitchenware & home furnishing items	Kitchenware (dishware, flatware, steamware, cookware)	USA
2.	American Commercial Inc.; Mikasa Licensing Inc.; ARC International, SA	5.00%	Kitchenware & home furnishing items	Kitchenware (dinnerware, giftware, stemware)	USA
3.	Oneida Ltd.	8.00%	Kitchenware & home furnishing items	Kitchenware (cookware, bakeware, glassware, hollowware, stemware, serve ware, and storage accessories)	USA
4.	Smith & Wesson Corp	7.00%	Kitchenware & home furnishing items	Kitchenware (cutlery and cutlery gift sets)	USA
5.	Harrow Enterprises inc.	5.00%	Kitchenware & home furnishing items	Kitchenware (glassware, dinnerware and tableware)	USA
6	Colonial Downs, L.P and Stansley	7.00%	Kitchenware & home furnishing items	Kitchenware (plastic bottles, coolers, drink holders)	USA

	<i>Racing Corp.</i>				
7	<i>FAR-B Acquisition Corp.</i>	<i>S.00%</i>	<i>Kitchenware & home furnishing items</i>	<i>Kitchenware (cookware, bakeware)</i>	<i>USA</i>
8	<i>Genius Products, Inc.</i>	<i>9.00%</i>	<i>Kitchenware & home furnishing items</i>	<i>Kitchenware (juice cap bags, bottle bags)</i>	<i>USA</i>
	<i>Arithmetic mean</i>	<i>6.00%</i>			

17. Perusal of the above chart shows that five comparables selected by the assessee are from same geography ie USA and the same industry te. "Kitchenware and home furnishing items" as the comparables considered by the Ld. TPO. The Ld. TPO rejected two of his own comparables Le Mikasa Inc. and Oneida Ltd. by holding that these two comparables are providing know-how whereas the assessee is not obtaining know-how which in our considered view is incorrect as evident from the license agreement as well as other documentary evidence submitted by the assessee. The assessee has paid royalty for use of trademark and marketing information/marketing know-how. All the eight comparables listed in the chart in para 16.5 above are from the same geography and same industry and hence are valid comparables to that of the assessee. Accordingly, the Ld. AO/TPO is directed to include the aforesaid eight comparables in the final set of comparable agreements for the purpose of benchmarking the payment of royalty by the assessee. Ground No. 6 and 9 are thus allowed

34. We find that the above decision of this Tribunal for AY 2013-14 has been approved by the dhc in ITA 304/2023 dated 14.03.2024. Respectfully following the same we hold that no transfer pricing adjustment need to be made in respect of royalty paid on brand marketing fees. Accordingly, ground No. 8 raised by the assessee is disposed of in the above mentioned manner by allowing it for statistical purposes.

35. In the result, the appeal of the assessee for AY 2017-18 in ITA No. 462/Del/2022 partly allowed for statistical purposes.

2409/Del/2022 for AY 2018-19

36. The ground No. 1 to 9 raised by the assessee for AY 2018-19 are identical to ground Nos. 1 to 4 raised for AY 2017-18. Hence, the decision rendered by us for AY 2017-18 shall apply mutatis mutandis for ground No. 1 to 9 for AY 2018-19 also in view of the identical facts except with variance in figures.

37. Ground No. 10 raised by the assessee is general in nature and does not require any specific adjudication.

38. Ground No. 12 raised by the assessee is identical to ground No. 12 raised by the assessee for AY 2017-18. Hence, the decision rendered by us for AY 2017-18 shall apply mutatis mutandis also in view of the identical facts except with variance in figures.

39. Ground No. 11 raised by the assessee is challenging the addition in the sum of Rs. 99,22,922/- on account of duty drawback.

40. We have heard the rival submission and perused the material available on record. The assessee was sanctioned duty drawback of Rs. 1,30,41,802/- according to data available with the Id AO, whereas the assessee submitted that it received duty drawback of Rs. 31,18,880/- only. Accordingly, Id AO added back the differential sum of Rs. 99,22,922/- to the income of the assessee ascertained with the reaming sum had indeed accrued to the assessee and that assessee had violated the accounting principles of recording only the actual amount of receipt of duty draw back in its books. It is not in dispute that the assessee furnished the complete details of duty draw back received by it together with all the supporting documents and working thereon which are enclosed in pages 1466 to 1762 of the pb. The Id AO pursuant to direction of the Id DRP provided 360 degree data referred in the draft order which captures the details of duty draw back available with

the Id AO for Rs. 1,30,41,802/-, to the assessee. The assessee submitted that the export data provided by the Id AO was not restricting to the year under consideration but it contains figures for FY 2014-15, 2015-16 data also which resulted in restriction high duty draw back figure. The assessee also pointed out the duplication of entries in the said data provided by the Id AO. The Id AR before us furnished the reconciliation between the actual data and the data provided by the Id AO by referring to page 1766 to 1769 of the pb. The assessee also submitted the invoice wise break up of actual export sales along with audit workings for this prepared by its auditor for follow all duty draw back which are enclosed in pages 1773 to 1777 of the pb.

41. We find that duty drawback is a figure receipt from the Govt department. The figure of Rs. 1,30,41,802 was adopted by the Id AO based on sum work sheets with him in the 360 degree data base of information received by him. The assessee had tried to reconcile the said data by pointing out various deficiencies with the actual figures. The figures of export sales has been accepted by the Id AO are considered by the assessee in its books of account has been accepted by the Id AO and duty draw back figure is a particular percentage of export sales. Hence, in this circumstances we deem it fit and in the interest of justice and fairly to restore this issue to the file of the Id AO for de novo adjudication in accordance with law. The assessee is at liberty to furnish fresh evidences in support of its contentions. Accordingly, ground No. 11 raised by the assessee is allowed for statistical purposes.

42. Ground No. 13 raised by the assessee is challenging the initiation of penalty proceedings u/s 270A of the Act which would be premature for adjudication at this stage. Hence, dismissed.

43. Ground No. 14 raised by the assessee is seeking proper credit for dividend distribution tax should consequentially challenging the incorrect levy

of interest u/s 115P of the Act. This is a factual matter required verification of the Id AO. Hence, we restore this issue to the file of the Id AO for de novo adjudication in accordance with law. Accordingly ground No. 14 raised by the assessee is allowed for statistical purposes.

44. With regard to ground No. 15, we hold that chargeability of interest u/s 234B is consequential in nature. With regard to interest u/s 234C of the Act, the law is well settled that the same shall be charged only on the returned income and not on the assessed income.

45. In the result, the appeal of the assessee for AY 2018-19 is partly allowed for statistical purposes.

46. To sum up both the appeals of the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on 17/04/2025.

-Sd/-
(MAHAVIR SINGH)
VICE PRESIDENT

-Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 17/04/2025
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi