IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI MANISH AGARWAL, ACCOUNTANT MEMBER

ITA No. 5938, 6088 /Del/2018
Assessment Year: 2010-11 & 2011-12

Unicharm India Private Limited Unit No. 501 to 508 & 510 to 518, 5th Floor, Centrum Plaza Building, Golf Course Road, Sector- 53, Gurgaon, Haryana- 122 002	Vs	Deputy Commissioner of Income Tax, Circle- 18(1) New Delhi- 110 055
(APPELLANT)		(RESPONDENT)
PAN No. AABCU0113A		

ITA Nos. 6104, 6203/Del/2018
Assessment Year: 2010-11 & 2011-12

Deputy Commissioner of Income Tax, Circle- 27(1), I.P.Estate, New Delhi- 02	Vs	M/s Unicharm India Private Limited Unit No. 501 to 508 & 510 to 518, 5th Floor, Centrum Plaza Building, Golf Course Road, Sector- 53, Gurgaon, Haryana- 122 002
(APPELLANT)		(RESPONDENT)
		PAN No. AABCU0113A

ITA No. 7414/Del/2019
Assessment Year: 2012-13

M/s Unicharm India Private Limited Unit No. 501 to 508 & 510 to 518, 5th Floor, Centrum Plaza Building, Golf Course Road, Sector- 53, Gurgaon, Haryana- 122 002	Vs	Deputy Commissioner of Income Tax, Circle- 27(1), I.P.Estate, New Delhi- 02
(APPELLANT)		(RESPONDENT)
PAN No. AABCU0113A		

Assessee by: Sh. Gaurav Garg, CA
Ms. Preksha Gupta, AR

Revenue by : Sh. Mahesh Kumar, CIT DR

Date of Hearing: 04.06.2026		Date of Pronouncement: 30.07.2026

ORDER

PER SATBEER SINGH GODARA, JM:

These assessee's three appeals ITA No. 5938, 6088/Del/2018 & 7414/Del/2019 along with the Revenue's twin cross appeals ITA Nos. 6014 & 6203/Del/2018, in former as many assessment years, arise against the Deputy Commissioner of Income Tax (for short, "the CIT(A)"), New Delhi's orders all dated 29.06.2018, passed in Orders No.203/2015-16 (A.Y. 2010-11), 64/2016-17(A.Y. 2011-12), 20/2019-20 (A.Y. 2012-13), 203/2015-16(A.Y: 2010-11) & 64/2016-17(A.Y. 2011-12) involving proceedings u/s 143(3) r.w.s. 144C(3) of the Income Tax Act, 1961; hereinafter referred to as, "the Act".

Heard both the parties at length. Case files perused.

2. Assessee's "lead" appeal ITA No. 5938/Del/2018 (for A.Y. 2010-11) raises the following grounds of appeal:

> *"1. Ld Commissioner of Income Tax (A)/ Transfer Pricing Officer (Ld. CIT (A)'/ 'Ld. TPO') has erred in making an addition to the total income of the appellant on account of adjustment in the Arm's Length Price (ALP) of the international transactions.*

Grounds with respect to Advertisement Marketing Promotion expenses (AMP expenses) adjustment carried on by the Ld. CIT(A)

2. In law and facts and circumstances of the case, Ld. CIT(A) erred in considering AMP expenses as a non-routine function and providing adjustment for the same without appreciating the fact that Assessment Year under review was the first full year of operations and the beneifts from AMP expenditure would accrue only to the Appellant.

3.Without prejudice to the above and in the law and facts and circumstances of the case, Ld. CIT(A) erred in considering direct selling expenses as a part of Advertisement Marketing Promotion expenses.

4. Without prejudice to the above and in law and facts and circumstances of the case, alternate approach followed by Ld. CIT(A) is vague and arbitrary as it is based on the premise that marketing function will always yield favorable return in the year of incurring expenses which is not prudent in commercial circumstances.

Grounds with respect to benchmarking of international transaction of purchase of goods and business performance guarantee

5. Without Prejudice to the above and in law and facts and circumstances of the case, with regard to the international transaction of purchase of goods, Ld. CIT (A) erred in rejecting computation of arm's length price as documented in the transfer pricing study without passing any speaking order.

6. Without Prejudice to the above and in law and facts and circumstances of the case, Ld. CIT(A) erred in not giving an opportunity or any show cause notice to the Appellant while reworking ALP of international transaction of purchase of finished goods, particularly when the same results into enhancement of total income by the Ld. CIT(A).

7. Without prejudice to the above and in law and facts and circumstances of the case, even if Appellant is considered as the tested party, Ld. CIT(A) erred in not applying Resale Price Method as the most appropriate method when the Appellant is only engaged in trading of its products in India.

8. In law and facts and circumstances of the case, Ld. CIT(A) erred in determining the arm's length price of international transaction of business performance guarantee applying overall TNMM after providing AMP intensity adjustment without substantiating any reasons for rejecting the methodology applied by the Appellant which had also been accepted by Ld. TPO in the assessment proceedings.

9. Without prejudice to the above and in law and facts and circumstances of the case, Ld. CIT(A) erred in considering Gufic Biosciences Ltd as a comparable to the Appellant when the company is having trading sales/ total sales of less than 75%, a criteria which had also been applied by the Ld. TPO in Assessment proceedings for the AY 2012-13.

10. Without prejudice to the above and in law and facts and circumstances of the case, Ld. CIT(A) erred in rejecting certain comparables performing marketing support function considered by the Appellant.

11. Without prejudice to the above and in law and facts and circumstances of the case, Ld. CIT(A) erred in considering certain functionally different companies not engaged in performance of marketing support function as comparables for providing AMP intensity adjustment.

12. In law and on facts and circumstances of the case, the appellant may be allowed to add, supplement, revise, amend or withdraw any of the grounds raised herein above at or before the time of hearing. "

3. Learned CIT(DR) next invites our attention to the Revenue's "lead" cross appeal ITA No. 6104/Del/2018, canvassing the following grounds of appeal:

*"1. **Ground NO.1**: "On the facts and circumstances of the case and in law the Ld. CIT (A) has erred in directing the TPO/AO to compute the arm's length price of trading segment by using the alternative approach using TNNM as the most appropriate method and OP/Sales as the PLI"*

*2. **Ground NO.2**: "On the facts and circumstances of the case and in law the Ld. CIT(A) is not justified in dismissing the action of the TPO/AO in treating the complete amount of AMP as price of International transaction for Brand creation/building.*

*3. **Ground No.3**: "On the facts and circumstances of the case and in law the Ld. CIT(A) is not justified in dismissing the use of Bright line test for Transfer Pricing adjustment.*

*4. **Ground No. 4**: " On the facts and circumstances of the case and in law the Ld. CIT(A) is not justified in excluding the Cyber Media Research Ltd. from the final set of comparables and to consider a different set of comparables for marketing support function.*

*5. **Ground No. 5**: "On the facts and circumstances of the case and in law the Ld. CIT(A) is not justified in directing the AO to compute functional intensity adjustment on account of AMP expenses by using the comparables and filters used in the transfer pricing report for AY 2012-13*

6. "The appellant craves, leave or reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."

4. We have given our thoughtful consideration to the assessee's and the Revenue's respective submissions. There is hardly any dispute between the parties that the assessee namely, M/s Unicham India Private Limited came to be set up on 10.07.2008 as a wholly owned subsidiary of its holding

entity i.e., M/s Unicham Corporation, Japan, to carry out various personal hygiene products business. Coming to the impugned assessment year 2010-11, it had entered into and carried out various international transactions with its overseas associates enterprises 'AEs' regarding purchase of finished goods, raw and packaged materials etc. The assessee filed its return on 04.10.2010 stating loss(es) of Rs. 20,67,99,303/-. The Assessing Officer thereafter made section 92C reference to the Transfer Pricing Officer 'TPO' to determine the arms' length price 'ALP' to its aforesaid international transactions involving varying sums. The TPO thereafter passed his order on 30.01.2014 holding the assessee to have incurred its expenditure on its AEs' brand promotion in India under advertisement, marketing, and promotion "AMP" whose "alp" stood computed as Rs. 17,57,91,340/- in issue. He thus recommended the same as an adjustment to be made in the assessee's hands which followed the Assessing Officer's assessment order passed on 27.05.2014 in very terms.

5. The assessee then preferred its lower appellate wherein the learned CIT(A) has reversed the TPO's action adopting bright line test "BLT" and further directed him to compute the assessee's "ALP" afresh going by "functional intensity" 'FIM', reading as under:

7. The appellant is engaged in trading of diapers and sanitary products in India during the year under consideration.The business of the appellant had a can be divided into two different segments i.e. a distribution segment where it acts as a trader as well as a manufacturing segment where it is a manufacturer.As per the documents available on record, the manufacturing activity started only in the subsequent year i.e. AY 2011-12. Hence the only segment for consideration during the year under reference is the distribution segment.

Licensing Agreement:

7.1 The appellant has entered into an agreement with it's AE dated 01.04.2009 for the use of the brands in India.The said agreement was initially for a period of three years which has been extended from time to time. The brands used by the appellant are owned by the AE.The licensing agreement permits the appellant to use the trademark legally owned by Unicharm Corporation, Japan. It is an exclusive license agreement to manufacture, sell and / use the license products using technical information and/or marketing information provided by Unicharm, Japan.

Marketing Strategy of the Appellant:

7.2 The appellant submitted that it carried out an aggressive marketing strategy during the year under reference in order to establish itself in the Indian market. The appellant stated that it was selling baby diapers under the name and style of "MamyPoko Pants" which were a specific style introduced in India for the first time. It has been stated that when it entered the market in India, the market for baby diapers was controlled by two large players, namely Kimberley Clarke (Huggies) and Procter & Gamble (Pampers) which were set to hold 90% of the market share. The appellant stated that it needed to spend aggressively on advertisement and marketing as it was the first year of business and the appellant wanted to penetrate the market which had a large potential. The appellant also stated that AMP spend in the year under reference would create a base for increase market share in the future years. It was pointed out that while the ratio of AMP/sales had decreased considerably between AY 2009-10 to AY 2013-14 the year on year sales as well as the market shares had increased considerably.

TP Documentation of the Appellant:

7.3 As stated above, the only segment for consideration during the year under reference is the distribution segment. The appellant, in its transfer pricing documentation, applied the TNMM method for purchase of packing material / repacking material / finished goods and took the AE as the tested party. It selected certain comparables, applied OP/OR as the PLI and claimed that the above mentioned international transactions were at arm's length.

Order of the TPO:

7.4 During the course of appellate proceedings, the TPO noticed that the AMP expenditure of the appellant accounted for 136.97% of the income compared to AMP expenditure to sales ratio of 5.05% in the case of comparables selected by the TPO. The TPO issued a show cause notice to the appellant and after taking the various contentions of the appellant into account, proceeded to benchmark the international transactions on the basis of 'bright line'. The mean expenditure incurred on AMP / sales of the comparable companies was taken as the 'bright line' and the expenditure in excess of the 'bright line' was held by the TPO to have been incurred for development of marketing intangibles which were owned by the AE and, in the opinion of the TPO, needed to be suitably compensated by the AO. The TPO took a mark-up 12.36% based on SBI PLR and made a transfer pricing adjustment of Rs. 17,57,91,342 holding it to be the amount by which the appellant should have been reimbursed by the AE. The TPO held that the appellant was performing additional function of advertising the products / intangibles owned by the AE.

The AE was the legal owner of the brands and the appellant was held to be promoting the said brand in India "*as per the decision of your AE in relation to how the said brand has to be used*".

Appellant's Objections to Transfer Pricing Adjustment made by the TPO in AY 2010-11 using the Bright Line Method:

7.5 The appellant has raised a number ofgrounds ie A-Z for appealin it's original appeal. Subsequently, additional grounds were filed vide letter dated 28.09.2016. The various grounds are overlapping and have been addressed to, subsequently, in this order.As these grounds of appeal are common in nature as they pertain to the contention of the appellant that the application of bright line for calculation of AMP expenses, was incorrect, the said grounds of appeal are being considered together.

Main Contentions in the Various Grounds of Appeal:

7.6 The main contention of the appellant is that the year under consideration was a first year of operation and the appellant needed to establish its brand value and to penetrate the market. It was stated that the intention of the appellant was to become a full risk bearing entrepreneurial entity. The appellant pointed out that it dealt directly with independent advertising agencies in India and hence, there was no international transaction entered into by the appellant. It was pointed out that the TPO had failed to establish any arrangement or written agreement between the parties to establish that there was such transaction and that the amendments in the Finance Act, 2012 did not come to the rescue of the TPO. The appellant further pointed out that it had entered into an exclusive license agreement with Unicharm, Japan to manufacture, sell and /use licensed products using technical information/ marketing information provided by Unicharm, Japan. It was further pointed out that the benefit of the AMP function had accrued only to the appellant and hence, the implemental value to the brands/ trademark owned by the AE would economically approve to the appellant itself. The appellant pointed out that there was tangible benefit in terms of increased revenue and market share over the period 2009-10 to 2013-14 and the benefit to the AE was only incidental. The appellant observed that commercial expediency of a tax payer cannot be questioned in view of the judgment of the Hon'ble Supreme Court in the case of SA Builder Ltd. v/s CIT (supra) and the judgment of the Hon'ble Delhi High Court in the case of CIT v/s EKL Appliances (supra). It was further pointed out that the order of the TPO was not in consonance with the judgment of the Hon'ble Special Bench of ITAT, Delhi in the case of LG Electronics. The appellant also filed its objection against the choice of comparables; inclusion of rebates and discounts, incentives, sales promotion expenses and sales commission expenses as part of AMP expense and use of mark-up on excessive AMP expenses.

Appellant's Urges Adoption of Alternative Approach Followed by the TPO in AY 2012-13:

7.7 During the course of appellate proceedings, the appellant submitted that, without prejudice to it's contentions regarding the applicability of the 'Bright Line' Approach in it's case, the alternative approach used by the TPO during AY 2012-13should be applied in the year under reference.The AO/TPO had applied an alternative approach which was as follows:-

"*4. During the course of proceedings for earlier years, this office has taken a stand that bright line test should be applied and non routine expenditure incurred by the assessee in excess of the expenditure incurred by the comparable should be considered as the expenditure incurred by the assessee for the benefit of the parent AE and corresponding adjustment should be made. The Hon'ble High Court in your case has rejected the contention of revenue on the applicability of bright line test and corresponding calculations. The Department has filed an appeal against the order of the Hon'ble High Court. Accordingly, the primary contention of this office remains the same as in earlier years. The comparables identified for this approach are same as the comparable considered in the case of alternative approach discussed below. In view of the Hon'ble Supreme Court order refusing the stay, the alternative approach in line with the directions/judgment of the Hon'ble High Court your case is discussed below.*"

7.8 The appellant urged that the alternative approach used by the ATO/TPO in AY 2012-13 should be used on the principle of consistency. It was also pointed out that the Hon'ble ITAT, Pune in the case of Brintons Carpets Asia Pvt. Ltd. ITA No 1296/PN/10 had held that selection of comparables using TNMM in different assessment years should be done by adopting a consistent stand when there is no significant or material change in the circumstances prevailing in those years. The Hon'ble Bench had relied upon the decision of Mumbai ITAT in the case of ACIT v/s NGC Network India Pvt. Ltd. ITA No 5307/M/2008whilecoming to the above conclusion.

TPO's Approach in AY 2012-13:

7.9 The TPO held as follows in his order for AY 2012-13:-

TPO's Approach in AY 2012-13:Trading Segment:

(i) The TPO, in his order for AY 2012-13, did not accept the transfer pricing methodology adopted by the appellant in its documentation. He benchmarked the transactions in two different segments namely trading & manufacturing segments. "Purchase of finished goods" were taken to constitute the trading segment while "Purchase of packing/ repacking material" constituted manufacturing segment.

(ii) In the Trading segment, the TPO applied TNMM as the most appropriate method and used operating profit / sales as the PLI in the Trading segment. He applied the following filters for the selection of comparable and has given detailed reasons in the impugned order for their selection:-

(a) use of current year data

(b) rejection of companies having different financial year

(c) rejection of companies with a turnover is less than rupees one crore

(d) rejection of companies that are affected by some peculiar economic circumstances

(e) rejection of companies where related party transactions exceeds 25% of sales

(f) rejection of companies having trading income less than 75%

(g) rejection of companies which are functionally incomparable

(iii) The TPO selected the following companies in the final set of comparables:-

(a) Rama Vision Ltd

(b) Pudumjee Hygiene Products Private Limited

(c) Gufic Biosciences Ltd

(iii) The TPO selected the following companies which were engaged in market support functions in order to make adjustment in the margins of the companies selected in the final set of comparables to account for functions performed with regards to AMP:-

(a) Concept Communication Ltd

(b) Cyber Media (India) Ltd

(c) Killick Agencies and Marketing Ltd

(d) Just Dial Ltd

(e) Marketing Consultants and Agencies Ltd

TPO's Approach in AY 2012-13: Manufacturing Segment:

(iv)The TPO applied TNMM as the most appropriate method in the manufacturing segment also and used OP/OR as the PLI. He applied the same filters for the selection of comparable as were used in the trading segment.

(v)The TPO selected the following companies in the final set of comparables:-

(a) Ginni Filaments Ltd.

(b) Johnson & Johnson Ltd.

(vi)The TPO selected the same comparables used in the manufacturing segment for making adjustment in the margins of the companies selected in the final set of comparables to account for functions performed with regards to AMP.

Findings for AY 2010-11:

7.10 I have considered the facts in the circumstances of the case. I have also perused the order of the AO as well as the submissions of the appellant and the judgments of the Tribunals, High Courts and Supreme Court relied upon by the appellant. The various grounds of appeal are discussed below after duly considering the above mentioned documents.

7.11 It may be relevant to pinpoint here that 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 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.

7.12 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.

7.13 As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i) (a) to (e) to Section 92B are described as an 'international transaction'. This might be only an illustrative list, but significantly it does not list AMPs pending as one such specific transaction.

7.14 The settled position emerging out of various decisions of judicial authorities including jurisdictional Delhi High Court is that for a 'transaction' there has to be two parties and the Revenue has to show that there exists an 'agreement' or 'arrangement' or 'understanding' between two parties whereby one is obliged to spend excessively on AMP in order to promote the brand of other entity. The courts have held that it is important to demonstrate that the parties were "acting in concert". Further, there can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons. The relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal.

7.15 The TPO has held that the appellant is engaged in brand building exercise and hence, the benefit has been drawn by the foreign AE owning such brands. TPO held this act of brand promotion on the part of appellant company as "action in concert" with its parent entity based on transfer pricing report. Further, TPO held that the foreign AE owning the brands need to compensate the appellant for the benefit drawn out of the exercise of spending the AMP expenditure.

7.16 It may be relevant to refer to the decision of Hon'ble Delhi High Court in CIT vs. EKL Appliances Ltd., wherein the court held that the very existence of international transaction cannot be a matter for inference or surmise.

7.17 The appellant company is using the brand logo of the foreign AE as for the purpose of exploiting it for the business purpose. In the process, the foreign AE, the owner of the brand, would have also got benefitted due to brand building as a result of appellant company's spending on AMP in India. However, there is no dispute that such AMP expenditure was very much required by the appellant company for carrying out and growth of its business in India.

7.18 With regards to exclusion of direct selling expenses while computing the AMP intensity adjustment, it is relevant to take note of the finding of Hon'ble Delhi High Court in the case of Sony Ericsson ITA No. 16/2014 wherein it is held that "Routine or non-routine AMP expenses would not materially and substantially affect the gross profit margins when the tested party and the comparable undertake similar AMP functions." In view of this finding of Hon'ble High Court, it is evident that while making AMP adjustment for equating AMP functions, the relevance of routine and non-routine AMP expenditure does not materially affect the gross profit margins. Hence, the contention of the assessee to exclude direct selling expenses while computing AMP intensity adjustment is not accepted.

7.19 The case of the Appellant is duly covered by Sony Ericsson (supra) as far as distribution segment was concerned. The relevant extracts of the decision of Hon'ble Delhi High Court in the case of Sony Ericsson are reproduced as under:-

"52. The contention that AMP expenses are not international transactions has to be rejected. There seems to be an incongruity in the submission of the assessee on the said aspect for the simple reason that in most cases the assessed have submitted that the international transactions between them and the AE, resident abroad included the cost/value of the AMP expenses, which the assessee had incurred in India. In other words, when the assessed raise the aforesaid argument, they accept that the declared price of the international transaction included the said element or function of AMP expenses, for which they stand duly compensated in their margins or the arm's length price as computed.

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. The expenses incurred or the quantum of expenditure paid by the Indian assessee to third parties in India, for incurring the AMP expenses is not in dispute or under challenge. This is not a subject matter of arm's length pricing or determination."

7.20 The above findings of Hon'ble High Court clearly highlight that the AMP is an international transaction where the declared international transaction includes functions of AMP expenses.

7.21 The appellant also stated that while carrying out the benchmarking of alleged "international transaction" of incurring AMP expenses, the TPO has wrongly de-bundled the distribution segment without providing any reason for the same. The appellant relied on the decision in the case of Sony Ericsson (supra), wherein the Hon'ble Delhi High Court has held that distribution and marketing were inter-connected and intertwined functions and the TPO may de-bundle them only for good and sufficient reason.

7.22 I find that the method of computing AMP adjustment by the AO/TPO is not correct because of the following reasons:-

(a) de-bundling of the AMP expenses from the integrated function of distribution activity is without any justification and

(b) the routine and non-routine AMP expenses have not been segregated.

7.23 Hon'ble High Court in Sony-Ericsson case explained with the help of an example that the de-bundling of AMP as an independent international transaction would be irrational and unsound because the purchase price adjustments/ set off would be mandated to arrive at the ALP. Further, it is noted that as per decision of Hon'ble Delhi High Court in the case of Sony Ericsson in ITA No.16/2014, the Assessing Officer/TPO can de-bundle interconnected transactions, i.e. segregate distribution, marketing or AMP transactions only for good and sufficient reasons. This may be necessary when bundled transactions cannot be adequately compared on aggregate basis. However, the TPO has not given any justification for segregating AMP transactions from the integrated distribution activity including marketing.

7.24 Further, the Hon'ble High Court in Sony-Ericsson case held that *"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. —Brand has reference to a name, trademark or trade name and like goodwill' is a value of attraction to customers arising from name and a reputation for skill, integrity, efficient business management or efficient service. Brand creation and value, therefore, depends upon a great number of facts relevant for a particular business. It reflects the reputation which the proprietor of the brand has gathered over a passage or period of time in the form of widespread popularity and universal approval and acceptance in the eyes of the customer. 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."*

7.25 As per Hon'ble High Court, the brand creation and value depends on number of facts relevant for a particular business including nature and quality of goods and services sold or dealt with. Therefore, in view of the decision of Hon'ble High Court as discussed above, the action of TPO in treating the complete amount of AMP as price of international transaction for Brand creation/building was not justified.

7.26 It is a fact that the promotion of products and brands go hand in hand and at most of the times brand is distinguishable from products as only by display of products in a particular manner or emphasis on a particular feature of the product, the consumer is given the message of what to expect from a given product. Hence, it is difficult to compartmentalize promotion of product or promotion of brand expenses and record them as separate from each other. This becomes more pertinent particularly in the case of marketing of liquor products because of the legal restrictions on display of products.

7.27 It is important to note that Hon'ble Delhi High Court held in the case of Sony Ericsson ITA No. 16/2014 that CP Method requires functional comparability which would necessarily imply that the comparable must and should be performing similar functions, including the nature of costs and expenses incurred.

7.28 However, it remains a fact that AMP expenditure does form part of marketing activity which is one of the functions of distribution segment. It is noted that the appellant has not made AMP intensity adjustment on its own to the profit rates of the comparables for bringing the intensity of AMP functions of the assessee at par with theirs in computing the ALP of the international transaction. By equalizing the intensity of AMP function carried out by the appellant to the comparables, the comparables are being made functionally similar to the assessee so that the profit margins at net level can be reliably compared.

7.29 The genesis of AMP intensity concept is in the judgment of the Hon'ble jurisdictional High Court in the case of Bausch & Lomb Eyecare India Pvt. Ltd. and Ors. Vs. Addl. CIT and Ors. (2016) 381 ITR 227 (Del) in which it has been held: "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." It has been further held in para 165 that: `An external comparable should perform similar AMP functions.... Comparable analysis of the tested party and the comparable would include reference to AMP expenses'.

7.30 Hon'ble High Court of Delhi in the case of Sony Ericsson clearly point to the conclusion that for the purpose of comparability with the entities carrying out distribution and marketing, only such comparables are required to be identified which are also carrying out both the functions in a similar manner, suitable comparability adjustment should be carried out to bring the comparables at par to the taxpayer.

7.31 In view of the above, the benchmarking exercise of the assessee deserves to be rejected because it is without factoring in the AMP intensity adjustment by treating AMP as a function. Accordingly, the TNMM benchmarking has been undertaken afresh as below after factoring in AMP intensity adjustment to the profit rates of the comparables for bringing the intensity of AMP functions of the assessee at par with theirs in computing the ALP of the international transaction of "Business Performance Guarantee" & "Purcahse of finished goods". This view has been upheld by Hon'ble ITAT, Delhi in the case of Luxottica India Eyewear Pvt. Ltd., ITA No.1492/Del/2015, AY 2010-11, ITA No. 1205/Del/2016, AY 2011-12. ITA No. 344/Del/2017, AY 2012-13.

7.32 Further, Hon'ble Delhi High Court in the case of Sony Ericsson ITA No. 16/2014 held that *"Routine or non-routine AMP expenses would not materially and substantially affect the gross profit margins when the tested party and the comparable undertake similar AMP functions."*

7.33 The TPO has made a transfer pricing adjustment on account of AMP expenses incurred by the appellant for the brand building of the intangibles owned by the AE. This is the primary approach used by the TPO in his impugned order for AY 2010-11 dated 30.01.2014. The order of the TPO does not stand the test of judicial scrutiny as the issue has been decided in favour of the taxpayer by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India Pvt. Ltd. v/s CIT in ITA No. 16/2014 dated 16.03.2015. In view of the same, the transfer pricing adjustment made by the TPO by using the 'Bright Line' method is deleted.

7.34 The appellant in its letter dated 28.09.2016 has submitted that the alternative approach used by the TPO in his report for AY 2012-13 should be used. The TPO in AY 2012-13 had considered expenditure on AMP brand building exercise by making adjustment in the profit margin of comparables by using the "functional intensity".

Alternative Approach used by the TPO in AY 2012-13 is Applied for AY 2010-11:

7.35 In view of the above discussion, the contention of the appellant that the alternative approach used by the TPO in AY 2012-13 in his order dated 30.01.2016 should be applied, is accepted.

The TPO /AO is directed to compute the arm's length price of the trading segment by using the alternative approach using TNMM as the most appropriate method and OP/Sales as the PLI.

7.36 The final set of comparables selected by the TPO in AY 2012-13for the trading segment,which is the only segment during the year under consideration, is as follows:

(a) Rama Vision Ltd

(b) Pudumjee Hygiene Products Private Limited

(c) Gufic Biosciences Ltd

Exclusion of Gufic Biosciences Ltd:

7.37 The contention of the appellant regarding rejection of Gufic Biosciences Ltd. is not accepted as the company is functionally similar to the appellant and use of TNMM as the most appropriate method irons out differences at the entity level.

Exclusion of Cyber Media Research Ltd:

7.38 It is seen that the above-mentioned company is engaged in research , consulting and advisory services like research-based insights and consulting services – market intelligence, market sizing, stakeholder satisfaction, growth opportunity identification, incubation advisory, and go to market services – covering the information technology, telecommunications, semiconductors, electronics and smart infrastructure, government, energy and utilities and life sciences sectors, as well as large enterprises, SMB and consumer user segments. The appellant has submitted that the above-mentioned company operates in single segment that is market research and management consultancy.The contention of the appellant regarding exclusion of Cyber Media Research Ltd from the set of comparables for making adjustment on account of marketing support servicesis accepted because the above-mentioned company is engaged in research, consulting and advisory services rather than actually providing marketing support services.The AO/TPO is directed to exclude the above-mentioned company from the final set.

Set of Comparables to take into Account the Marketing Support Function :

7.39 Hence, the AO/TPO is directed to use the following set of comparables to take into account the marketing support function of the appellant:-

(a) Concept Communication Ltd

(b) Killick Agencies and Marketing Ltd

(c) Just Dial Ltd

(d) Marketing Consultants and Agencies Ltd

7.40 The appellant in its letter dated 28/09/2016 has submitted that the following companies should be included in the set of comparables for determining marketing support function: –

(i) Crystal Hues Limited:

(a) The appellant has not furnished any specific reason for inclusion of the above-mentioned company. However the business profile furnished at para 89 of Annexure 8 states that the company is engaged in international marketing communications services combined with localisation services in India. Its services include developing, designing and localising advertisements, ensures, product packaging, manuals, multimedia presentations and websites.

(b) A perusal of the profile of the above-mentioned company shows that it is not a good comparable for determining marketing support function of the appellant as the appellant has not been able to demonstrate how it is functionally similar to the above-mentioned company. The contention of the applicant regarding inclusion of the above-mentioned company in the set of comparables for determining marketing support function is not accepted.

(ii) Interactive Avenues Marketing Solutions Private Limited:

(a)The appellant has not furnished any specific reason for inclusion of the above-mentioned company. However, the business profile furnished at para 208 of Annexure 8 states that the company is engaged in digital marketing in India. The company provides media and creative advertising services: publisher services, such as outsourced advertising, trafficking and web analytics solutions; search engine marketing services; search engine optimisation services; social media, e – commerce enablement, and online media research services; and technology services including campaign management, execution and analytics, IT services, finance, e-commerce, automobiles, travel, FMCT and education sectors.

(b) A perusal of the profile of the above-mentioned company shows that it is not a good comparable for determining marketing support function of the appellant as the appellant has not been able to demonstrate how it is functionally similar to the above-mentioned company. The contention of the applicant regarding inclusion of the above-mentioned company in the set of comparables for determining marketing support function is not accepted.

(iii) Interactive Avenues Limited:

(a) The appellant has not furnished any specific reason for inclusion of the above-mentioned company. However, the business profile furnished at para 209 of Annexure 8 states that the company is a full-service digital marketing company with offices in Mumbai, Delhi and Bangalore. It's comprehensive bouquet of services range from media, creative, search, analytics, mobile, social and ORM.

(b) A perusal of the profile of the above-mentioned company shows that it is not a good comparable for determining marketing support function of the appellant as the appellant has not been able to demonstrate how it is functionally similar to the above-mentioned company. The contention of the applicant regarding inclusion of the above-mentioned company in the set of comparables for determining marketing support function is not accepted.

(iv) Mindset Advertising Private Limited:

(a)The appellant has not furnished any specific reason for inclusion of the above-mentioned company. However, the business profile furnished at para 259 of Annexure 8 states that the company is an advertising agency which offers our account management, creative, strategy, media and production services. The company also provides public relations, direct response, even management, and specialist activation services, as well as specialises in recruitment and retention programs specially for technology companies. It serves clients in information technology, education, infrastructure, consumer, healthcare, corporate, cement, and micro-finance industries.

(b) A perusal of the profile of the above-mentioned company shows that it is not a good comparable for determining marketing support function of the appellant as the appellant has not been able to demonstrate how it is functionally similar to the above-mentioned company. The contention of the applicant regarding inclusion of the above-mentioned company in the set of comparables for determining marketing support function is not accepted.

(v) Outdoor Advertising Professionals India Private Limited:

(a)The appellant has not furnished any specific reason for inclusion of the above-mentioned company. However, the business profile furnished at para 287 of Annexure 8 states that the company is engaged in the business of media planning and providing outdoor advertising services to its clients. It designs outdoor advertising campaign, plan sites for advertisements as per the budget and target groups.

(b) A perusal of the profile of the above-mentioned company shows that it is not a good comparable for determining marketing support function of the appellant as the appellant has not been able to demonstrate how it is functionally similar to the above-mentioned company. The contention of the applicant regarding inclusion of the above-mentioned company in the set of comparables for determining marketing support function is not accepted.

(vi) Quadrant Communications Ltd:

(a) The appellant has not furnished any specific reason for inclusion of the above-mentioned company. However, the business profile furnished at para 310 of Annexure 8 states that the company is a full service advertising agency, providing clients with 360° marketing communications solutions. It offers support in providing direct marketing, brand strategy, media solutions, public relations, exhibitions, retail solutions, feature film associations etc.

(b) A perusal of the profile of the above-mentioned company shows that it is not a good comparable for determining marketing support function of the appellant as the appellant has not been able to demonstrate how it is functionally similar to the above-mentioned company. The contention of the applicant regarding inclusion of the above-mentioned company in the set of comparables for determining marketing support function is not accepted.

(vii) Sporting and Outdoor Ad Agency Private Limited:

(a) The appellant has not furnished any specific reason for inclusion of the above-mentioned company. However, the business profile furnished at para 262 of Annexure 8 states that the company offers outdoor advertising and publicity services.

(b) A perusal of the profile of the above-mentioned company shows that it is not a good comparable for determining marketing support function of the appellant as the appellant has not been able to demonstrate how it is functionally similar to the above-mentioned company. The contention of the applicant regarding inclusion of the above-mentioned company in the set of comparables for determining marketing support function is not accepted.

7.41 The AO/TPO is directed to compute functional intensity adjustment on account of AMP expenses by using the comparables and filters used in the transfer pricing report for A.Y 2012 – 13 with modifications as discussed above. The AO/TPO is further directed to give benefit of the 2nd proviso to section 92C (2) of the Act as per law.

7.42 The various grounds of appeal are accordingly disposed off.

8. For statistical purposes, the appeal is decided partly in favour of the appellant.

It is in this factual backdrop that the assessee as well as the Revenue have filed their respective instant cross appeals before the Tribunal. The former's case is that be it "BLT" or functional intensity" ; as the case may be, the alleged "AMP" expenditure does not at all form an international transaction u/s 92B of the Act whereas the Revenue's endeavour is to reverse the learned CIT(A) aforesaid directions.

7. We have given our thoughtful consideration to the assessee and the Revenue's respective vehement submissions. We note that the question as to whether "AMP" expenditure constitutes an international transaction or not, stands recently decided against the department in 2025 177 taxmann.com 325(Del) Sony India Private Limited vs ACIT; as follows:

3. Based on the rival submissions and the material on record we feel it convenient to deal with the grounds as raised in the form of issues. The ground no. 1-3 are general in nature. *The first issue* thus relates to two aspects of substantive additions in AY 2015-16 made using Intensity approach and protective addition in all the three AY, on alleged international transaction of AMP expenses made on the basis of BLT.

4. The brief background to the issue are that Appellant/ assessee, was established in November 1994 and during the year FY 2014-15, it is held entirely by Sony Corporation, Japan ("Sony Corp") through its subsidiaries Sony Overseas Holding B.V., Netherlands, Sony Mobile Communication AB, Sweden, Sony Mobile Communications International AB, Sweden and Sony Middle East & Africa FZE, Dubai. The assessee's primary business is to distribute consumer electronics products in India mainly comprising of audio/visual entertainment products in the Indian markets. In addition to distribution of consumer electronics products, assessee (hereinafter also referred to as 'SID') also renders advisory to its Group companies.

4.1 In assessment proceedings for assessment year ("AY") 2015-16, the assesse filed its original return of income on 30 November 2015 declaring an income of Rs. 96,83,40,450/-. A notice under section 143(2) of the Act was issued to the assessee on 21 June 2016. The information/ details called upon by the TPO/AO were duly filed by the assessee. Further, a reference was made by the AO to the Additional Commissioner of Income Tax, Transfer Pricing officer- 3(1) ("TPO") under section 92CA of the Act for determination of the arm's length price. The Ld. TPO *vide* her order dated 29 October 2018 passed under section 92CA(3) of the Act made an adjustment to the income of the assessee amounting to Rs. 12,34,76,11,326/- on account of transfer pricing provisions. Based on the order of the Ld. TPO, the AO has issued a draft assessment order to the assessee in terms of provisions of section 144C of the Act proposing to make variations to the returned income of the assessee on account of transfer pricing and corporate tax issues. The assessee being an eligible assessee as per provisions of section 144C of the Act filed objections before the DRP against the transfer pricing variations proposed to be made by AO in the draft assessment order.

4.2 Now we find that that the details of international transactions undertaken during financial year ("FY") 2014-15 are as under:-

S. No	Type of international transaction	Amount in INR
1	Import of finished goods for resale	74,53,27,26,476
2	Export of finished goods	5,77,90,937
3	Receipt of Information Technology ("IT") services	2,97,71,350
4	Receipt of Infrastructure services	14,22,51,145
5	Receipt towards use of Intel logo	3,15,67,625
6	Payment of Royalty	2,29,72,438
7	Use of FIFA logo	2,31,06,943
8	Provision of warranty services	3,63,70,082
9	Purchase of Promotional Material	1,82,51,095
10	Purchase of Samples	20,98,093
11	Purchase of airtime slots	19,61,394
12	Reimbursement paid by SID to its AEs	3,43,10,234
13	Receipt of Cali Centre Services	4,70,69,542
14	Receipt of Application services	1,61,97,008
15	Purchase of Spare and repair parts	20,94,72,430
16	Purchase of Solid-State Storage Media Products	1,14,02,12,373
17	Provision of advisory services	72,90,433
18	Reimbursement received by SID from its AEs	27,73,23,584

4.3 The assessee has at the time of preparing its Transfer Pricing documentation benchmarked the international transactions from point 1-16 using a combined transaction approach considering Transactional Net Margin Method ("TNMM") as the most appropriate method for computing the arm's length price of the international transaction. The case of assessee is that since the transactions are closely linked to the activity of distribution of consumer electronics, thus they have been analyzed together using TNMM. Therefore, companies, whose economically significant activities consist of distribution and marketing of consumer electronic products, and that are similar to SID in respect of responsibilities undertaken, were considered as comparable to SID. Based on the economic analysis so conducted by the assessee, it was concluded that the pricing in respect of the above transactions is at arm's length as per section 92(1) of the Act.

4.4 The transaction pertaining to reimbursement received by SID from its AEs was benchmarked using "Other method" and provision of advisory services was benchmarked separately, since, price/profit level details for the transactions were available with reasonable accuracy. Based on the economic analysis so conducted by the assessee, it was concluded that the pricing in respect of the above transactions is at arm's length as per section 92(1) of the Act.

4.5 Transfer Pricing Officer's by order u/s 92CA (3) dated 29 October 2018 made an adjustment on transaction pertaining to import of finished goods by contending that there is a mutual agreement/ arrangement between assessee and the AE for discharge of function of marketing and market development in addition to the arrangement/ agreement for sale and distribution of the goods purchased from the AE for which the costs have been borne by the AE. Thus based on the same, the Ld. TPO has concluded that the assessee is not a plain vanilla distributor carrying out only purchase and sale function but has been rendering Development, Enhancement, Maintenance, Protection and Exploitation ("DEMPE") services which include market development, value addition, creation of marketing intangible etc as well. The Ld. TPO has contended that there is no bifurcation provided on the promotional expenditure and the expenditure on market development function incurred by the assessee for which the assessee is eligible for compensation under a situation where no such bifurcation is available. Thus the ld. TPO concluded that contribution of the assessee in developing the marketing intangibles which requires to be compensated by AE is primarily to be benchmarked using Profit Split Method ("PSM") but then observed that PSM cannot be applied as the assessee has failed to provide requisite information. Further ld. TPO observed that the Hon'ble Delhi High Court has emphasized that while benchmarking the first endeavor of the TPO should be to benchmark the entire distribution function by use of suitable comparables. Failing such effort, segregate approach should be used. Ld. TPO observes that the Hon'ble High Court has not laid down any methodology for segregated benchmarking. It was further observed that the assessee has not provided monitory value of marketing function discharged by the assessee and identification of costs using brightline test is no longer permissible pursuant to Hon'ble High Court decision. Hence, ld. TPO found it to be handicapped to benchmark the entire distribution function including purchase, marketing and market development. According to the ld. TPO, the comparables chosen by the assessee do not discharge both the functions (i.e. distribution and marketing) in the manner carried out by the assessee. The recourse left to the ld. TPO was to use broad category comparables, which although engaged in purchase and sale of goods of the broad category dealt by the assessee but are not carrying out significant marketing functions.

4.6 Based on reasons mentioned above, the comparables were subject to comparability adjustment under Rule 10B(1)(*e*)(*iii*). This comparability adjustment was carried out in the margin of the comparables by identifying the excess intensity of expenditure incurred by the assessee on indirect expenses, excluding personnel expenses, (SGA) as a ratio of sales vis-a-vis the comparables. The expenditure incurred by the comparable companies is then increased in order to equalize the intensities. According to ld. TPO, since the marketing function provides a return in the market, the average profit margins returned by entities providing market support functions were identified.

S. No	Name of the company	OP/OC (%)
1.	NDTV Worldwide Ltd.	34.49%
2.	Killick Agencies & Marketing Ltd	26.47%
3	Fcbulka Advertising Pvt. Ltd.	28.62%
	Average	29.86%

4.7 Considering the above return, the sales in the comparables was increased by 1.2986 times the increase made in the cost. The ld. TPO further computed working capital adjustment on such margins.

4.8 In carrying out the above TNMM analysis, Ld. TPO has rejected ten companies out of twelve companies selected by the assessee (while submitting updated data for FY 14- 15) and proposed ten additional companies. The list of twelve companies finally selected as comparables by Ld. TPO along with their intensity and working capital adjusted operating profit/ operating revenue (OP/OR) is tabulated as under:

S. No.	Name of the company	Intensity and working capital adjusted OP/OR
Companies selected by the assesse		
1	Optiemus Infracom Limited	5.34%
2	Salora International Ltd.	2.65%
Additional companies selected by LD. TPO		
3	Intex Technologies (India) Limited	5.60%
4	Micromax Informatics Limited	7.96%
5	United Telelinks (Bangalore) Private Limited	12.21%
6	Lava International	8.30%
7	Ample Technologies	5.90%
8	Novel Appliances Private Limited	6.27%
9	Aditya Infotech	7.10%
10	Virtual Netcom Private Limited	2.85%
11	OTS E-Solutions Private Limited	4.62%
12	Sargam India Electronics Private Limited	4.78%
	Median	5.75%
	35th Percentile	5.34%
	65th Percentile	6.27%

4.9 The case of assessee before the DRP was that the Ld. TPO has not provided assessee the back-up computation for the adjustment being proposed. The Ld. TPO has incorrectly computed the operating expenses of the assessee. Further Ld. TPO increased the above computed operating cost of the assessee by 5% without giving any valid rationale for such stepping up of operating cost. The credit notes received by the assessee which were set-off against its purchases were grossed up twice in operating expenses. Assessee also alleged that advertising, travelling, warranty reimbursement and other reimbursements received were erroneously included in operating cost by the ld. TPO while determining assessee's operating margins. As per assessee pursuant to these errors, the assessee's margins were determined at (-) 8.21 percent of operating revenue. Thus based on the above approach, the Ld. TPO proposed an adjustment of INR 12,32,35,19,000/- to the assessee's taxable income.

5. Further ld. TPO also made a protective adjustment of INR 2,06,652.54 lakhs following Brightline Test ("BLT") approach which has been rejected by Hon'ble Delhi High court in case of (*Sony Ericsson Mobile Communications India (P.) Ltd.* v. *Commissioner of Income-tax* [2015] 55 taxmann.com 240/231 Taxman 113/374 ITR 118 (Delhi)/ITA 16/2014).

6. Ld. Counsel has submitted that in the absence of clear machinery provisions in the Act for benchmarking Advertisement, Marketing and promotion (AMP) expenditure, multiple attempts were made by Revenue to use ad hoc and arbitrary methods. One such method euphemistically called intensity adjustment is just a mirror image of Bright Line Test (BLT) which is disapproved by Hon'ble Delhi High Court and several decisions of Coordinate benches of Hon'ble Tribunal across the country. Department's SLP is pending consideration. In present case Sony is the tested party *i.e.*, whose BLT is compared to BLT of companies chosen as comparable OR tested party margin of Sony is compared with notional intensity (BLT substituted) margins of comparable companies. This is termed as protective adjustment by TP order. As BLT is invalidated by Hon'ble Courts this arithmetic jugglery is performed on comparable companies and labelled as intensity adjustment. Steps involved were explained as below:

> "Bright Line Test
>
> Median of Expenditure towards AMP as a % of sales (AMP/ Sales 0.96% internal page 44 of TP order relating to AY 15-16) for companies selected as comparable(internal page 29 and 30 of TP order) for benchmarking core business segment in Sony (in present case import and sale of finished goods) is taken as bright line (see page 44 of TP order. BLT of 0.96 % translates to INR 10570. 39 lacs).
>
> Excess of AMP expenditure (AMP / sales % of which is 16.45% please see internal page 44 of TP order) incurred by Tested party (Sony - see working on internal page 44 of TP order for AY 15 -16 for excess expenditure over BLT INR 170547.61 lacs) above Bright line is determined

Tax department refers to such excess expenditure to justify its claim that AMP is a separate and distinct international transaction

As tax department imagines that such excess expenditure is incurred by Indian entity for rendering marketing and advertisement services to overseas AE. Such excess is further marked up by margin earned by companies engaged in advertising and marketing business (please see internal page 30 - average of such margins as per TPO is 21.17%).

As per tax department such marked up amount (excess AMP further marked ="206652".54 lacs) is Transfer pricing adjustment applying BLT. This amount is required to be received by Indian entity from the overseas AE.

Adjustment if any on bench marking of core segment goes separately as AMP is bench marked as separate transaction

In regard to the Intensity adjustment it was submitted that

(*i*)To (*viii*) STEPS adopted by TPO for intensity are described at internal page46 of TP order (just above para 22). Reference to page 2641 of Transfer pricing paper book III - copy of letter from TPO to Commissioner explains key factors used in working of intensity. This clarification by TPO, when viewed in context of BLT based adjustment on internal page 44 of TP order would show jugglery of same numbers and acrobatics.

Expenditure towards AMP as % of sales (AMP/Sales - 16.45 % please see internal page 44 of TP order) incurred by tested party (SONY) is considered as the basis (without labelling this as 'bright line'). For convenience of reference this amp / sales % (16.45 %) of tested party is referred hence forth in this note as BLT 2. This is just mirror of AMP/Sales% of same set of comparable companies used as basis in BLT approach.

For purpose of recasting margin of comparable companies selected for benchmarking core business transaction (in present case import and sale of finished goods) BLT 2 percentage (16.45 %) is used as notional AMP cost in place of actual AMP expenditure incurred by each of such companies. Each company's revenue/income/ sales is also correspondingly increased/substituted by amount of notional AMP + mark-up (21.17 % used in BLT - please see internal page 30 - average of such margins as per TPO is 21.17%) as described below in next steps.

Average margin earned by companies engaged in advertising and marketing business is worked out for determining mark up % - just as in BLT. This mark- up % is used to gross up the notional AMP worked out (amount of AMP worked out using same percentage 16.45% as tested party) in earlier step. This new amount *i.e.*, notional AMP expenditure determined above grossed up further for mark up(21.17%) is increased to sale/revenue/ income. Margin of each comparable company is worked out using the notional sale (-) cost including substituted AMP as described above.

Margin earned by tested party is compared with average of new margins worked out for comparable companies to determine necessity and quantum of adjustment (please see internal page 64 of TPO order for working of adjustment based on intensity -.

Thus, same steps as in BLT are carried out in reverse direction *i.e.*, on comparable companies and this method is euphemistically termed as intensity adjustment

Appreciating above process though called intensity is a mirror image of BLT, coordinate bench of Tribunal in Widex has invalidated the same as mental acrobatics."

7. Thus in summary for applying BLT, Sony's AMP/ Sales is determined and excess over similar AMP / sales of comparable companies (Bright line) is considered as adjustment after further marking up with margin of advertisement companies and in intensity approach the actual AMP of comparable companies is substituted by Sony's % AMP/ Sales and by a notional exercise income is increased by excess of Sony AMP over comparables AMP expenditure after further mark up. The average of fresh notional margin of comparables is used to work out TP adjustment.

8. Now in regard to use of appropriate method for benchmarking AMP transactions while finding BLT to not be a method recognized under the Act and Rules. Hon'ble Delhi High Court in *Casio India Company (P.) Ltd.* v. *Dy. CIT* [2025] 172 taxmann.com 195 (Delhi)/ITA 814/2017, order dated 10th February, 2025, has considered the decision of in *Maruti Suzuki* [2015] 64 taxmann.com 150/237 Taxman 256/381 ITR 117 (Delhi), and relevant para of *Maruti Suzuki* decision (*supra*) are reproduced below;

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

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

72. As rightly pointed out by the Assessee, while such quantitative adjustment involved in respect of AMP expenses may be contemplated in the taxing statutes of certain foreign countries like U.S.A., Australia and New Zealand, no provision in Chapter X of the Act contemplates such an adjustment. An AMP TP adjustment to which none of the substantive or procedural provisions of Chapter X of the Act apply, cannot be held to be permitted by Chapter X. In other words, with neither the substantive nor the machinery provisions of Chapter X of the Act being applicable to an AMP TP adjustment, the inevitable conclusion is that Chapter X as a whole, does not permit such an adjustment."

8.1 Then Hon'ble Delhi High Court in *Pr. CIT* v. *Beam Global Spirits & Wine (India) (P.) Ltd.* [2025] 172 taxmann.com 292/304 Taxman 397/475 ITR 664 (Delhi)/ITA 155/2022 & 156/2022, order dated 7.3.2025 in para 22 has categorically discarded benchmarking of AMP expenses which was commenced solely on the basis of a perceived excessive expenditure incurred by an assessee. Similar is the case before us.

8.2 Then in *Addl. CIT* v. *Bacardi India Pvt. Ltd.* [IT Appeal Nos.4069 & 4070 (Del) of 2019, dated 20.05.2022], the Co-ordinate bench at Delhi in para 15 has held as follows:-

"15. Having said so, the ld. CIT(A) held that there is a rationale to factor in AMP intensity adjustment while equating the functional profit into the comparables in TNMM benchmarking. The "bright line test" which is the mirror image of intensity approach has no statutory mandate. Hence, cannot be upheld."

8.3 Similarly in *Samsung India Electronics (P.) Ltd.* v. *Dy. CIT* [2020] 120 taxmann.com 283/185 ITD 387 (Delhi - Trib.) has relied the decision of Chandigarh Bench in *Widex India (P) Ltd.* v. *ACIT* [2019] 108 taxmann.com 125 (Chandigarh - Trib.) to approve that what applies to BLT also applies to 'intensity approach' as a method for making ALP adjustment.

9. On the basis of aforesaid discussion we have no hesitation to uphold the contention of ld. Counsel that either applying BLT or by way of intensity approach alone the adjustments to AMP were not in accordance with law. Thus this issue and corresponding grounds are decided in favour of the assessee. Both substantive and protective adjustments to AMP shall stand deleted.

6. There does not appear to be any dispute between the parties that the department challenged the above extracted findings in its Tax Appeal ITA No. 367/Del/2026 which stands declined in their lordships judgement on 06.05.2026. We conclude in this factual backdrop that the impugned alleged "AMP" expenses in the assessee's case could not have been treated as an international transaction u/s 92B of the Act as per both "BLT" as well as "functional intensity" (*supra*) . The assessee succeeds in its instant substantive ground whereas the Revenue's corresponding pleadings are

hereby rejected in very terms. So is the outcome of its cross appeal ITA No. 6104/Del/2018, herein.

7. Coming to the assessee's remaining grounds no. 5 to 12, learned counsel submits that the same are on merits raising various issues of comparables etc which stand rendered infructuous in view of our preceding findings on "AMP" issue in principal.

8. Learned counsel next invites our attention to the assessee's petition dated 14.02.2023 seeking working capital adjustment regarding the alleged outstanding payables treated as an international transaction u/s 92B(c) of the Act. Suffice to say we are of the considered view that larger interest of justice would be served if the assessee files all of its relevant details before the learned TPO who shall finalize his consequential computation as per law within three effective opporutnities of hearing. This additional ground is treated as accepted for the statistical purposes. The assessee's instant "lead" appeal ITA No. 5938/Del/2018 is partly accepted therefore.

9. We next advert to the assessee's remaining twin appeals ITA Nos. 6088 & 7414 in A.Y. 2011-12 & 2012-13 along with the Revenue's cross appeal in the former instance i.e. ITA No. 2303/Del/2018. We are informed that the first and foremost issue raised at their behest is regarding "AMP" only which stands as per identical footing as in the preceding assessment year 2010-11(*supra*). We decide the same in the assessee's favour and against the department as per our preceding detailed discussion in very

terms. The Revenue's cross appeal ITA No. 6203/Del/2018 is hereby rejected therefore.

10. We are next informed that the assessee raises its latter substantive ground identically in both these assessment years that learned lower authorities have made the impugned "arms' length" adjustment(s) in trading and manufacturing segment after rejecting its stand taking the foreign AEs as a tested party for the purpose of benchmarking the impugned import transactions. The said foreign associate enterprise 'AE' had admittedly charged the assessee @ + 5%. The assessee's case all along has been that it represents the "least" complex entity duly accepted in the preceding assessment year 2010-11 in principle. It is in this factual backdrop that we note that the tribunal in ITA No. 2093/Del/2014 decided on 23.08.2018 Global Vantedge Private Limited vs ACIT has settled the very issue in principle in the assessee's favour and against the department ; as follows:

> *"5. The plea of the assessee is indeed well taken. The law is by and large well settled on this issue. There is no dispute that, in principle, the least complex party is to be taken as the tested party but the trouble usually arises on account of lack of data with respect to the foreign tested party and it is for this reason that the foreign enterprise is, more often than not, not really taken as a tested party. That does not mean however that the use of a foreign enterprise as a tested party can be rejected summarily without assigning any reason- as has been done by the TPO and approved by the CIT(A). Learned CIT(A) has also not discussed the matter on merits and summarily dismissed the plea of the assessee. That course of action cannot be approved. We have also noted that on the peculiar facts of this case and looking to the nature of functional relationship between the assessee and GV Inc, there can indeed be little dispute that least complex of the party is GV Inc. While the core business function is performed by the assessee company, and entire infrastructure and operating assets are owned by the assessee company, the foreign AE, i.e. GV Inc, is primarily responsible for procuring the work and owns relatively much less assets, employees*

and operating assets. On these facts, therefore, the claim of the assessee that the foreign AE was the least complex entity could hardly be summarily rejected. Of course, the next question is the availability of data and the onus to furnish the same is on the assessee, but the authorities below have not at all addressed themselves to this aspect of the matter. In view of these discussions, as also bearing in mind entirety of the case- particularly peculiar business model and functional relationship between the assessee and GV Inc, its foreign AE, we deem it fit and proper to remit the matter, with respect to determination of ALP on the basis of adopting the foreign AE as the tested party, for fresh determination at the assessment stage. The matter will be decided afresh by the TPO/AO after giving a fair and reasonable opportunity of hearing to the assessee, in accordance with the law and by way of a speaking order dealing with contentions of the parties. Ordered, accordingly.

6. We have also noted that even with respect to the assessee being adopted as the tested party, the assessee has raised several legal and factual arguments with respect to the comparables adopted by the authorities below. The only other grounds pressed before us, apart from challenging rejection of GV Inc as tested party, are with respect to the comparables but as the matter is being remitted to the assessment stage, it would not be appropriate for us to deal with that aspect of the matter, which is, strictly speaking, somewhat academic at this stage. We, however, make it clear that the assessee will be at liberty to take up all such issues, as he may deem appropriate, and the same will be decided on merits, if at all required, by way of a speaking order, in accordance with the law and after giving a fair and reasonable opportunity of hearing to the assessee. In effect thus all the issues are open and all other grievances raised in both the cross appeals are, as on now, academic."

11. We accordingly direct the learned TPO to finalize his consequential computation after taking the assessee's foreign AE as a tested party subject to a rider that it shall plead and prove all the relevant evidence at its own risk and responsibility, within three effective opportunities in consequential proceedings. We further quote Virtusa Consulting Services (P) Ltd. v. Dy. CIT [(2022) 325 CTR 307 (Madras)] and PCIT vs ITC Info-tech India Ltd (2024) 298 taxmann.com 46 (Calcutta) that the instant legal issue of a foreign AE as tested party already stands decided in the assessee's favour. We thus accept the assessee's instant latter substantive ground for statistical purposes. Necessary working adjustment; if any, shall follow as

per law in light of our directions in the lead assessment year 2010-11. These assessee's latter twin appeals ITA No. 6088/Del/2018 & 7414/Del/2019 are partly allowed in above terms.

No other ground or argument has been pressed before us.

12. To sum up, these assessee's three appeals ITA No. 5938, 6088/Del/2018 & 7414/Del/2019 are partly allowed and Revenue's twin cross appeals 6104 & 6203/Del/2018 are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order Pronounced in the Open Court on 30.07.2026.

Sd/-	***Sd/-***
(MANISH AGARWAL)	**(SATBEER SINGH GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 30.07.2026

Pooja Mittal, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR