INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCHES, NEW DELHI

BENCH: I

BEFORE ANUBHAV SHARMA, JUDICIAL MEMBER
AND NAVEEN CHANDRA, ACCOUNTANT MEMBER

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<tr><td colspan="3" align="center">ITA Nos. 1955 /DEL/2021
&
SA Nos. 239/Del/2026
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20TH-24TH FLOOR, DLF TWO HORIZON CENTER, SECTOR-43, GURGAON-122002, HARYANA</td><td rowspan="2">Vs.</td><td>ADDI CIT NATIOANL E-ASSESMENT CENTRE
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NEW DELHI-110002, DELHI</td></tr>
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अपीलार्थी द्वारा/Appellant represented by:	**Shri Himanshu S. Sinha, Adv. (Virtual), Shri Prashant Meharchandani, Adv. (Virtual) & Shri Jainender Kataria, Adv. (Virtual)**
प्रत्यर्थी द्वारा/Respondent represented by:	**Shri Dharm Veer Singh, CIT(DR) (Virtual)**

सुनवाई की तारीख / Date of conclusion of hearing:	**02.06.2026**
घोषणा की तारीख / Date of pronouncement:	**12.08.2026**

आदेश / ORDER

PER ANUBHAV SHARMA, JUDICIAL MEMBER:

These two appeals and Stay Applications preferred by the assessee against the order dated 30.03.2021 & 30.11.2021 passed by the Ld. National e-Assessment Centre, Delhi (hereinafter referred as 'Ld. Assessing Officer') arising out of the direction of Dispute Resolution Panle-1, u/s 144C(5) of the Income Tax Act, 1961 for AYs: 2016-17 & 2017-18.

2. These appeals are disposed by this common order as major issues are factually common and involve common questions of law. The appeal for AY 2016-17, being the earlier year, is taken as the lead year for recording the facts, where ever relevant and issues specific to AY 2017-18 shall be separately dealt with by us.

3. The Assessee, M/s Samsung India Electronics Pvt. Ltd. ("SIEL" / "Assessee"), is a company incorporated under the Companies Act, 1956 is a part of the Samsung group of companies and is a wholly owned subsidiary of Samsung Electronics Co. Ltd. Korea ("SEC"). It is primarily engaged in the business of manufacturing and trading of consumer electronics, home appliances, mobile phones and IT products. The Assessee undertook contract software development activities for SEC and was also engaged in buy-sell operation of Telecommunication Equipment from SEC to third party customers in India. The Assessee filed its return of income on 29.11.2016 declaring income of Rs. 4864,43,19,590/-. Thereafter, a revised return was filed on 28.03.2018, declaring total income of INR 4763,89,58,528/-. However, vide letter dated 20.06.2018 submitted by the Assessee, the income was again restored to the income reported in Original Tax Return i.e. Rs. 4864,43,19,590/-. The Assessee's operations were segregated by it into the following business segments:

a) Manufacturing segment – Consumer electronics, home appliances and mobile phones
b) Trading segment – Consumer electronics, home appliances, mobile phones, IT products and medical equipment
c) Contract software development services segment
d) Networking segment

4. During the course of assessment proceedings, the international transactions entered into by the Assessee with its associated enterprises were referred to the Transfer Pricing Officer. The Ld. Transfer Pricing Officer ("TPO") passed an order under section 92CA(3) on 31.10.2019 proposing transfer pricing

adjustments. Pursuant thereto, the Ld. Assessing Officer ("AO") passed a draft assessment order dated 23.12.2019 under section 143(3) read with section 144C of the Act. Aggrieved, the assessee filed objections before the Ld. Dispute Resolution Panel ("DRP"), which issued directions on 22.10.2020. Thereafter, the final assessment order dated 30.03.2021 came to be passed, determining total addition of Rs. 4858,91,08,884/-, as follows;

S.No.	***Segment***	***Adjustment in INR***
1.	*Segmental Adjustment on account of Manufacturing*	*817,29,76,086*
2.	*Segmental Adjustment on account of Networking*	*436,80,85,062*
3.	*Adjustment on A/c of Trading Segment (BLT)*	*339,23,89,070*
4.	*Adjustment on A/c of Advertising and marketing expenditure*	*1338,82,19,250*
5.	*Royalty*	*1732,93,94,316*
	Total	***4665,10,63,784***

5. Thereafter, the AO passed draft assessment order u/s 144C of the Act wherein besides the additions proposed by TPO with respect to transfer pricing adjustment of international transactions, the AO further proposed to disallow salary expenses paid to ex-patriate employees at INR 193,80,45,100/-. Against the draft order, assessee filed objections before Ld. DRP who vide its order dated 22.10.2020 issued certain directions wherein Ld. DRP accepted the fact that adjustment related to advertising and sales promotion expenses (AMP expenses) as proposed by TPO are identical to the issues raised in immediately preceding years i.e. AYrs 2014-15 & 2015-16 and Ld. DRP directs the AO to follow such directions as given in preceding years. With respect to adjustment on account of payment of Royalty parent company, Ld. DRP followed its order in AY 2015-16

and also directed the AO to follow the same. With regard to corporate tax adjustment of disallowance of salary expenditure, Ld. DRP direct the TPO to delete the proposed adjustment. In compliance, the AO in its final order passed u/s 143(3) r.w.s. 144C (13) r.w.s. 143(3A) and 143(3B) of the Act dated 31.03.2021 observed that since the appeals were filed in respect to the orders of immediately preceding years therefore, the AO had made the additions to the total income of the assessee as proposed in the draft assessment order including transfer price adjustments though regarding the issue of disallowance of salary paid to expatriate employees, ld. DRP directed the AO to delete the adjustment as proposed by TPO and the total income of the assessee was, finally assessed at INR 9723,34,28,470/-.

6. Thus assessee is in appeal and has raised following grounds of appeal for AY 2016-17;

Grounds of appeal

"1. That on the facts and circumstances of the case and in law, the Ld. AO has erred in assessing the total income of the Appellant at Rs. 9723,34,28,470/- as against the returned income of Rs. 4864,43,19,590/-.

2. That on the facts and circumstances of the case and in law, the Ld. Dispute Resolution Panel ("DRP")/ AO/ Transfer Pricing Officer ("TPO") erred in making a transfer pricing adjustment of Rs. 4665,10,63,784/- on account of the following transactions: (i) advertising, marketing, promotion ("AMP") expenses amounting to Rs. 1678,06,08,320/-, (ii) networking segment amounting to Rs. 436,80,85,062/-, (iii) manufacturing segment amounting to Rs. 817,29,76,086/- and (iv) payment of royalty amounting to Rs. 1732,93,94,316/- alleging the same to be not at arm's length in terms of the provisions of section 92C of the Act read with Rule 10B of the Income Tax Rules, 1962 ("the Rules").

3. That on the facts and circumstances of the case and in law, the Ld. DRP/TPO erred in making a protective adjustment of Rs. 1783,92,66,237/- in Manufacturing segment on account of AMP expenditure by applying Bright Line Test method which is impermissible under law.

4. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO erred in making an addition of Rs. 193,80,45,100/- on account of disallowance of salary expenditure incurred in relation to expatriate employees under section 37(1) of the Act.*

GROUNDS AGAINST SUBSTANTIVE ADJUSTMENT MADE IN RELATION TO AMP EXPENSES – INTENSITY BASED APPROACH

5. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in making substantive adjustment of Rs. 1338,82,19,250/- on account of AMP which comprised of Rs. 863,18,68,537/- for the Manufacturing Segment and Rs. 475,63,50,713/- for Networking Segment.*
6. *That the Hon'ble DRP/Ld. AO/ Ld. TPO grossly erred in not appreciating that the issue of AMP expenditure is squarely covered in favour of the Appellant by the order of this Hon'ble Tribunal in Appellant's own cases for 10 financial years (AY 2005-06 to 2014-15).*
7. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in holding that the AMP expenditure incurred by the Appellant in India is an 'international transaction' as per the provisions of the Act.*
8. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO erred in not demonstrating the existence of an 'understanding' or an 'arrangement' or 'action in concert' between the Appellant and its Associated Enterprises (AEs) w.r.t. the AMP spend and in not appreciating that the AMP expenses incurred by the Appellant are wholly and exclusively focused on generating domestic sales for its own business operations (and aligned with the risk profile of the Appellant) and the benefit arising from the incurrence of the AMP expenses by the Appellant has been received by the Appellant and the benefit, if any, resulting to its AEs is merely incidental.*
9. *That on the facts and circumstances of the case and in law, the Ld. DRP/ AO/ TPO have erred in adopting intensity-based approach which is not a prescribed method under the Income-tax Rules, 1962.*
10. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO erred in holding that the AMP expenses incurred by Appellant has led to the creation of marketing intangibles and resulted in promotion of 'Samsung Brand' for which the Appellant should be compensated by the legal owner of the brand.*
11. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO erred in applying mark-up on the alleged incurred excessive AMP expenditure by selecting companies providing market support functions in order to determine the mark-up to be imputed on AMP adjustment.*
12. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO failed to appreciate that artificially making duplicative adjustments on account of AMP is perverse and contrary to law as the alleged AMP expenses and AMP activities for the trading segment, manufacturing segment and networking segment are already included in the arm's length determination of the trading segment, manufacturing segment and networking segment.*

13. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in not appreciating that after application of Transactional Net Margin Method ("TNMM") as the Most Appropriate Method ("MAM") for benchmarking the international transactions, no separate arm's length analysis was required in respect of the individual elements of cost (AMP expenditure) as it is inconsistent with the tenets of applications of TNMM as per Rule 10B(1)(e) of the Rules.*
14. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in making transfer pricing adjustment on account of AMP expenditure in networking segment ignoring the fact that under networking segment, the Appellant operates under a Business-to-Business ('B2B') model wherein it caters to a single customer and does not undertake any activity pertaining to AMP.*
15. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in considering all 'value added expenses' (excluding employee costs) as part of the AMP expenditure on the premise that all value-added expenses lead to promotion of the brand 'Samsung' disregarding the fact that many of such expenses are purely operational in nature.*
16. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in not allowing the exclusion of sales related expenses from the ambit of AMP disregarding the fact that exclusion of such expenses has been allowed in Appellant's own case by DRP in prior years.*
17. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO erred in modifying the comparable set, in contravention of section 92C(3) of the Act read with Rule 10B(2) of the Rules, by including/selecting companies that are not comparable to the Appellant in terms of functions performed, assets employed, risks assumed and rejecting companies selected by the Appellant.*
18. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO erred in incorrectly computing margin of the Appellant and the comparables.*

GROUNDS AGAINST SUBSTANTIVE AND PROTECTIVE ADJUSTMENT MADE IN RELATION TO AMP EXPENSES UNDER BRIGHT LINE TEST METHOD

19. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in making substantive adjustment of Rs. 339,23,89,070/- on account of AMP for Trading segment and protective adjustment of Rs. 1783,92,66,237/- for Manufacturing segment by applying Bright Line Test method which is impermissible under law.*
20. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in making protective adjustment for Manufacturing segment when substantive adjustment has already been done in the hands of the Appellant for same assessment year, which is impermissible under law, thereby also not appreciating that this issue of making an adjustment on a 'protective' basis along with substantive adjustment is squarely covered in favour of the Appellant by the order of this Hon'ble Tribunal in Appellant's own case for AY 2005-06.*
21. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred applying the "bright line" test as a tool to identify and benchmark the alleged AMP*

transaction which has no statutory mandate under the Act as laid down by the Hon'ble Delhi HC in the case of Sony Ericson Mobile Communications India Pvt. Ltd. [2015] 374 ITR 118 (Delhi).

22. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in levying a further mark up on the alleged AMP expenses incurred over and above the so-called 'bright-line' limit, stating that it tantamounts to services being provided by Appellant to its AEs.*

GROUNDS AGAINST SUBSTANTIVE ADJUSTMENT MADE UNDER TNMM IN THE MANUFACTURING SEGMENT AND NETWORKING SEGMENT

23. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in making an adjustment of Rs. 817,29,76,086/- in manufacturing segment by including companies that are not comparable to the Appellant in terms of functions performed, assets employed, risks assumed, and rejecting comparable companies selected by the Appellant.*
24. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in making an adjustment of Rs. 436,80,85,062/- in networking segment under TNMM by including companies that are not comparable to the Appellant in terms of functions performed, assets employed, risks assumed, and rejecting comparable companies selected by the Appellant.*
25. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in incorrectly computing the margin of the Appellant and the comparables for both the segments i.e. manufacturing segment and networking segment.*
26. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO erred in considering the foreign exchange gain as non-operating in nature for the purpose of computation of margins of the Appellant as well as of the comparables.*
27. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in denying working capital adjustment under Rule 10B(1)(e) for the purpose of determination of ALP to account for the difference in working capital employed by the Appellant vis-à-vis the comparable companies by ignoring the fact that working capital adjustment was allowed by this Hon'ble Tribunal in Appellant's own case for AY 2007-08, AY 2008-09, AY 2009-10 & AY 2014-15.*
28. *That on the facts and circumstances of the case and in law, the Ld. DRP/ TPO/AO erred in wrongfully computing proportionate adjustment.*

GROUNDS AGAINST ROYALTY ADJUSTMENT

29. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in making an adjustment of Rs. 1732,93,94,316/- on account of royalty payment by rejecting TNMM applied by the Appellant and instead applying CUP as the MAM.*

30. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO erred in not appreciating the fact that payment of royalty is intrinsically linked with the manufacturing activity, thus segregating and benchmarking the transaction of royalty is in violation of transfer pricing provisions.*
31. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO erred in including/selecting companies that are not comparable to the Appellant in terms of functions performed, assets employed, risks assumed, in contravention of section 92C(3) of the Act read with Rule 10B(2) of the Rules.*

GROUNDS AGAINST CORPORATE TAX ADJUSTMENT

32. *That on the facts and circumstances of the case and in law, the Ld. DRP /AO erred in disallowing the salary expenditure of INR 193,80,45,100/- incurred in relation to expatriate employees under section 37(1) of the Act ignoring the binding decision of this Hon'ble Tribunal in the case of Samsung Electronics Co. Ltd v DCIT: [2018] 92 taxmann.com 171 (Delhi - Trib.). The above disallowance has been made by the Ld. DRP / AO based on conjectures and surmises and without taking into consideration the documents placed on record.*
33. *That the Hon'ble DRP/ Ld. AO/ Ld. TPO grossly erred in not appreciating that this issue is squarely covered in favour of the Appellant by the binding order of this Hon'ble Tribunal in Appellant's own case for AY 2014-15.*
34. *That on the facts and circumstances of the case and in law the Ld. DRP /AO erred in holding that there was no employer-employee relationship between expatriate employees and the Appellant and the expatriate employees were the employees of the parent company, i.e., Samsung Electronics Co. Limited.*
35. *That on the facts and circumstances of the case and in law the Ld. DRP /AO erred in holding that expatriate employees were not working wholly and exclusively for the business of the Appellant and accordingly, their salary expenditure is disallowable under section 37(1) of the Act.*
36. *That on the facts and circumstances of the case and in law, the AO has erred in charging interest under Sections 234C and 234B of the Act.*
37. *That on the facts and circumstances of the case and in law, the AO erred in initiating penalty proceedings under Section 271(1)(c) and Section 271BA and Section 271AA of the Act for furnishing of inaccurate particulars and concealment of income.*

Each of the above grounds are independent and without prejudice to the other grounds of appeal preferred by the Appellant. The Appellant prays for leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before, or at, the time of hearing of the appeal."

7. We have considered the rival contention and perused the records. **The first issue arises out of ground of appeal Nos. 5 to 22** raised by the assessee are with

respect to the adjustments made towards AMP expenditure incurred by the assessee where the AO has made adjustments by following BLT ("Bright Line approach") and IBA ("Intensity based approach") on protective and substantive basis. The TPO based on the fact assessee has received 2,00,22,148/- as reimbursement of marketing expenses from its parent Samsung Electronics Co. Ltd., Korea held the same as an international transaction. Accordingly, the TPO held the entire amount of AMP expenditure incurred by the assessee in manufacturing, trading and networking segments as international transactions of intra-group service rendered by the assessee to its parent for the promotion of the brand 'Samsung' and proposed following adjustments on substantive basis and protective basis by applying Intensity Approach and Bright line approach for different segments.

8. The ld. DRP in para 3.1.1. of its order has observed that this issue was considered and decided in assessee's own case for AY 2014-15 and 2-15-16 and since the objections raised are identical, ld. DRP directed the AO/TPO to follow its directions given in these years. In preceding years i.e. in AY 2014-15 and 2015-16, the DRP held that AMP expenditure as excessive as compared to other independent and uncontrolled comparable Indian companies (referred to as the Bright Line). This "excessive" expenditure incurred by the assessee is primarily for the promotion of the brand 'Samsung' and since the brand is owned by the assessee's Korean parent Samsung Electronics Co Ltd., the "excess" AMP

expenditure above the Bright Line should be treated as a separate international transaction of brand-promotion service. Therefore, the ld. DRP treated this excess amount alongwith an arm's length mark-up (profit that comparable service companies would earn) as the arm's length price of this international transaction by applying BLT. It is further observed by DRP that in its order for preceding years and also by TPO in the order for the year under appeal that ***Hon'ble Delhi High Court*** in ***Sony Ericsson Mobile Communications v. CIT*** reported in ***(2015) 374 ITR 118 (Delhi)*** held the BLT as illegal and since this order is pending before the Hon'ble Supreme Court by way of a Special Leave Petition, the AO/TPO and ld. DRP kept this adjustment on protective basis in manufacturing segment, and in trading segment made adjustment on substantive basis by applying BLT.

9. Further, by adopting the Transaction Net Margin Method (TNMM) on intensity based approach, TPO has made adjustments in manufacturing and Networking segment on substantive basis. This approach of the TPO has been approved by the ld. DRP subject to certain modifications regarding choice of certain comparables. The total adjustment made on this issue is tabulated as under:

Nature of adjustment	**Substantive adjustment by applying intensity approach (Rs.)**	**Substantive adjustment by applying bright line approach (Rs.)**	**Protective adjustment applying bright line approach (Rs.)**
AMP-Manufacturing	863,18,68,537/ -	-	1783,92,66,237/-
AMP-Trading	-	339,23,89,070/-	-
AMP-Networking	475,63,50,713/-	-	-

Total	**1338,82,19,250/-**	**339,23,89,070/-**	**1783,92,66,237/-**

10. At the outset, Ld.AR for the assessee submits that since past Eleven (11) assessment years, the Tribunal has been consistently held the existence of international transaction cannot be inferred from the reimbursement obtained by the assessee from certain marketing activities and further held that no addition is warranted either under BLT or IBA method. Ld.AR also submits that in AY 2011-12 to 2014-15, the orders passed by the Tribunal stood affirmed by the Hon'ble Jurisdictional High Court and submits that appeal against the order of Tribunal in AY 2015-16 has not yet been filed. Ld. AR thus, submits that the issue in hand is squarely covered in assessee's favour and requested for the deletion of the adjustments made on this score.

11. Ld. CIT DR for the Revenue vehemently supported the orders of the lower authorities. As per ld. CIT DR principle of res-judicata does not apply to income tax proceedings and each assessment year is to be judged on its own basis thus the orders of Tribunal in preceding years cannot be followed without looking into the merits of the case in each individual year. He submits that assessee itself has reported transaction of recovery of marketing expenses of Rs. 2,00,22,148/- is an international transaction. He further submits that in trading segments, AMP expenses are to be benchmarked separately which was not done in preceding years and thus, the issue is totally distinguishable in the year under appeal. He further

submits that in the case of ***Sony Ericson Mobile Communications Pvt. Ltd. 55 taxmann.com 240*** wherein Hon'ble Jurisdictional High Court has observed that in para 50 to 52 which observations are in favour of the Revenue and Ld.AR submits that in para 118 also states that marketing and manufacturing segment is the core of the transfer pricing adjustment price paid by or composite to the domestic AEs must be complement and reciprocate for the functional performed and for this, the TP adjustment of AMP expenditure is required to be made.

12. As with respect to the AMP expenditure on Intensity Based approach, reliance is placed by Ld. CIT DR on the judgement of Co-ordinate Bench of ITAT in the case of ***Luxottica India IVR P. Ltd. vs ACIT, Circle-15(2), New Delhi [2017] 82 taxmann.com 361 (Delhi)*** wherein the Co-ordinate Bench has confirmed the transfer pricing adjustment based on TNMM intensity based adjustment approach. He thus, prayed for the confirmation of the order of the lower authorities.

13. On hearing both sides we find that this is a recurring issue and is squarely covered in favour of the Assessee by the orders of the Tribunal in the Assessee's own case for prior 11 years, wherein it has been consistently held that AMP expenditure cannot be treated as a separate international transaction in the absence of any arrangement, understanding or agreement obligating the Assessee to incur such expenditure for brand promotion on behalf of the AE. Admittedly Tribunal's

orders for AY 2011-12 to AY 2014-15 have also been upheld by the Hon'ble jurisdictional High Court. We find that Ld. DRP has also observed that the facts and the objections raised by the assessee on the issue of AMP expenditure are identical as had existed in preceding assessment years i.e. AY 2014-15 and 2015-16 and for of AY 2015-16 Co-ordinate Bench vide its order dated 29.07.2024 in ITA No. 9482/Del/2019 has held as under:-

> *13. We have given our anxious consideration to the issue at hand and the rival contentions and arguments along with the material on record. In our considered view, the issue whether AMP is an international transaction in respect of the assessee is no longer res integra qua the assessee, since Coordinate Benches of this Tribunal in ten prior assessment years have consistently held that AMP expenditure incurred by the assessee could be treated as an international transaction only to the extent of what has been agreed with its associated enterprises to be reimbursed. Any amount beyond such agreed reimbursements do not warrant inclusion within the ambit of the international transaction as these expenses have not been necessitated by any understanding, arrangement, or agreement with the AEs. In the absence of any evidence of this common understanding or action in concert, any such conclusion would be a mere surmise.*
>
> *14. During the instant year, we find that not only there was no MDF agreement in effect between the assessee and the AE, the amount of reimbursement of marketing expenses received by the assessee has diminished to a meagre sum of Rs. 5,51,13,066/. However, the TPO and the DRP have proceeded on an assumption that there was an understanding between the assessee and its AE that "excessive" AMP expenditure would be incurred in India to promote the 'Samsung' brand in a manner that was not justified by the scale and nature of Indian business but at the behest and requirement of the foreign parent that owned the brand. We do not find any merit in the approach taken by the TPO and the DRP as well the contention raised by the Ld. CIT(DR) that consistency of approach by the Tribunal should be disregarded. The Transfer Pricing Report of the assessee states very clearly in Para 4.4.3 that the reimbursement of marketing expenses of the assessee is strictly limited to those items for which prior approval is received from the AE and consequently there is no element of service to the AE. The reimbursement is restricted to the actual expense without any mark-up as per the prior approval granted by the AE. In the prior years, the Tribunal had found that identical system of reimbursements was adopted. Accordingly, even without any express MDF agreement, the assessee and its AE have been consistently following the same approach over the years.*
>
> *15. Since it has consistently been held that the scope of international transaction pertaining to AMP expenses cannot be expanded beyond what has already been*

disclosed by the assessee in its transfer pricing report and Form 3CEB, any adjustment either by way of Bright Line Test or intensity based TNMM approach is not tenable in law. Reliance placed on Sony Ericsson Mobile Communications India Pvt. Ltd. v. CIT (2015) 374 ITR 118 (Del) by the Ld. CIT(DR) to justify the TNMM intensity-based approach is wholly misplaced. The justification of adoption of a method can be examined only after the issue of existence of an international transaction is established. If no international transaction is found to exist, the occasion to select the most appropriate method to determine the arm's length price would not arise at all.

16. The finding of the Coordinate Benches in ten prior assessment years that the AMP expenditure could not be treated as an international transaction in the absence of any evidence or material to demonstrate an understanding, arrangement, or action in concert between the assessee and its AE is based on the principles laid down in the subsequent decisions of the Hon'ble Delhi High Court in Maruti Suzuki (2015) 381 ITR 117 (Delhi) and Bausch & Lomb Eyecare (India) (2016) 381 ITR 227 (Delhi). In these decisions their Lordships have observed that in Sony Ericsson (supra), the existence of an international transaction was not in issue. The following extract from the Maruti Suzuki (supra) makes this amply clear:

> *"..43. Secondly, the cases which were disposed of by the Sony Ericsson Mobile Communications India (P.) Ltd. (supra) judgment, i.e. of the three Assessees Canon, Reebok and Sony Ericsson were all of distributors of products manufactured by foreign AEs. The said Assessees were themselves not manufacturers. In any event, none of them appeared to have questioned the existence of an international transaction involving the concerned foreign AE. It was also not disputed that the said international transaction of incurring of AMP expenses could be made subject matter of transfer pricing adjustment in terms of Section 92 of the Act.*
>
> *44. However, in the present appeals, the very existence of an international transaction is in issue. The specific case of MSIL is that the Revenue has failed to show the existence any agreement, understanding or arrangement between MSIL and SMC regarding the AMP spend of MSIL. It is pointed out that the BLT has been applied to the AMP spend by MSIL to (a) deduce the existence of an international transaction involving SMC and (b) to make a quantitative 'adjustment' to the ALP to the extent that the expenditure exceeds the expenditure by comparable entities. It is submitted that with the decision in Sony Eric.sson Mobile Communications India (P.) Ltd. (supra) having disapproved of BLT as a legitimate means of determining the ALP of an international transaction involving AMP expenses, the very basis of the Revenue's case is negated.*
>
> *45. Since none of the above issues that arise in the present appeals were contested by the Assessees who appeals were decided in the Sony Ericsson Mobile Communications India (P.) Ltd. case (supra), it cannot be said that the decision in Sony Ericsson Mobile Communications India (P.) Ltd. (supra), to the extent it affirms the existence of an international transaction on account of the incurring of the AMP expenses, decided that issue in the appeals of MSIL as well…."*

16.1 *In the instant case, therefore, where the assessee does not accept the existence of any such transaction, the onus is on the TPO to bring evidence and material on record to rebut the assessee's position. From the facts on record, it is manifest that the Revenue's position is not backed by any evidence that the assessee had agreed either explicitly or implicitly to incur any AMP expenditure on behalf of the parent company. There is no material that would show that the assessee's advertising and marketing budget was finalised or determined at the behest of the parent entity.*

17. *The relevant paragraphs of the Coordinate Bench decisions in the assessee's appeals on this issue in prior assessment years reproduced below manifest the position of this Tribunal that has been consistently taken over the past ten assessment years:*

ITA Nos. 3248 & 3410/Del/2012: 5856/Del/2010: 5315/Del/2011; 52/Del/2013; 1567/Del/2014; 6741/Del/2014; 868/Del/2016; 251/Del/2018 (AYs 2005-06 to AY 2011-12) vide a combined order dated 4.10.2019

> *"43. In the present case we find that the Revenue has not been able to place any material to record to show or suggest that the Appellant's AMP activity was carried out at the behest of its AE, beyond what was approved and reimbursed under the MDF Agreement. No understanding or arrangement or "action in concert" can be inferred from the terms of the MDF agreement or the conduct of the appellant to show that "excessive" AMP expenditure has been incurred at the behest of the brand-owing AE. The appellant being one of the major players in the Indian market has carried out its AMP activity and function based on its own judgement and commercial realities. Revenue has not placed any material or evidence to show that there existed an understanding to incur "excessive" AMP expenditure. The arrangement and understanding were limited to the amounts agreed to be paid as assistance under the MDF Agreement. The amounts incurred as AMP expenditure by the appellant under the MDF Agreement have already been received as reimbursement/assistance and have indisputably been disclosed as an international transaction in Form 3CEB and form part of the transfer pricing study conducted under Rule 10D. The AMP expenditure which is outside the ambit of reimbursement received under the MDF Agreement, has been incurred by the appellant on its own volition as per its own requirements and without any interference of the AE and have been paid to third parties.*
>
> *44. In view of the above, we hold that the scope and value of international transaction cannot be expanded beyond the reimbursements received under MDF agreement to cover the entire gamut of AMP expenditure incurred by the Appellant during the year.*
>
> *45. In view of the above, we hold that the "bright line" approach is untenable in law either as a way to determine the existence of an international transaction or as a method to determine the ALP of an international transaction pertaining to AMP. No international transaction*

can be presumed to exist merely on the basis of "bright line" of expenditure incurred by comparable companies."

ITA No. 6813/Del/2017 (AY 2012-13) vide order 7.01.2020

"6. Heard the arguments of both the parties and perused the material available on record. This matter stands adjudicated by the Co-ordinate Bench of /TAT wherein it was held that the scope and value of the International Transaction cannot be expanded beyond the reimbursement received under MDF agreement to cover the entire gamut of AMP expenditure incurred by the Appellant during the year.

7. Regarding the applicability of the Bright Line Text (BLT) (specific grounds at 11, 12 & 13) to determined the adjustment in the AMP expenditure has been rejected by the Hon'ble Jurisdictional High Court in the case of Sony Ericsson Mobile Communication India Pvt. Ltd. in Tax Appeal No. 16 of 2014. In view of the judgement of the Hon'ble High Court, we hereby hold that no International Transaction can be presumed to be in existence and hence no addition is called for."

ITA No. 7285/Del/2018 (AY 2013-141 vide order dated 14.12.2020
" 8…. Thus, the entire issue relating to AMP raised in the present assessment year is identical to that of earlier year as well as subsequent year and there is no different facts emerging either from the order of the TPO or from the perusal of the record. Therefore, Ground Nos. 3 to 15 are allowed. "

ITA no. 9481/Del/2019 (AY 2014-15) vide order 31.08.2020

"18. So, in view of what has been discussed above, we are of the considered view that merely by applying the BIT method which has no legal existence and merely on the basis of MDF agreement vide which taxpayer has received part reimbursement of the AMP expenses incurred by it duly disclosed this expenditure in Form 3CEB and in TP study, so called excessive AMP expenditure of the taxpayer cannot be treated as international transactions ids 92B of the Act. So, we cannot infer the existence of international transactions qua AMP expenses between taxpayer and AE beyond the reimbursement already made by the AE under MDF Agreement. ..

24. Ld. TPO by adopting the intensity approach qua trading segment and network segment proceeded to make alternative benchmarking as a substantive adjustment. In AY 2012-13, similar adjustment was made by the Id. TPO by adopting the intensity approach which w>as held not to be sustainable by the coordinate Bench of the Tribunal in ITA No.6813/Del/2017 for AY 2012-13 order dated 07.01.2020 in taxpayer's own case by following the order passed by the coordinate Bench of the Tribunal in taxpayer's own case in earlier years.

25. So, in view of what has been discussed above and by following the aforesaid order passed by the coordinate Bench of the Tribunal, we are of the considered view that scope and value of the international transactions cannot be extended to the so called excessive expenditure incurred by the taxpayer on account of non-routine AMP beyond the reimbursement already received by the tax payer under MDF agreement and as such, adjustment made by the TPO on account of AMP expenses is not sustainable in the eyes of law, hence, ordered to be deleted."

17.1 Following the aforesaid decisions rendered by various Coordinate Benches in ten prior assessment years on this issue, we hold that the transfer pricing adjustments to the arm's length price of the alleged international transaction of AMP expenditure of the appellant is bad in law and liable to be deleted. Grounds 4 to 20 are accordingly allowed.

14. Thus AMP expenditure are held to be incurred by assessee in the course of its own business in India and the same was not incurred on behalf of the AE. In the absence of an international transaction as defined under the Act, no benchmarking of AMP can be undertaken. Thus the TPO also erred in applying the Bright Line Test / intensity approach contrary to the settled legal position and contrary to the consistent findings rendered in the Assessee's own case in earlier years. Therefore, based on the above discussion Substantive AMP adjustment in manufacturing segment by applying TNMM intensity approach of INR 863,18,68,537/-, Substantive AMP adjustment in manufacturing segment by applying TNMM intensity approach of INR 863,18,68,537/-, Protective AMP adjustment in manufacturing segment by applying BLT of INR 1783,92,66,237/, Substantive AMP adjustment in trading segment by applying BLT of INR 339,23,89,070/- and Substantive AMP adjustment in networking segment by applying TNMM intensity approach of INR 475,63,50,713/- are liable to be deleted.

15. The **second issue, relates to Transfer Pricing Adjustment in Manufacturing and Networking Segments**. Now in respect of inclusion and exclusion of comparables in the Licensed Manufacturing Segment covered by Ground 23 we find that an adjustment of Rs. 817,29,76,086/- was made by the TPO to the arm's length price of the international transactions in the manufacturing segment under TNM method by altering the comparables. The assessee has challenged exclusion of Six (06) comparables which accordingly to the assessee are to be included as they are functionally similar and passed the filters of quantitative criteria applied by TPO. Ld. AR further requested exclusion of one company on the grounds that same was not functionally similar with the assessee.

16. The assessee has taken total Eight (08) comparables for benchmarking international transactions pertaining to manufacturing segment, out of which TPO has rejected Six (06) comparables and included Two (02) more comparables and accordingly, computed the arm's length margin at 13.44% as against 10.75% worked out by the assessee and made the adjustment of INR 817,29,97,806/- on substantive basis for manufacturing segment. Ld. DRP has confirmed the order of TPO wherein Ld. DRP directed AO/TPO to follow its order in preceding AYs.

17. Aggrieved by the said order, the assessee is in appeal wherein assessee requested for the inclusion of Six (06) comparables excluded by TPO and further requested for the exclusion of one comparable which was included by TPO in final set of comparables.

18. Taking up issue of inclusion of comparables, relying the quarterly results of **Value Industries** available at 1740-1741 of the paperbook and **Videocon**

Industries at 1749-1750 of the paperbook ld. Counsel has submitted that same would allow the Ld. TPO to rebuild the annual financials and therefore, the company should be included in the final set of comparables. This Tribunal's in Assessee's own case for AY 2015-16 has accepted in principle that companies with different financial year ending can be taken as comparable if the quarterly results of the company are available in public domain and further reliance is further placed on the following judgements for the proposition that if the quarterly data in respect of a company is available, it cannot be excluded on the ground of different financial year ending:

- *DCIT v. McKinsey Knowledge Centre India (P.) Ltd. [IT Appeal No. 2195 (Delhi) of 2011, dated 13-09-2013]* affirmed by the Hon'ble High Court of Delhi in *CIT v. McKinsey Knowledge Centre India (P.) Ltd. [IT Appeal No. 217 of 2014, dated 27-03-2015]*
- *CIT v. Mercer Consulting (India) (P.) Ltd. [2016] 76 taxmann.com 153*

19. Further, it is demonstrated by relying extracts from the annual report of the company are given at pages 2-3 of AR compilation/pages 1741-1742 of the paperbook that **Value Industries** is engaged in the similar industry as that of the Assessee's manufacturing segment. It is engaged in manufacturing of consumer electronic goods including washing machine, air conditioners, refrigerators, and other home appliances. **Videocon** is also engaged in the same industry as that of the Assessee's manufacturing segment and is engaged in manufacturing of products such as washing machine, refrigerators, televisions, air conditioners, etc., which are exactly the kind of products being manufactured by the Assessee.

Both the companies pass the quantitative filters applied by the Ld. TPO. Thus these two comparable deserve to be included.

20. In regard to **Trend Electronics Ltd.,** we find that the TPO has excluded the this comparables on the ground that it had different financial year whereas the arguments of Ld. AR is that quarterly results of the company are available in public domain and company is functionally similar and also passed the quantitative filters applied by the TPO. Ld. Counsel has demonstrated by referring to financials at page 4 of AR compilation/page 1733 of the paperbook, that this company in AY 2016-17 has modified its financial year end from December to March, and hence, for AY 2016-17, the financial statements end in March 2016. The Ld. DR submitted that this comparable be sent back to the Ld. TPO for verification if for the present AY 2016-17, the financial year ending is March. Same was not disputed by ld. Counsel, thus the issue for inclusion of Trend Electronics Ltd. is remanded back to the Ld. AO/TPO for verification that the financial year ending of Trend Electronics for AY 2016-17 is March and not December.

21. In case of **IFB Industries Ltd.,** this company is rejected by TPO as the company has failed the manufacturing filter as it has less than 75% earning from the manufacturing activity. Ld. AR drew our attention to the financial statements of the company as per which company IFB Industries Ltd. is having total receipts

of INR 1,91,583 Lakhs which include sales and services both and after excluding Receipts from services from the gross-operating revenue, the net sales coms to INR 1,50,094 lacs i.e. revenue from operations as against which the total manufacturing sales was of 134700 and thus, percentage of manufacturing sales viz a viz total revenue from operation comes to 80.74%. It is evident from the figures, the actual revenue from manufacturing function as a % of total revenue from all operations is 89.74% (page 13 of the AR compilation/1752 of the paperbook). Therefore it has to be considered to have pass the filter of manufacturing turnover of more than 75%. Further, we find that IFB Industries is engaged in the manufacture of products such as washing machine, microwave, air conditioner, etc., which is similar to the products being manufactured by the Assessee in its Licensed Manufacturing segment (page 14 of AR compilation/ pages 1753 of the paperbook) and therefore, it is a valid comparable to be included in the final set of comparables.

22. In case of **Penguin Electronics Ltd.** ld. TPO has rejected the company as it is allegedly having diversified businesses and therefore, are not valid comparable. The argument of Ld. AR is that the Penguin Electronics Ltd. was allowed to be included as valid comparable in AY 2015-16 by the Tribunal. We find that the functional profile of the company has remain unchanged in the subject AY and therefore, following principle of consistency, the company should be included in the final set of comparables.

23. Coming to **Amber Enterprises (India) Pvt. Ltd.**, It was submitted that this company was erroneously excluded by the Ld. TPO on the ground of product dissimilarity. In this regard, it is submitted that Amber Enterprises is into the business of manufacturing of air conditioners which is largely similar to the product profile of the Assessee in its licensed manufacturing segment and therefore, the contention of the Ld. TPO is liable to be rejected that the company has different product profile from that of the Assessee and consequently, the company should be included as a valid comparable. We have considered the functional profile of the company at page 18 of AR compilation and are of considered view that only common product is air conditioners and that only makes the substantial revenue contribution while assessee is in diversified white goods segment. **Thus this comparable was rightly rejected.**

24. Now coming to the issue of exclusion of the comparable companies which are included by the TPO, it is seen that TPO has included **M/s. Frog Cellstat Ltd**. as valid comparable as it is engaged in similar line of business. Ld.AR submits that this comparable company is very small company as compared to the business of the assessee and in preceding years, the Co-ordinate Bench of Tribunal also rejected the same as valid comparable.

25. On the other hand, Ld. CIT DR supports the order of TPO and submits that the TPO has rightly included the same in the final set of comparable.

26. After considering the facts and arguments of both the parties, we find that company Frog Cellstat Ltd. was excluded under the identical circumstances in immediately preceding year where the Co-ordinate Bench has made the following observations:-

> *46. “..... In our considered view, the dissimilarities in product profile is too stark, vitiating the comparability with the assessee. The products manufactured by this company-repeaters are used by mobile service providers as a telecom equipment. It does not fall under the category of consumer electronics or home appliances. The goods manufactured by the appellant are TVs, refrigerators, mobiles, microwave ovens, air conditioners etc.. These products form part of rapidly growing section of the Indian market. Whereas products meant for industrial and technical use face very different economic dynamic and the risks involved are wholly dissimilar. Another factor which differentiates them is the R&D function. While the assessee is wholly dependent on its AE for the R&D, Frog Cellsat has its own R&D function. This further vitiates functional similarity. In view of the aforesaid there is little justification in including this comparable. It is, accordingly, directed that Frog Cellsat Ltd. be excluded from the list of comparables."*
>
> - *The company's functional profile has not changed in the relevant AY, i.e, AY 2016-17. (refer to extracts of annual report on page 20 of AR compilation/pages 1761-1763 of the paper book).*
> - *The company has a miniscule revenue of INR 84.92 cr whereas the Appellant has revenue of INR 32,084 cr in Licensed Manufacturing segment. (refer to page 21 of AR compilation/pages 1763-1764 of the paper book)*
> - *R & D function:-The company has a design and development center & owns intangibles. (refer to page 22 of AR compilation/page 1764 of the paper book).”*

27. As there is no material change in the financial of this company accordingly, by respectfully following the decision of the coordinate bench in preceding year,

we direct the AO/TPO to exclude this comparable from the final set of comparables.

28. In the light of aforesaid discussion we direct the TPO/AO to re-compute the transfer pricing adjustment of international transactions in manufacturing segment by including/excluding the comparables as per above directions. Thus, Ground of appeal Nos. 23 is partly allowed.

29. **Ground of appeal No.24** raised by the assessee is with respect to the transfer pricing adjustment of INR 436,80,85,062/- in networking segment. The assessee has taken Five (05) companies as valid comparables to work out the transfer pricing adjustment under TNMM. The TPO has rejected Two (02) comparables and included fresh Ten (10) comparables as valid comparables and accordingly, proposed the adjustment by taking thirteen (13) comparables. Thereafter, TPO has worked out the arm's length margin at 10.41% and made adjustment of INR 4,36,80,85,062/- on substantive basis for international transaction relating to networking segment.

30. Before us, at the outset, Ld. AR submits that 07 comparable companies included by the TPO namely, PCS Technologies Ltd. Hughes Communication India Ltd., Planetcast Media Services Ltd., Altruist Technologies Pvt. Ltd., Avantel Ltd., AT & T Global Network Services India Pvt. Ltd. and Bharti Airtel

Ltd. were also included by the TPO to work out the transfer price adjustment under networking segment in immediately preceding year i.e. in AY 2015-16 where the Co-ordinate Bench of the Tribunal vide its order in ITA No. 9482/Del/2019 vide order dt.27.07.2024 has excluded these companies by holding that these companies are service companies and are not engaged in the business of trading of any goods. Ld. AR thus submits that these companies should be excluded in this year also as there is no change in the activity of the assessee nor of any of these companies. Ld.AR also submits a detailed chart wherein he has distinguished the nature of activities carried out by all these companies, which is placed on records.

31. On the other hand, Ld. CIT DR for the Revenue supports the order of TPO and stated that AO has rightly included these companies in the final set of comparables and he prayed accordingly.

32. After considering the facts, we find that the Co-ordinate Bench under the identical circumstances, has included these companies in the final set of comparable by observing in para 39 as under:-

> *39. "We have perused the annual reports and financials of these companies that have been taken as comparables to the Networking segment of the assessee. We find merit in the contention that all these seven companies are service companies and are not engaged in trading of any goods. The services provided by these companies range from IT services, telecom services, content based services, digital media distribution services, to mobile and internet services. The assessee, in contrast,*

> *derives 95% of its revenues in this segment from sale of telecom equipment to Reliance. The design, installation, and commissioning fee is a small part of the composite sale agreement and this fee is a meagre 5% of the total revenues. In these circumstances, there is no justification in permitting these companies as comparables. These service companies are, therefore, ordered to be excluded from the list of comparables."*

33. As there is no material change in the facts and circumstances as existed in the preceding year, thus, by respectfully following the observations of the Co-ordinate Bench in assessee's own case for AY 2015-16 and further looking to the facts that Revenue has failed to controvert such findings of the Co- ordinate Bench, we direct the AO/TPO to exclude these 07 companies from the final set of comparable. Further, one more comparable company namely Verizon Communication Pvt. Ltd. which ash been included by the TPO by holding that this company is engaged in providing networking services and thus, is similar to the appellant company. The claim of the assessee is that this company is engaged as service provider for dedicated internet lease license services, provision for Multi-Protocol Level Switching and international Private Leased Circuits which is not at all comparable activity carried out by the assessee under the networking segments. Ld.AR further submits that this company has failed the revenue filter it derived 99.99% of revenue from provision of services whereas appellant derived 92% of revenue from the trading activities thus it deserves to be excluded.

34. On the other hand, Ld. CIT DR submits that company is a valid comparable and deserves to be included. He further submits that its business is more or less similar to the business of the assessee which is evident from page 24 of the TPO's

order wherein TPO has pointed out from the website and annual report of the company that it engaged in the business of networking services. He thus, prayed for the inclusion of the same.

35. Heard the contentions of both the parties and perused the material available on record. We find that the assessee has been able to demonstrate that function performed by company namely Verizon Communications Pvt. Ltd. is mainly of providing internet lease line services and it is related service product and its major part of revenue is coming from services segment and therefore, cannot be held as a valid comparable with the appellant who is into trading under this segment. Accordingly, we direct the AO/TPO to exclude this company as a valid comparable. The Ground of appeal No.24 raised by the assessee is allowed.

36. In respect of the networking segment, it is submitted that the segment is predominantly a trading segment, with nearly 92% of the total revenue from this segment being derived from its trading activities, whereas the companies introduced by the TPO are service providers and therefore not comparable. It is submitted that 8 comparables, being PCS Technology, Hughes Communication India Ltd., Planetcast Media Services Ltd., Bharti Airtel Ltd., AT&T Global Network, Altruist Technologies Pvt. Ltd., Avantel Limited, and Verizon Communications Pvt. Ltd. are liable to be excluded from the final list of comparables. It is submitted that except Verizon Communications, the other 7

companies have been excluded by this Hon'ble Tribunal in Assessee's own case for AY 2015-16 on the ground of functional dissimilarity, and following the said order, these companies are liable to be excluded from the final set of comparables. It is also submitted that the functional profile of these companies has not changed in the subject AY and therefore, the decision of this Hon'ble Tribunal in AY 2015-16 is squarely applicable.

37. As far as **Verizon Communications Pvt. Ltd** is concerned, we find from the submission of ld. Assessee, that it is principally engaged in the provision of dedicated internet lease line services, MPLS (Multi-Protocol Label Switching) services, and IPLC (International Private Leased Circuits), and is thus predominantly a service provider, which renders it functionally incomparable to the Assessee's networking segment. ***(refer to page 56 of AR compilation/1793-1794 of the paperbook).*** Verizon derives 99.99% of its revenue from rendering services ***(refer page 54 of AR compilation/page 1794-1795 of the paperbook)***, whereas the assessee derives about 92% of its revenue in the networking segment from trading activities. Therefore, while the said company did not fall for specific consideration before the Tribunal in the Assessee's own case for AY 2015-16, the principle laid down is equally applicable that a company primarily engaged in provision of services cannot be regarded as a valid comparable for benchmarking Assessee's pre-dominantly trading-based networking business. The Ground of appeal No.24 raised by the assessee is allowed.

38. **Ground no. 25,** arises out of alleged incorrect margin computation of the Assessee and comparable companies in the manufacturing and networking segment. In the manufacturing segment, the Ld. TPO recomputed the operating margin of the Assessee at 8.68%. vis-a-vis 10.75% as computed by the Assessee and in the networking segment, the Ld. TPO recomputed the operating margin of the Assessee at 3.44%. vis-a-vis 6.08% as computed by the Assessee. The issue of incorrect computation of the margins of the Assessee as well as the comparables also arose in AY 2014-15 and AY 2015-16, wherein this Tribunal remanded the calculation of the margins to the Ld. TPO. This Tribunal had directed that all items of income and expenditure which have a nexus with the business operations of the Assessee are to be considered whereas any financing or non-recurring/non-operational item is to be excluded. We, thus find that in immediately preceding years, Co-ordinate Bench of the Tribunal has accepted the contention of the assessee of incorrect computation of the margins of the appellant as well as the comparables and remand the matter of the file of TPO with direction that all items of income and expenditure which have nexus with the business operations are to be considered and non-operational items are to be excluded. We find that similar facts exist in the year before us, and, therefore, we remand this issue back to the file of AO / TPO with the same direction as has been made in AY 2014-15 & 2015-16. Accordingly, Ground of appeal No.25 raised by the assessee is allowed for statistical purposes.

39. **Ground No. 26** relates to the alleged error committed by ld. TPO to consider foreign exchange gain as non-operating in nature for the purpose of computation of the margins of the Assessee as well as the comparables and this issue now stands covered in the Assessee's favour by this Tribunal's order for AY 2011-12 [ITA No. 2105/Del/2016] which has also been upheld by the jurisdictional High Court in ITA No. 453/2024. Rather issue itself is settled and reliance is also placed on the following judgements:

- *PCIT vs. Ameriprise India Pvt. Ltd. [2017] 78 taxmann.com 373 (Delhi) [23-03-2016]*
- *PCIT v. Global Logic India Ltd. [2023] 155 taxmann.com 483 (Delhi) [11-09-2023]*
- *PCIT v. Fiserv India P. Ltd. [2018] 92 taxmann.com 471 (Delhi) [06-01-2016]*

40. We thus find that this issue was decided in assessee's own case for AY 2011-12 where in ITA No. 2105/Del/2016 the Co-ordinate Bench of Tribunal has confirmed the directions of Ld. DRP of including the forex gain as operating income. It is further seen that this order of the Co-ordinate Bench stood confirmed by the Jurisdictional High Court in ITA No.453/Del/2024 vide order dated 22.08.2024 therefore, by respectfully, following the judgement of the Hon'ble Jurisdictional High Court in assessee's own case in AY 2011-12, we direct the AO to include the foreign exchange gain as operating income for computing the margins of the assessee as well as of the comparables. Ground of appeal No.26 raised by the assessee is accordingly allowed.

41. **Ground No. 27** relates to the non-grant of working capital adjustment and ld. Counsel submits that despite binding directions of the Ld. DRP and in violation of Section 144C(10) of the Act, the ld. TPO denied working capital adjustment in manufacturing and networking segment. Our attention was drawn to the directions of DRP in AY 2016-17 at para 3.1.1.1 on page 25 of the appeal set or internal page of the DRP directions. We find that this is a recurring issue and working capital adjustment has been consistently given to the Assessee in the prior years. Thus, following the principle of consistency, we direct the AO/TPO to allow the working capital adjustments in both manufacturing and networking segments by following directions of the Ld. DRP are binding on the Ld. AO u/s 144C(10) of the Act and following the mandate of the section as well as principle of consistency, working capital adjustment should be granted to the Assessee. Accordingly the ground stands allowed.

42. **Ground No. 28** raised by the assessee is with respect to wrong computation of proportionate adjustments in respect of transactions in manufacturing and networking segments.

43. It is seen that this issue has already been considered and decided by the Co-ordinate Bench of Tribunal in assessee's own case for AY 2015-16 wherein CO-ordinate Bench has followed its order for AY 2013-14 & 2014-15 and made the following observations in para 51 of the said order:-

> *51. "The last common ground pertaining to the Trading, Networking and Manufacturing segments' adjustment is Ground no. 28 wherein the appellant has contended that the manner of computation of proportionate adjustment is erroneous. It was submitted that in prior years (A.Yrs. 2013-14 and 2014-15) similar errors were committed while determining the proportion of AE transactions and the Tribunal had remanded the matter back to the TPO for reconsideration. Ld. CIT(DR) did not object to the issue being remanded back to the TPO. We, accordingly, direct the TPO to determine the proportionate adjustment, if any, in an appropriate manner which considers the transactions with the AEs and excludes the unrelated party transactions after taking into account the computations submitted by the assessee."*

44. As there is no change in the facts and this issue has already been settled by the Co-ordinate Bench in assessee's own case accordingly, we direct TPO to determine the proportionate adjustment, if any, in appropriate manner by consider the transactions with AEs and excluded the unrelated party transactions, after taking into account, the computation submitted by the assessee. With these directions, we direct the AO to correctly compute the proportionate adjustment in the year under appeal. Accordingly, Ground of appeal No.28 raised by the assessee is allowed for statistical purposes.

45. **Ground of appeal Nos. 29 to 31** raised by the assessee are with respect to the transfer pricing adjustment made of INR 1732,93,94,316/- on account of Royalty payment by rejecting TNMM applied by the assessee and by applying CUP method as the most appropriate method. Admittedly, the Assessee is engaged in licensed manufacturing of colour televisions, washing machines, refrigerators, air conditioners, and mobile phones under license agreements with SEC Korea, which provides the requisite technical know-how and assistance. The

Assessee has been paying royalty to SEC Korea since 2004-05. Given the close nexus between the royalty payment and the manufacturing business, the Assessee did not benchmark this transaction separately; instead, it was combined with other manufacturing segment transactions and benchmarked on an aggregated basis using TNMM to arrive at an arm's length price for the manufacturing segment. The Ld. TPO rejected the Assessee's aggregated TNMM approach and applied the CUP method, relying on three third-party royalty agreements (a) Rosetta Inpharmatics Inc. and Monsanto Co., (b) Monsanto Co. and Calgene II, and (c) Paradigm Genetics Inc. and Monsanto Co., to determine an ALP of 1.50%, resulting in a proposed adjustment of Rs. 1732,93,94,316/-**.** The Ld. DRP upheld the TPO's benchmarking, and the adjustment was subsequently sustained in the final assessment order.

46. In respect of this adjustment, the ld. Counsel for the Assessee submits that the three royalty agreements introduced by Ld. TPO relate to a completely different industry, i.e., agricultural industry. This is a recurring issue and same three royalty agreements were also introduced by the Ld. TPO for AY 2015-16 wherein, this Tribunal rejected these comparables, held that the royalty transactions selected by the Ld. TPO do not even have a modicum of similarity with the royalty transactions entered into by the Assessee. Further, the Tribunal further affirmed that when relevant data of comparable transactions is not available, CUP method should not be used and TNMM can be an appropriate method to determine the arm’s length price.

47. Ld. Counsel also submitted that this Hon'ble Tribunal has further held in AY 2015-16 that licensing arrangement of the Assessee is an inextricable part of the manufacturing segment and must be bundled with other transactions in the manufacturing segment. Furthermore, once TNMM has been accepted as the most appropriate method for all the international transactions of a segment, it is not permissible for the Ld. TPO to cherry pick one particular transaction like royalty and subject the same to a separate benchmarking as it results in an impermissible double adjustment. Reliance was also placed on ***Magnetti Marelli Powertrain India Pvt Ltd vs DCIT: 389 ITR 469(Del),*** affirmed by Hon'ble Supreme Court vide order dated November 3, 2017in SLP(C) no. 15244 of 2017).

48. We find that the Royalty agreements introduced by the Ld. TPO under CUP method belong to a completely different industry, i.e, Agricultural Industry. The Appellant (in its licensed manufacturing segment) is engaged in manufacturing of consumer electronics & home appliances such as mobile phones, televisions, washing machines, refrigerator etc. and the products are sold under a B2C model to the general public. The technology and other economic parameters in the electronics and communication industry is highly unique, fast evolving and affected by global factors. The three comparable royalty agreements introduced by the Ld. TPO involve agricultural companies, engaged in developing products and tools in relation to seeds development which help farmers/ crop-growers make more efficient use of resources such as energy/ water/land etc. It is settled law that among other factors such as geographical market where the transaction takes

place, strong similarity of product is required for application of CUP method and these factors are clearly not satisfied here.

49. Ld. CIT Dr submits that TNMM is not an appropriate method to work out the arm's length price of royalty as the same is not inextricably linked with other transactions. The payment of royalty is not under a "package deal" comprising of numerous transactions. Each transaction is separate and diverse. Therefore, transfer pricing norms require separate benchmarking of each transaction thus he supports the application of CUP method. For this ld. CIT DR has placed reliance on the judgement of hon'ble Delbhi High court in the case of ***Magneti Marelli Power Train P. Ltd. vs DCIT*** *reported in* ***[2016] 75 taxmann.com 213 (Del).*** The Hon'ble High Court has decided the second substantial question of law in favour of assessee which was taken before the court as under:

> *2. Whether the Income Tax Appellate Tribunal was right in holding that Transaction Net Margin Method should not be applied for benchmarking / computing arm's length price in respect of transactions relating to "technical fee"?*

50. Ld. CIT DR submits that in Para 17 of the order, the hon'ble court has decided this question in favour of assessee, thus the TNMM method cannot be applied for benchmarking the transaction related to technical fee. He prayed accordingly.

51. We find that this is recurring issue and stood decided in favour of assessee by the Co-ordinate Bench of Tribunal in preceding years in assessee's own case.

In AY 2015-16 following observations were made by the Tribunal to delete the adjustments made on this score:-

63. "We have considered the rival contentions and examined the material on record. We find considerable merit in the contention of the assessee that the comparable transactions chosen under CUP are devoid of any meaningful comparability. Of all the methods prescribed, CUP is the most rigorous as it compares prices at transactional level. It requires highest level of similarity in terms of subject matter of agreements and transactions in respect of products/services, salient contractual terms, tenure and several other economically relevant characteristics. We find that the TPO's selection of comparable transactions is vitiated as wholly incomparable technologies, products and contracts have been picked up in an arbitrary manner. Such an approach is inimical to the accuracy demanded under CUP We have perused the royalty transactions chosen by the TPO and we note the following glaring dissimilarities that render the entire process untenable:

(a) ROSETTA INPHARMATICS INC (LICENSOR) AND MONSANTO CO (LICENSEE) This agreement pertains to payment of royalty in lieu of the right to use technical knowledge (algorithms and methods) for developing and selling species of animals, plants, plant or animal products, animal progeny, seeds containing a gene lead. It not valid for the relevant year since this agreement started in November 2000 for a period of 3 years and there is no material on record to show that it was in currency for the current year. The Licensor is a laboratory based in Washington which is engaged in provision of genomics services such as genotyping, gene sequencing, and gene expression profiling. The licensee is an agricultural company engaged in developing products and tools to including seeds to help farmers grow crops while using energy, water, and land more efficiently. The licensee uses biotechnology and other advanced methodologies including gene editing to make improvements in the plant DNA to ensure a productive harvest.

(b) MONSANTO CO (LICENSOR) AND CALGENE II, INC (LICENSEE)- The agreement Aloes not even state the date of commencement nor the date of termination of the license. The Licensor is an agricultural company engaged in developing products and tools to including seeds to help fanners grow crops while using energy, water, and land more efficiently and Licensee is a biotechnology research and development firm.

(c) PARADIGM GENETICS INC (LICENSOR) AND MONSATO CO. (LICENSEE) - This agreement was entered on 17 November 1999 and valid for 6 years. Renewal agreement has not been produced. The Licensor is engaged in medical biotechnology and makes use of genomics information obtained from Arabidopsis, for extensions into crop plants via agricultural biotechnology while Licensee is an

agricultural company engaged in developing products and tools to including seeds to help fanners grow crops.

64. *These transactions are ex-facie disparate and do not have even a modicum of similarity at transactional level. We have no hesitation in holding that the approach adopted by the TPO is unsustainable and should be deleted. The adjustment made to the royalty transaction is therefore, held to be invalid and unsustainable in law.*

65. *Since we have held that on merits this adjustment is sustainable, we need not get into the issue of jurisdiction and other ancillary aspects raised by the assessee. These are academic in view of our aforesaid conclusion. As regards the issue of adoption of TNMM versus CUP, it is fair to conclude that if relevant data of comparable transactions (in terms of material aspects like nature of goods and services, geographical markets, contract terms etc) is not available CUP should be eschewed and TNMM can be an appropriate method to determine the arm's length. In the instant case, we have held that the data chosen by the TPO for CUP is wholly inappropriate. Secondly, the TPO has already accepted TNMM for the Manufacturing segment as a whole. There are numerous international transactions in this segment - all these transactions like royalty, purchase of raw materials etc. have been aggregated under TNMM and benchmarked against independent third party comparables. In these circumstances, cherry-picking of one particular transaction like royalty and subjecting the same to a separate benchmarking and adjustment under CUP results in an impermissible double adjustment - once under TNMM and another CUP. This is contrary to the provisions which mandate adoption of only one method as the most appropriate method. A licensing arrangement where technical know-how is used for manufacturing is an inextricable part of the entire segment and we do not find any infirmity in bundling the same with the other transactions of this segment. At the end of the day, if the segment is generating arm's length level of operating profits which is equivalent to or more than profit margin of the comparables, there can be no cause for the Revenue to carry out an exercise of the present kind. Grounds 29-32 are disposed of in terms of the aforesaid observations.*

52. Admittedly there was no change in the circumstances and the observations made by the TPO and also the submissions of the assessee remained the same. The ld. DRP also admitted this fact and directed the AO / TPO to follow its direction given in AY 2015-16 for computation of ALP with respect to the Royalty. Under these circumstances, by respectfully following the observations made by the Co-ordinate Bench of Tribunal in AY 2015-16 in ITA

No.9482/Del/2019, as reproduced herein above, we allowed the Grounds of appeal Nos. 29 to 31 raised by the assessee.

53. **Ground No. 32-35** relates to disallowance of salary paid to expatriate employees. This is a recurring issue which has been decided by this Tribunal in assessee's own case for prior years and by the Hon'ble Delhi High Court in the case of SEC Korea, parent entity of the Assessee which seconded personnel for employment with the Assessee. Ld. AO disallowed a sum of **Rs. 193,80,45,100/-** under section 37(1) on account of salary paid to expatriate employees, holding that the expatriates were, in substance, working for SEC Korea. These findings were upheld by Ld. DRP.

54. It was submitted before us that the expatriate employees were working under the control and supervision of the Assessee in India and were local employees of the Assessee for the relevant period. It is also submitted that the salaries were paid in India and due taxes were duly withheld. Further, it is submitted that the case of the Assessee that the expatriates are the employee of the Assessee is strengthened by the decision of this Tribunal in the matter of the Assessee's parent entity Samsung Electronics Co. Ltd. v. Deputy Commissioner of Income Tax (Int. Taxation), New Delhi [IT Appeal Nos. 65 TO 70 (Delhi) of 2013 & Ors.] (common order for AY 2004-05 to AY 2014-15) wherein it was held that the parent entity do not conduct any business through the expatriates and consequently there is no fixed place PE for SEC Korea through the expatriates.

This has been affirmed by the Hon'ble High Court of Delhi in PCIT, International Taxation v. Samsung Electronics Co. Ltd. ***[2025] 170 taxmann.com 417 (Delhi).***

55. Lastly, it was submitted that the Ld. DRP has directed the Ld. AO to delete this addition and that the Ld. AO has erred in not following the binding directions of the Ld. DRP and hence, has violated Section 144C(10) of the Income Tax Act.

56. Now, from the perusal of the order of Ld. DRP, it is seen that ld. DRP has given clear directions to the AO to delete the adjustment proposed by TPO, the said directions are reproduced as under:

> *3.3.1 **DRP Directions:***
>
> *3.3.1.1 This issue has been considered by the DRP in assessee's case in AY 2014-15 and AY 2015-16 vide directions of even date. The DRP in AY 2014-15 has concluded as under:*
>
> *"6.2 Having considered the submission of the assessee, we are of the view that the Hon'ble ITAT Delhi decision dated 22.03.2018 in case of SEC Korea, reported in (2018) 93 taxmann.com 171 was on the limited issue of whether the expatriated employees seconded in India constituted any fixed place PE in India, in the absence of any business being conducted by the assessee foreign company in India, and where no income was derived through activities of these employees. We have noted that SEC Korea has earned royalty income of Rs. 543.38 crores from the assessee, besides technical services income of Rs. 50.97 crores during the year, therefore it could not be said that SEC Korea had no income from any source in India. It could also not be said that the seconded employees did not assist the assessee through their technical and managerial services for exploiting the technical know-how and trademark licensed by SEC Korea, for which incomes chargeable under the DAA has been earned by the AE of assessee. It is also not the case of the assessee that the seconded employees, by performing the functions in India did not help the parent company.*
>
> *6.3 Having said that, if the seconded employees are held to be part of the technical assistance for exploiting the intangibles licensed by SEC Korea, such payment could be taxed in the hands of the foreign company in terms of Centrica judgment of Hon'ble Supreme Court. Further, the ratio of DRP decision in case of LG Electronics India cannot be imported by the AO in the present case, without identical facts and supporting evidence, as has been extracted in Para 4.7 of the draft assessment order. In the case of LG, the existence of PE was an established and admitted fact, which is not*

> *the case here. The Tribunal decision in case of SEC Korea is clear on this.* ***<u>The AO is therefore directed to delete the proposed adjustment."</u>***
>
> *3.3.1.2 Since the facts of the case are identical, AO is directed to follow the directions as above for AY 2016-17 also.*

57. Thus, from the perusal of above findings, it is clear that ld. DRP has admitted that facts are identical with the facts of preceding year where the coordinate bench of the Tribunal has deleted the additions. However, the AO ignored such clear direction of ld. DRP given for the year under appeal, and by wrongly reproduced the directions given in AY 2014-15, where the DRP had directed the AO to verify about the status of further appeal in the case of SEC, Korea (supra) made the disallowance. The AO further observed that the Department filed an appeal before Hon'ble High Court against the order of Tribunal in the case of SEC, Korea (supra) thus, to keep the issue alive, he made the disallowance. It is seen that in AY 2014-15, the Co-ordinate Bench of ITAT in assessee's own case in para 47 to 50 deleted the additions made on this issue, and therefore in the present year, ld. DRP issued directions to delete the proposed adjustment.

58. It is further seen that order of the Co-ordinate Bench in AY 2014-15 was challenged by the revenue before the Hon'ble jurisdictional High Court in ITA No. 425/2024 however, from the perusal of the order of hon'ble high court as filed before us in the common case law compilation at pages 16-17, no substantial

ground of appeal was taken by the revenue on this issue. The relevant order is reproduced as under:

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 425/2024

THE PR. COMMISSIONER OF INCOME TAX -7....Appellant
Through: Mr. Ruchir Bhatia, SSC and Mr. Anant Mann, Mr. Pratyush Gupta, JSCs.

versus

SAMSUNG INDIA ELECTRONICS PVT. LTD.....Respondent
Through: Mr. Himanshu S. Sinha, Mr. Prashant Meharchandani, Mr. Jainender Singh Kataria, Advocates.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER
08.08.2024

%

CAV 371/2024

Since learned counsel for the caveator/respondent has entered appearance, the caveat stands discharged.

CM APPL. 45322/2024 (760 days delay)

Bearing in mind the disclosures made, the delay of 760 days in refilling the appeal is condoned.

The application shall stand disposed of.

ITA 425/2024

1. The Principal Commissioner impugns the order of the Income Tax Appellate Tribunal [‘**Tribunal**’] dated 31 August 2020.

2. We note that both the issues in question i.e. Advertisement, Marketing and Promotion [‘**AMP**’] as well as the exclusion of M/s

This is a digitally signed order.
The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above.
The Order is downloaded from the DHC Server on 09/08/2024 at 19:47:46

OTS E-Solutions Pvt. Ltd as a comparable stands answered against the appellant in light of the judgment dated 05 August 2024 rendered by us on ITA 419/2024.

3. Consequently and following the aforesaid decision, this appeal shall stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 8, 2024/*vp*

59. Since this issue attained finality as no further appeal is preferred by the revenue against the order of Tribunal deleting the disallowance in AY 2014-15 in ITA No. 9481/Del/2019 in assessee's own case, therefore, the action of AO to include the same solely for sole reasons to keep this issue live is patently incorrect and contrary to the facts as narrated above. Accordingly, we direct the AO to delete the disallowance made. Ground of appeal Nos. 32 to 35 raised by the assessee are hence, allowed.

60. Finally, in AY 2016-17, left out grounds Nos. 1-4 are general in nature while Ground No. 36, dealing with interest and Ground No. 37, dealing with levy of penalty, are merely consequential in nature, thus no specific discussion is needed.

ITA No. 1955/Del/2021 for AY 2017-18

61. Based on aforesaid determination of issues in AY 2016-17 as we consider ITA No. 1955/Del/2021 for AY 2017-18, we find that that barring ground nos. 12 to 14, the grounds raised in both years are identical, thus except to that limited extent, the findings returned by us in respect of the corresponding grounds for AY 2016-17 would apply *mutatis mutandis* to AY 2017-18 as well.

62. Also Ld. Counsel has drawn our attention to the grounds of appeal raised in AY 2017-18 to demonstrate how the grounds in two years are similar, the same is described as follows.

62.1 Ground No. 1 is general in nature and does not require separate adjudication.

62.2 Ground Nos. 2 to 11 raised in the appeal for AY 2017-18 pertain to the adjustment on account of AMP expenditure and correspond to Ground Nos. 5 to 22 raised in AY 2016-17. Save and except the difference in the quantum of addition, the grounds are materially identical and, therefore, the detailed submissions already advanced in AY 2016-17 are not being repeated for the sake of brevity. Since this issue stands covered in favour of the Assessee by the orders of this Tribunal in the Assessee's own case for AY 2005-06 to AY 2015-16, and the orders of this Tribunal for AY 2011-12 to AY 2014-15 have also been upheld by the Hon'ble jurisdictional High Court, the AMP adjustment of INR 1813,71,15,163/- *[substantive AMP adjustment of INR 254,16,44,246/- made in trading segment by applying BLT + protective AMP adjustment of INR 1559,54,70,917/- made in manufacturing segment by applying BLT]* made in AY 2017-18 is liable to be deleted.

62.3 Ground Nos. 15 to 17 in the appeal for AY 2017-18 deal with the transfer pricing adjustment to the royalty payment made under the manufacturing segment and are identical to Ground Nos. 29 to 31 raised in AY 2016-17. Accordingly, the discussion already made in relation to this issue in the appeal for AY 2016-17 applies for the present year as well. Therefore, the royalty adjustment of INR 2172,68,08,091 made in AY 2017-18 is liable to be deleted.

62.4 Ground Nos. 18 to 21 in AY 2017-18 relate to the disallowance of salary paid to expatriate employees and correspond to Ground Nos. 32 to 35 raised in AY 2016-17. The issue is covered in favour of the Assessee by the orders of this Hon'ble Tribunal in the Assessee's own case for AY 2014-15 and AY 2015-16, wherein identical disallowances were deleted. Accordingly, the disallowance of INR 224,65,05,444/- made in AY 2017-18 on account of salary paid to expatriate employees is liable to be deleted.

62.5 Ground No. 23 in AY 2017-18, relating to the charging of interest, corresponds to Ground No. 36 in AY 2016-17, while Ground No. 24, relating to initiation of penalty proceedings, corresponds to Ground No. 37 in AY 2016-17. These grounds are consequential in nature.

63. Now coming to the **ground no. 12-14,** arising out of transfer pricing adjustment of Rs. 177,72,26,294/- made to the Assessee's networking segment. Brief facts leading to this issue are that in this year the Appellant has separately benchmarked the transactions in networking segment for determining the ALP. In case of international transaction of import of telecommunication equipment from

the parent company i.e. SEC Korea, assessee benchmarked this transaction by selecting itself as tested party and applied TNMM as MAM, and used Berry Ratio as the PLI. Like earlier years, Appellant adopted distributor companies as comparables to this transaction. Regarding other set of international transaction of availing network support services of network design, installation and commissioning and network maintenance services from its AE, i.e. SEC Korea [through its Project Office in India ('SEC PO')]. The assessee has separately benchmarked this transaction by selecting SEC PO as tested party, since it was the least complex entity. The assessee adopted TNMM as MAM and OP/OC as PLI and took service comparables to determine the ALP. The assessee claimed that "Import of Network Equipment segment" and "availing of services for networking business" are different transactions and not even interlinked with each other, therefore, the same were benchmarked separately i.e. by following 'segregated approach'. The TPO rejected the segregate approach of the assessee and has benchmarked the transactions both in "Import of Network Equipment segment" and "availing of services for networking business" transaction on aggregate basis by selecting the Appellant as tested party, TNMM as MAM and OP/OR as PLI. The TPO has selected comparables engaged in provision of services to benchmark the aggregated networking segment of the Appellant and worked ot the adjustment of INR. 177,72,26,294/-.

64. In this context out attention was drawn by ld. Counsel of assessee to the the benchmarking approach adopted by the Assessee in its TP study, and same is summarized below:

(a) Import of Telecommunication Equipment from SEC Korea for Networking Business (Distribution)

64.1 The Assessee's first international transaction involved import of telecommunication equipment from SEC Korea for distribution to third-party customers, generating revenue of Rs. 6437,59,25,441/- during the year. The Assessee played a **limited role** procuring equipment **only against confirmed orders, selling on a high sea sales basis** (billed to SIEL and transferred via endorsement of Bill of Lading), **with customs clearance** and delivery handled **directly by the customer**. Accordingly, the Assessee **merely obtained flash title** to the goods, bearing **no inventory risk** and **maintaining no** warehouse. ***(refer pages 80–81 of PB Vol. 1 / internal pages 57–58 of TP report).*** Given its characterization as a low-risk distributor, the Assessee selected itself as the tested party, applied the "Other Method" as MAM, and used Berry Ratio (GP/VAE) as the PLI, with distributor companies as comparables — consistent with prior years. During the year, SIEL's GP/VAE ratio of 1.43 times exceeded the arm's length standard of 1.38 times (65th percentile). ***(refer paras 6.4.1–6.4.11 of TP report, pages 148–158 of PB).***

(b) Availing Network Support Services from SEC Korea for onward provisioning to Customer in Networking Business (Services)

64.2 The Assessee's second international transaction involved availing network support services — comprising network design, installation, commissioning, and maintenance — from SEC Korea through its Project Office in India ('SEC PO'), under the Technical Assistance Support Service Agreement, for onward provisioning to end-***customers.*** The value of services availed was INR 60,17,75,201/-. (refer para 5.6 of TP report, page 83 of PB). Given the distinct FAR profile of this transaction vis-à-vis the equipment import transaction, the Assessee benchmarked it separately, selecting SEC PO as the tested party (being the least complex entity), applying TNMM as MAM and OP/OC as PLI, with service companies as comparables. SEC PO earned an NCP of 10.06%, which fell below the 35th percentile arm's length margin of 10.36%. ***(refer paras 6.5.1–6.5.12 of TP report, pages 159–191 of PB Vol. 1).***

65. Ld. TPO aggregated the 'Import of Network Equipment' and 'availing of services for networking business' transactions, selected the Appellant as tested party, and applied TNMM with OP/OR as PLI, using service-sector comparables. The final list of comparables is at ***pages 30–32 of the appeal set / internal pages 13–15 of the DRP effect order.*** The Ld. DRP upheld the rejection of Berry Ratio

on the ground that the Appellant was carrying out warehousing activities a finding that is wholly contrary to the record.

66. In the instant year, profit of INR 6437,59,25,441/- earned from distribution business of network equipment. By taking it as a low-risk distributor, assessee benchmarked this transaction by selecting itself as tested party and applied TNMM as MAM and used Berry Ratio as the PLI. Second type of international transaction under this segment is availing network support services in the nature of network design, installation and commissioning and network maintenance services from its AE, i.e. SEC Korea [through its Project Office in India ('SEC PO')], as per the terms of the Technical Assistance Support Service Agreement, for onward provisioning to the end-customer. Total value of INR 60,17,75,201/- of services were availed by the assessee in the present year which is very insignificant looking to the total value of import and profit earned from import of networking equipments thus they both are neither interlinked and have separate nature. The transactions should be benchmarked separately unless they are so inextricably linked that one cannot survive without the other.

67. The Hon'ble Punjab & Haryana High Court in **Knorr Bremse India (P) Ltd. vs. ACIT, reported in (2016) 380 ITR 307 (P&H)** held that, several transactions between two or more AEs can form a single composite transaction, if they are closely linked transactions and the onus is always on the assessee to establish that such transactions are part of an international transaction pursuant to

an understanding between various members of a group. Further, each component may be priced differently also, but it will have to be shown that they are inextricably linked that one cannot survive without other.

68. The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2022 as available at pages 68 to 70 of case law compilation, provides following guidance on aggregation of transactions:

> *"3.9. Ideally, in order to arrive at the most precise approximation of arm's length conditions, the arm's length principle should be applied on a transaction-by-transaction basis. However, there are often situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis...*

69. Thus, the action of the Assessee of benchmarked this transaction separately by selecting SEC PO as tested party and by adopting TNMM as MAM and OP/OC as PLI and took service comparables to determine the ALP cannot be discarded. Accordingly, we approved the segregate approach adopted by the assessee for benchmarking both the transactions separately.

70. As with regard to justification for adopting Berry Ration, Ld. Counsel has submitted that the Assessee performs limited trading functions in the import of telecommunication equipment without bearing any risks, and is appropriately categorized as a limited-***risk distributor.*** It neither performs any function nor assumes any risk in relation to the value of goods reflected in its P&L account.

Since COGS is a mere pass-through and a non-value-added expense, Berry Ratio (GP/VAE) is the most appropriate PLI it is specifically suited to situations where the value of goods is irrelevant to profit generation and profits are directly linked to operating expenditure. Attention was drawn to pages 80–81 of PB Vol. 1 / internal pages 57–58 of TP report**.**

71. The following documents were placed before this Bench, in support of the Assessee's position that equipment sales occurred on a high sea basis and that the services transaction is distinct from the equipment transaction:

i) High sea sales agreement along with the bills of lading – to demonstrate that the import of telecommunication equipment is undertaken on a high sea sales basis and that the findings of the Ld. TPO/DRP regarding alleged warehousing are patently erroneous.
ii) Special Terms & Conditions – to establish that the services rendered are independent of the goods supplied.
iii) Purchase orders for both goods and services, to further substantiate the above position.

72. Thus the contention of assessee is that there are two transactions i.e. import of finished goods and Network services segment, which are independent and not interlinked and capable of bench individually therefore the assessee has benchmarked them separately. As per ld. AR transactions related to import of finished goods related to purchases of telecommunication equipments from its AE, the assessee is worked under very low risk environment where equipments were purchased from its AE on CIF basis and sold on high sea sales basis to the customers. The goods are directly transported to the warehouse of the customer

and the liability towards custom clearance and damage during transportation are of the customer. Assessee never used any warehouse nor maintained any inventory and the payment is received through LC issued by customers therefore, there is no collection risk. Therefore, as per ld.AR under these circumstances "Berry Ratio" is most suitable. The reliance is placed on the judgement of **Hon'ble jurisdictional High Court** in the case of ***Sumitomo Corporation (I) Ltd. Vs. CIT*** reported in ***(2016) Taxmann.com 260 (Delhi)*** and in the case of ***Mitsubishi Corporation Pvt. Ltd. Vs. DCIT*** reported in ***(2014) 50 Taxmann.com 379 (ITAT Delhi)*** and also in the case of ***Samsung SDI India Pvt. Ltd. Vs. AU*** in ***ITA No. 3472 & 5475/Del/2024***.

73. Besides the oral arguments, ld. AR also filed a detailed written submission and relevant part of law as relied is reproduced below;

> *"49. It is submitted that in the case of Sumitomo Corporation India (PJ Ltd. CIT /2016) 71 taxmann.com 290/242 Taxman 260/387 ITR 611 (Delhi), Hon'ble jurisdictional High Court, while considering applicability of Berry Ratio, has observed that it can be used effectively in cases where the value of goods have no role to play in the profit earned by the assessee and the profits earned are directly linked with the operating expendituce incurred by the Assessee. The operating expenditure incurred by the Assessee should effectively captures the functions performed and risk undertaken by the Assessee.* ***The relevant paragraphs are extracted below for reference:***
>
> > ***45.Traditionally, the denominator of the ratio only comprised of selling, general and administration expenses. However; the Treasury Legislation of USA also included depreciation as a part of the Operating Expenses used as a denominator in the berry ratio. As is apparent, Berry ratio has limited applicability; it can be used effectively only in cases where the value of goods have no role to play in the profits earned by an Assessee and the profits earned are directly linked with the operating expenditure incurred by the Assessee. In other words, the operating expenditure incurred by the Assessee***

effectively captures all functions performed and risks undertaken by the Assessee. Thus, in cases where an Assessee uses intangibles as a part of its business, Berry ratio would not be an apposite PLI as the value of such tangibles would not be captured in the operating cost and, therefore, it would not be appropriate to compute the ALP based on net profit margin having regard to the operating cost as a relevant base. Similarly, Berry ratio would not be an appropriate PLI for determining ALP in cases of Assessee who have substantial fixed assets since the value added by such assets would not be captured in Berry ratio.

"46. It can be seen from the above that the Berry ratio can be used only in very limited circumstances and the limitations that we have listed above are by no means exhaustive. There is also a view expressed that use of Berry ratio as a PLI results in indicating less than fair ALPs in tax jurisdiction where the Assessees have a lower bargaining power: In the aforesaid context, in our view, the TPO had correctly reasoned that Berry ratio could not be used as a PLI in cases of Assessees which were using intangibles. However; we find that there was no cogent material for the TPO to hold that the Assessee had developed supply chain and human resources intangibles. In any event, there was no material to conclude that costs of such intangibles were not captured in the operating expenses.

47. In our prima facie view, the third reason stated by the TPO, that is, the rate of commission paid to the Assessee is based on the value of the goods, would be a valid reason to reject the use of Berry ratio because Berry ratio can only be applied where the value of the goods are not directly linked to the quantum of profits and the profits are mainly dependent on expenses incurred. The fundamental premise being that the operating expenses adequately represent all functions performed and risks undertaken. For this reason Berry ratio is effectively applied only in cases of stripped down distributors; that is, distributors that have no financial exposure and risk in respect of the goods distributed by them."

50. Furthermore, the observation of the Hon' ble ITAT in Mitsubishi Corporation India (P.) Ltd. v. Dy. CIT [2014] 50 taxmann.com 379/ [2015/ 67 SOT 83 (Delhi - Trib.)/(ITA No. 5042/Del/2011 dated 21-10-2014) are highly relevant for the issue at hand. The relevant paragraphs are reproduced below for reference:

"50. In the landmark case of E.I. DuPont de Nemours & Co. v. United States, 608 F.2d 445, Charles Berry, an economist, served as an expert witness on behalf of the U.S. government and the development of berry ratio is attributed to his testimony. What came up for consideration in the said case was the "proper," arm's length compensation that a Swiss subsidiary of DuPont-USA, engaged as a distributor of the DuPont-USA, should earn on the distribution services it performed in Switzerland on behalf of the AE. In his analysis, Charles Berry determined that the best method for determining an arm's length result was to compare the Swiss distributor's mark-up on operating expenses

to the same mark-up earned by uncontrolled (ie., third-party distributors performing substantially similar functions. Berry's key insight in the case was that distributors should eurn a return commensurate to the distribution services performed and that the value of the products being distributed, in other words, was irrelevant. The implicit emphasis was thus on the service element even in trading activity, and in the costs incurred on rendering this service rather than in the value of goods traded. That was a case in which the assessee was simply involved in distributorship function without much risks, though certainly much more risks than in a back to back trading, associated with inventories or with uncertainties of normal trading. The key contribution to the economic activity was recognized as performing the distributorship function rather than the value of goods sold. Accordingly, distributors must achieve a particular gross profit in order to compensate them for their services, the costs of which are accounted for, almost entirely, in their operating expenses. To reflect the reality of distributors' economic significance and to provide an arm's length return to DuPont's Swiss subsidiary, Berry utilized a ratio that has since been named in his honour and is computed as gross profit to operating expenses. There are some variants to this ration but that aspect of the matter is not really relevant for the present purposes.

51. The underlying assumption for applicability of berry ratio is that the return to the tested party should be commensurate with his operating expenses and the value of goods dealt in was irrelevant for this purpose. While this proposition so laid down was in the case of a limited risk distributor without any value addition to the goods or significant risks associated with inventories, we are of the considered view that it is equally useful in a case in which the business entity is engaged in trading, with zero or low inventory levels, and particularly as it does not involve any unique intangibles or value addition to the goods traded.

52. The answer to the fundamental question of whether a taxpayer should be entitled to a return on the value of goods handled by it, would actually depend on the functions performed and the related risks borne by it, with respect to the goods; and not on whether the taxpayer has taken title to the goods, shorn of the assessee's FAR profile.

53. Clearly and undisputedly, on the facts of this case, neither the assessee has performed any functions on or with respect to the goods traded by it, beyond holding flash title for the goods in some of the cases, nor has the assessee borne any significant risks associated with the goods so traded. All the functions, assets and risk of the assessee are quite reasonably reflected by the operating costs incurred and the value of goods traded does not have much of an impact on its analysis of FAR. The cost of goods sold would be relevant if and only if the assessee would have assumed any significant risks associated with such goods sold and when monetary impact of such risks is not reflected in operating expenses of the assessee. The berry ratio should, therefore, *be equally useful in the present case as well. In the case of the traders like assessee, who neither assume any major inventory risk nor commit any significant assets for the same and particularly as there is no value addition or involvement of unique intangibles, the berry ratio should also be equally relevant as in the case of a limited risk distributor. '*

51. In view of the above, it is submitted that all the conditions for applicability of the Berry Ratio are met in the case of the Applicant as it does not have intangibles/substantial assets for this particular segment and is not exposed to any significant risk in respect of its distribution business in the networking segment. Further, all the expenses relating to depreciation, rent and insurance, after sales service expenses and other miscellaneous operating expenses have been included in the cost base while computing GP/VAE of the Applicant, thereby, effectively capturing the functions performed and risk undertaken by the Applicant in relation to its business.

52. Considering the above, it is humbly submitted that GP/ VAE (Berry Ratio) is the most appropriate PLI to rehably measure the income that Applicant would have earned had it dealt with uncontrolled parties at arm's length.

74. Ld. CIT DR has vehemently supported the order of AO/TPO/DRP and submits that in the present year, assessee has taken different approach and method for determination of similar set of international transactions as compared to preceding years. Since there is no change in the business activity and nature of transaction of network segment, no change is to be made in the method for determination of arm length price under this segment.

75. Ld. CIT DR filed detailed submission on this issue and for completeness same are reproduced here under:

For the relevant assessment year i.e. 2017-18, the assessee i.e. Samsung India Electronics Pvt Ltd (SIEL) has reported three International Transactions under the 'Networking Division segment' of its business and used two different methods for determination of Arm's Length Price (ALP) of the same. While ALP of the transactions of the nature of 'Purchase of Finished Goods' and 'Purchase of Software' were determined using 'Other Method' with Berry Ration (GP/VAE) as Profit Level Indicator (PLI), the ALP for the international transaction relating to 'Availing of Services for networking business' was determined with OP/OC as PLI.

Above approach and method used for determination of ALPs of International Transactions of 'Networking Segment' is found to be at variance with the approach and method used for determination of ALP for similar set of International Transactions of Networking Division Segment in A.Y. 2016-17. This variance is elaborated as under:

***During A.Y.2016-17**, the assessee had categorized its International Transactions under following segments:*

(i) Segment1: Manufacturing
(ii) Segment II: Trading
(iii) Segment III: Contract Software Development Services
(iv) Segment IV: Network Division
(v) Other Transactions

Segment IV Le. 'Network Division' segment included following International Transactions:

(i) Purchase of Finished Goods
(ii) Purchase of Software
(ill) Availing of other technical Services

For benchmarking of above International Transactions of Networking Division, the assessee had adopted aggregated transaction approach under Transaction Net Margin Method (TNMM) during A.Y. 2016-17 with OP/total Sales as PLI. (Kindly refer to Page 38, 157-160 of Paper Book, which are part of T.P. Study Report, filed by the Assessee for A.Y. 2016-17)

***<u>During A.Y. 2017-18,</u>** the assessee has bifurcated above mentioned three international transaction pertaining to 'Networking Division' segment into two different segments and then, used two different methods i.e. Berry Ration (GP/VAE) and TNMM to benchmark and for determination of ALP as shown in the table reproduced from TPSR below. Instead of using aggregated transaction approach for all three International Transactions, the assessee aggregated only two transactions namely, Purchase of Finished Goods and Purchase of Software and determined ALP of the same combinedly using 'Other Method' with Berry Ration as PLI. Third transactions namely, 'Availing of Services for networking business' was benchmarked separately using TNMM as MAM and OP/OC as PLI.*

S. N.	Nature of Transaction	Segment	Most Appropriate Method	Profit Level Indicator (‘PLI”)	Tested Party’s PLI(%)	Comparable companies Range/Mean	MAM used for A.Y.2016-17
19.	Purchase of finished goods	Import of telecommunication equipment	Other Method	Gross Profit/Operating (Value	1.43 times	1.32 to 1.38 times	TNMN with PLI as

20	Purchase of software	for networking business		Added) Cost ('GP/VAE')			OP/total Sales
21	Availing of services for networking business	Availing services for networking business	TNMM	OP/OC	10.06	10.36-17.21	

It needs to be taken note of that for the relevant assessment year l.e. A.Y. 2017-18, there is no change in business activity or nature of transaction of 'Networking Division vis-à-vis earlier years as evident from FAR analysis forming part of Transfer Pricing Study Report (TPSR) as available on Page 92 to 95 of the Paper Book (P/B) for AY 2016-17 and Page 80 to 83 of the P/B filed for A.Y. 2017-18. However, there is change in the consistently followed approach for benchmarking, method used and PLI used for determination of ALP of International Transactions of 'Networking Division'.

As against the same, during the A.Y. 2017-18, the TPO has determined ALP of all transactions of 'Networking Division' by using aggregated (combined) transaction approach under TNMM with OP/OR as PLI l.e. by using the same method and approach as used by the assessee in A.Y. 2016-17, In his show cause notice, the TPO has specifically mentioned the reasons for rejecting use of 'Berry Ration' under 'Other Method' by the assessee and discussed the reasons for adopting TNMM as Most Appropriate Method (MAM) (Page 94-96 of TP order). Hon'ble DRP upheld the use of TNMM as MAM for the 'Networking Division' Segment while specifically holding that 'Berry Ratio' has no application on fact of the instant case (Page 53-56 of DRP Direction).

In light of the above discussion, at the outset, a question arises as to whetherthe assessee was justified in changing consistently used benchmarking approach and method with regard to its 'Networking Division' despite there being no change in FAR analysis with respect to International Transactions of networking division. Second question which arises for consideration is as to whether for the purpose of determination of ALP, the assessee was justified In using 'BerryRatio', whose application is considered suitable only for the cases of limited risk distributors.

Both above aspects are discussed here in below:

2. With regard to networking business, the assessee is not only supplying telecommunication equipment to its customer, but also undertaking all activities right from the sage of designing of network to final commissioning of the network equipments. Such activities include network designing, supply of equipments, installation and commissioning of such equipment. Even after sales, Annual Maintenance Services, services relating to warranty provision are also being provided by the assessee only. Thus, as a matter of fact, the assessee is providing one stop solution to its customer in this segment. The A.E. of the assessee do not *enter into any kind of transaction or contract with the customer at all for above work.*

The assessee has claimed that, during A.Y. 2017-18, it has undertaken following International transactions under the networking division:

- *Import of telecommunication equipment from its AEs for the purpose of sale to end customers.*
- *Purchase of software.*

So far as benchmarking of above international transactions are concerned, the assessee has used 'Other Method' and has taken 'Berry Ration' as PLI on the ground that it is a limited risk distributor for above telecommunication equipments and software. The Assessee has contended that these equipments are sold on high sea sales basis to customer, wherein the equipment is involced/ billed to SIEL and transferred to customer through endorsement of Bill of Lading. Further, as contended by the assessee, customs clearance is also done by customer and shipment directly moves to customer's warehouse.

At the same time, following international transaction forming part of the 'networking division' has been benchmarked separately by the assessee using Transaction Net Margin Method (TNMM) as Most Appropriate Method (MAM).

- *Availing of services for networking business*

Thus, as stated earlier, the assessee has used two separate methods and Profit Level Indicators(PLIs) for benchmarking of above three international transactions, which are part of business segment i.e. 'Networking segment' only.

3. To analyze contention of the assessee with regard to suitability of use of 'Berry Ration' as PLI under 'Other method for the transactions of the nature of 'Import of telecommunication equipment from its AEs' and 'Purchase of Software', it would be pertinent to appreciate the situations/circumstances under which 'Berry Ratio' can be used as a PLI. For this, it would also be expedient to appreciate FAR analysis (functional performed, assets employed and risk assumed) for the assessee under 'networking division" while performing the orders placed by the customers.

About Berry Ration

Berry ratio is defined as the ratio of gross profit to operating expenses. The detailed formulae of the Berry ratio is as follows:

Berry ratio=GP/O Ear VAE
Where:
GP: Gross profit. Interest and extraneous Income
are generally excluded from the gross profit determination
OE Operating Expenses which are in the nature of Value Added Expenses (VAE).

WHEN SHOULD BERRY RATIO BE USED?

Under the OECD Guidelines, the Berry ratio is identified as one of the PLIs under the TNMM. The guidelines provide criteria for using the Berry ratio as a PLI. These criteria are as follows:

(i) the value of the functions performed in the controlled transaction (taking account of assets used and risks assumed) is proportional to the operating expenses;
(ii) the value of the functions performed in the controlled transaction (taking account of assets used and risks assumed) is not materially affected by the value of the products distributed, l.e., It is not proportional to sales; and
(iii) the taxpayer does not perform, in the controlled transactions, any other significant function (e.g., manufacturing function) that should be reimbursed using another method or financial indicator.

The first criterion is relevant, as the denominator is operating expenses in the Berry ratio. Thus, the value created in the controlled transaction must be reflected only in the operating expenses
Accordingly, it is gathered that the Berry ratio would not be an appropriate PLI:

- *when there are significant non-routine Intangibles Involved in controlled transactions, as the contribution of Intangibles is not reflected merely in the operating expenses;*
- *in the case of an integrated distributor that performs different functions, such as assembling or customizing, because the ratlo will not be able to reflect the pure return on operating expenses:*
- *in the case of a full-fledged distributor performing an Inventory management function and bearing related risk, and*
- *in the case of a manufacturer because the manufacturer's cost base typically comprises not only operating expenses but also the cost of goods sold. [4]*

The second criterion excludes those cases where sales or revenues reflect the value created. The third criterion can be interpreted as a requirement to ensure that a mix of different activities does not influence the quality of a transfer pricing analysis using the Berry ratio.

Accordingly, a situation where the Berry ratio can prove useful is for intermediary activities. It has been observed in practice that the Berry ratio is used as a PLI for limited-risk distributors and service providers. The Berry ratio assumes a relationship between the level of operating expenses and the level of gross profits earned by distributors and service providers in situations where their value-added functions can be considered to be reflected in the operating expenses.
In respect of applicability of Berry Ration, HON'BLE HIGH COURT OF DELHI in the case of Sumitomo Corporation India (P.) Ltd. v. Commissioner of Income-tax [2016] 71 taxmann.com 290 (Delhi) held as under:

"45. Traditionally, the denominator of the ratio only comprised of selling, general and administration expenses. However, the Treasury Legislation of USA also included depreciation as a part of the Operating Expenses used as a denominator in the berry ratio. As is apparent, Berry ratio has limited applicability; it can be used effectively only in cases where the value of goods have no role to play in the profits earned by an Assessee and the profits

earned are directly linked with the operating expenditure incurred ***by the Assessee****. In other words, the operating expenditure Incurred by the Assessee effectively captures all functions performed and risks undertaken by the Assessee. Thus, in cases where an Assessee uses Intangibles as a part of its business, Berry ratio would not be an apposite PLI as the value of such tangibles would not be captured in the operating cost and, therefore, it would not be appropriate to compute the ALP based on net profit margin having regard to the operating cost as a relevant base. Similarly, Berry ratio would not be an appropriate PLI for determining ALP in cases of Assessees who have substantial fixed assets since the value added by such assets would not be captured in Berry ratio.*

46. It can be seen from the above that the Berry ratio can be used only in very limited circumstances and the limitations that we have listed above are by no means exhaustive. There is also a view expressed that use of Berry ratio as a PLI results in indicating less than fair ALPs in tax jurisdiction where the Assessees have a lower bargaining power. In the aforesaid context, in our view, the TPO had correctly reasoned that Berry ratio could not be used as a PLI In cases of Assessees which were using intangibles. However, we find that there was no cogent material for the TPO to hold that the Assessee had developed supply chain and human resources intangibles. In any event, there was no material to conclude that costs of such intangibles were not captured in the operating expenses.

47. In our prima facie view, the third reason stated by the TPO, that is, the rate of commission paid to the Assessee is based on the value of the goods, would be a valld reason to reject the use of Berry ratio because Berry ratio can only be applied where the value of the goods are not directly linked to the quantum of profits and the profits are mainly dependent on expenses Incurred. The fundamental premise being that the operating expenses adequately represent all functions performed and risks undertaken. For this reason Berry ratio is effectively applied only in cases of stripped down distributors; that is, distributors that have no financial exposure and risk in respect of the goods distributed by them.

48. In the present case, the Assessee asserts that its business comprises of two segments, trading segment and indenting segment and the functional risk and the reward in the two segments are different. In the trading segment, the Assessee earns a higher profit margins (calculated on the value of the goods traded) while in the indenting segment its profit margins are lower. Plainly, the use Berry ratio would give unrellable results if the product mix of the comparables is different from the product mix of the Assessee. This would make the task of finding a set of comparables fairly difficult."
(Emphasis supplied)

4. In backdrop of above discussion on applicability of 'Berry Ration', it would be Important to now analyse the functions performed, risk assumed by the assessee as per FAR analysis for 'networking division' forming part of the Transfer Pricing Study Report (TPSR). Relevant extractsfrom the TPSR along with reference to relevant page of TPSR are reproduced as under:

<u>Functions Performed by the Assessee:</u>

<u>Page 80 of TPSR</u>

5.5 Import of telecommunication equipment for networking business
SIEL has entered into a contract with a customer for supply of telecommunication equipment and provision of network support services in relation to such equipment. Under the said contract, SIEL is responsible for providing networking services in the nature of network design, installation and commissioning and annual maintenance service of the equipment supplied to the said customer*. The equipment for the customer contract entered into by SIEL Is procured from SEC Korea. It is important to note that typically, equipment sales forms major part of the revenue stream for SIEL. SIEL has limited role as regards technical specifications of the equipment and procures it against confirmed orders from the customer.*

Sales and marketing

Marketing strategy functions are those activities that determine the positioning of a firm's product in a market and that establish marketing techniques that bring the products to the customers' attention.

The sales and marketing team at SIEL and SEC Korea is continuously engaged with the customer for securing contracts for additional supply of equipment and services. SIEL has a team of 7 persons who are engaged in marketing and selling networking equipment and services to customers. They also assist in providing product demonstrations to potential customers. SIEL also takes need based support from SEC Korea for performing such activities e.g. marketing, technical demonstration etc.

Based on the PO Issued by the customer, SIEL places a PO with SEC Korea for purchase of networking equipment and related software. The PO contains detalls regarding quantity of the equipment required. SIEL places a PO for purchase of finished goods on its AEs only after it has received a corresponding PO from the customer.

<u>Page 81 of TPSR</u>

"Further, SIEL purchases installation kits (which are required for installing the goods purchased from the AE) from third party suppliers in India. These purchases are made after obtaining PO from the customer.

Inbound and outbound logistics

Inbound Logistics refers to the functions undertaken to administer the shipment of raw material from the supplier to the purchaser. Outbound Logistics refers to the functions undertaken to administer the shipment of finished goods from the supplier to the purchaser.

SIEL purchases the equipment from SEC on a CIF basis and thereafter transfers the title in such goods to the customer on high sea sales basis. Accordingly, the customer is responsible for clearing the goods from the custom authorities and arranging logistics for moving the goods from the ports to its own warehouse.

For installation kits purchased from unrelated parties, the suppliers directly ship the goods to the customer and bill SIEL for the same. Accordingly, SIEL Is not engaged in providing any logistics support. However, the company does monitor the movement of such goods to ensure timely delivery to the customer.

Warehousing and inventory management

Warehousing includes all functions to keep and manage stock of raw materials, semi-finished products and finished products efficiently to maintain the lowest possible cost levels and effectively to minimize lost orders.

SIEL does not have any infrastructure and warehouse to maintain the Inventory of LTE equipment. The same is procured by SIEL from SEC is directly shipped to the customer's warehouse on a high sea sale basis. Hence SIEL does not hold any Inventory in its books, except for the period when the goods are in transit.

Further with respect to the spare parts which are required for providing AMC services are procured by SIEL from SEC Korea only, for which SIEL maintains a small Inventory."

<u>Risks Undertaken by the Assessee:</u>

"Business risk/Market risk

Since SIEL has directly entered into a contract with its end-customer, It bears business risk associated with this contract with respect to the quantity of equipment supplied and the price recovery agreed upon. However, since SIEL does not have a significant role in equipment supply, the risk indirectly shifts to the AE as the AEs also face a possible decline in orders from SIEL in case of any adverse circumstances. Also, given the sufficient resale margin allowed by the AE to SIEL on equipment sales, the risk ultimately shifts to the AE."

"Inventory risk

Since the ownership in goods Imported is transferred to end customer on high sea sales basis and SIEL does not maintain any Inventory, SIEL does not bear any Inventory risk in this regard. However, it bears inventory risk in respect of Inventory of stores and service spares maintained by it for providing AMC services."

<u>Page 82 TPSR</u>

"Product/service liability risk

Since SIEL has entered into the contract with the customer, the liability for any product or service failure shall be borne by SIEL. In this respect, SIEL also provides a performance Stand by Letter of Credit ('SBLC') amounting to 10 percent of each invoice of material supply to the customer valid for 18 months from shipment date.

……..

……..

SIEL bears the cost of any fault in the equipment supplied to the customer covered under the free warranty period of 27 months."

"Credit and collection risk

To ensure guarantee of payment, the end customer issues a SBLC/LC to SIEL which SIEL can bank in case the customer fails to make payment within the credit period extended to him. The bank charges pertain to such SBLC/LC is borne by SIEL. Accordingly, SIEL does not bear any collection risk.

With respect to imports by SIEL from its AEs, the AEs Invoice SIEL for the imports. Payment to AEs is not contingent upon payment received by SIEL. Accordingly, the AEs do no bear any collection risk."
(Emphasis Supplied)

With regard to international transaction of Availing of technical services for networking business', it is noted that the said transaction comprises of functions performedby the assessee in connection with the same contract i.e. the contact for which functions relating to 'Purchase of Telecommunication Equipment' and 'Purchase of Software' were performed by the assessee. Relevant part of the said International Transaction as mentioned in TPSR is reproduced below:

Page 83 of TPSR
"5.6 Availing of technical services for networking business

SIEL does not have the requisite skills for providing certain services in the nature of network design, installation and commissioning and optimization of sites., required to be performed in relation to the supply of telecommunication equipment. It accordingly avalls such services from its AES. SEC has established a Project Office (PO) in India for the purpose of providing technical assistance required by SIEL for installation and commissioning of such equipment. SEC PO has employed technicians having expertise in the field of networking. For the purpose of the same SIEL raises its requirement for resource deployment to SEC and the same is fulfilled by SEC. Further the technicians also provide services pertaining to troubleshooting of technical issues and integration of SIEL's equipments with other vendors equipment installed in the network." (Emphasis Supplied)

5. In light of the above discussion, it is evident that:

1. *The assessee is carrying out all the activities right from designing the network solution, procurement of materials/equipments, ensuring their timely delivery to the customers, Installation, testing and commissioning of such equipments. Further, the assessee also fulfil Its commitment under provisions of warranty, also provide services relating to annual maintenance contract with regard to solution provided by it. These are entire gamut ofactivities, which any entity handling projects relating to networking segments would be required to perform. All above activities and price associated with the same form part of the single composite contract of the assessee with the customer. Thus,*

assessee provided full-fledged solution for establishing the network for its customer. From business point of view, the assessee is bearing full risk as any other network solution provider bears. Thus, the assessee can not be considered merely as a limited risk distributor.

II. The customer does not deal or enter into any contract with the A.E. of the assessee at all. Thus, A.E. of the assessee is not accountable towards the customers. It is the assessee, which for the purpose of execution of contract entered into with its customer, procures equipments from its AE and supplies the same to its customer. Further, for commissioning and installation of such equipments, it is the assessee which take assistance from its AE. Customer is not concerned with any of such dealings between assessee and its AE.

I. Customer can not hold AE of the assessee legally responsible for any lapse in execution of the contract. Entire legal responsibility lies with the assessee. To ensure timely delivery of equipments to the customer (even if sale is made on high sea basis) is responsibility of the assessee only. Product/service liability risk, which are relating to quality aspects and connected to warranty provisions and payment collection risk are borne by the assessee only. Thus, entire risk with regards to execution of contract vis-à-vis customer is borne by the Assessee. The AE does not bear any risk at all vis-à-vis customer in respect of the contracts.

IV. The assessee maintains inventory of stores and spare parts for providing AMC services. Further, the assessee procures installations kits from third parties for installing goods received from AE. Therefore, it bears inventory risk and should be maintaining warehouse too for such inventory of stores and spares. Moreover, on the high seas, It is the assessee who holds inventory of the goods. Thus, any loss or damage happening on high seas will have to be borne by the assessee. Performing all such activities coupled with risk Involved and providing AMC services by using Inventory maintained in warehouse rule out that assessee acts as a pure limited risk distributor.

V. Telecommunication Equipments are purchased by the assessee from its AE. The transfer of ownership of such equipments by assessee from itself to the customer on high sea basis, custom clearance and shipment from port to warehouse by the customer does not materially change the nature of overall functions performed by the assessee for its customer under networking segment. Performance of these two tasks by the customer instead of assessee may have some impact on amount charged by the assessee from its customer. It is very normal to design contracts as per convenience of parties. But, it does make assessee a low risk distributor engaged merely in limited role of distribution of equipments in light of multifarious nature of activities performed, risk assumed and Inventory maintained.

VI. Since assessee is not only supplying equipments, but alsoperforming activities of designing of network, Installation of equipments, commissioning of equipments and network besides AMC functions, the operating expenses *which are used as denominator in 'Berry Ratio' would not capture entire range of functions performed by the assessee because all these functions are highly technical in nature adding value to the goods/equipments supplied. As sated earlier, the assessee has multifarious activities undertaken as a part of a single contract with its customers and therefore, it can not be said that overall solution provided by the assessee by aggregating all such activities together do not add value to the good/equipments supplied and will not command better margins than what a limited risk pure distributor of goods will command.*

VII. *It needs to be noted that in a business, price of goods or services supplied are decided by the range and nature of activities provided to the customer. When an enterprise is providing multiple technical services besides supply of goods by way of a composite contract to its customer, it can not be ruled out that enterprise may adjust margin of goods into services or vice-versa to make deal look more attractive to its customer. The customer is mainly concerned with overall price to be paid vis- a-vis overall services received by it. Whereas in a case of a pure limited risk distributor, whose function is just limited to supplying goods purchased by it to customer directly without keeping the same in warehouse and without maintaining any Inventory, there is no scope for such internal adjustment. in case of such limited risk pure distributor, Berry ratio may be used as all the value adding functions undertaken by that distributor would get captured in operating expenses. On the other hand, functional profile of the assessee under Networking Segment vis-à-vis Its customer is of a contractor providing end to end network solutions and systems, which is much complex and higher level profile than profile of even a full-fledged or integrated distributor, what to speak of limited risk distributor. Therefore, operating expenses alone in the case of assessee cannot capture entire gamut of value adding functions undertaken by it. It is very Important to ensure that in a case like that of the assessee, cost of goods sold and other non-operating expenses are also taken into consideration for benchmarking purposes: Berry ration can not take into consideration such factors or expenses.*

VIII. *All three international transactions mentioned in table given above are of 'Networking Segment' and are closely interlinked and intertwined. They form part of the same contract with customer and are meant to provide a complete network solution to customer. In the kind of arrangement the assessee has entered into with its customer, value is created/added by the assessee at different stages of execution of the project. Therefore, they should be benchmarked combinedly by using composite transaction approach as such approach would be able to capture overall value created by the closely linked functions performed by the assessee in much better manner.*

IX. *On the point of change of method and approach for benchmarking vis-à-vis that adopted in earlier years, it is stated that the assessee has changed consistently used approach and method for determination of ALP under Networking Segment. While adopting TNMM as MAM in AY 2016-17, it was mentioned in TPSR.*

"6.4.2Aggregation of international transactions

During FY 2015-16, SIEL undertook the following international transactions and specified domestic transactions with its AEs:

- *Purchase of finished goods;*
- *Purchase of software;*
- *Payment of other service charges; and*
- *Payment of other technical services*

In order to assess, whether the international transactions and specified domestic transactions entered into by SIEL are at arm's length, a transfer pricing method may be applied to each of the said transactions separately or to all such transactions as a single group of transactions. In the instant case, given the range of transactions involved, the arm's length method cannot be adequately applied on a transaction-by-transaction basis. Accordingly, based on above, for the purposes of determining the ALP, the aforesaid International and specified domestic transactions have been aggregated for benchmarking.
………………….

6.4.3.5TNMM
Given the fact and circumstances, the TNMM provides the most reliable measure of an arm's length result for the International transactions aggregated under the networking segment. Further, in the instant case, since the multiple transactions listed in the preceding paragraphs under this segment are closely interlinked, the same have been aggregated under the TNMM.

In view of the above, we have considered the TNMM to be the most appropriate method to justify the arm's length pricing of the international transactions and specified domestic transactions aggregated under networking segment."
Thus, in A.Y. 2016-17, use of aggregated/combined transaction approach andTNMM as MAM was a conscious decision of the assessee itself taking into consideration all relevant factors. The TPO had accepted the said approach and MAM in the said year and had only disagreed with regard to comparables chosen. The assessee has failed to explain the factors which have led to change in approach and method for determination of ALP during A.Y. 2017-18. There is no change in FAR during the year with regard to transactions in question. In such a situation, there was no justification for changing a consistently followed method by the assessee.

6. In view of the above discussion, it is submitted that the assessee was not justified in using 'Other Method' and 'Berry Ration for International Transactions relating to 'Purchase of Finished Goods' and 'Purchase of Software' for telecommunication equipments of 'Networking Segment'. The TPO was justified in using TNMM as MAM for these transactions alongwith International Transaction of 'Availing of Services for network business' and carry out fresh determination of the ALP. It is therefore, requested to uphold the order of the TPO on this issue.

76. The position that is coming out from the various rulings is that Berry Ratio can be used effectively in cases where the value of goods have no role to play in the profit earned by the assessee and the profits claimed are directly linked with the operating expenditure incurred by the Assessee. The operating expenditure incurred by the Assessee should effectively captures the functions performed and risk undertaken by the Assessee.

77. At page 80-81 of the paper book, Vol. I/internal page 57-58 of the TP report for functional risk profile of the company has been considered and we find that with respect to the import of telecommunication equipment, the Appellant operates as a merchant trader and merely acts as a facilitator between the AE and the end customer. As, for the transaction of purchase of finished goods under the "import of telecommunication equipment for networking business" segment, the Appellant distributes telecommunication equipment to its customers under a contractual arrangement with the customers. The equipenent for the customer contract entered into by the Appellant is procured from SEC Korea. This equipment is purchased from SEC on CIF basis and thereafter, are sold on high sea sales basis to customer wherein the equipment is invoiced/billed to the Appellant and transferred to customer through endorsement of Bill of Lading, Further, customs clearance is also done by customer and shipment directly moves to customer warehouse. The Appellant does not have any infrastructure and warehouse

to maintain the inventory and operates on a bill to ship to model. Therefore, the Appellant gets only flash title to the goods which are sold to the customer. The Appellant does not hold any inventory in its books, except for the period when the goods are in transit. For installation kits purchased from unrelated parties, the suppliers directly ship the goods to the customer and bills the Appellant for the same. Accordingly, the Appellant is not engaged in providing any logistics support.

78. In the submission filed for the assessee the risks assumed by the Appellant are highlighted below in a tabulated form:

Kind of risk	**Whether assumed by the Appellant**
Business/Market risk	The Appellant bears business market risk like any other low-risk distributor conducting the business in a jurisdiction. Since the Appellant directly enters into a contract with its end-customer, it bears limited risk associated with this contract with respect to the quantity of equipment supplied and the price recovery agreed upon.
Inventory risk	The Appellant does not bear any inventory risk as regards the imported goods since these are transferred on high sea-sales basis. The Appellant does not maintain any inventory of imported goods. However, it bears inventory risk in respect of inventory of stores and service spares maintained by it for providing annual maintenance services.
Research and Development risk	The Appellant is not exposed to this risk since it does not carry out any R&D activities on its own and is dependent upon its AEs for the same.
Product/service liability risk	The Appellant does not bear risk with regards to the quality of the supplied product and in case of any such manufacturing defect/fault, the risk of product quality lies with SEC Korea. However, the Appellant only bears some limited risk if any fault subsequently arises in the product within the specified warranty

	period. Therefore, the Appellant only bears limited risk in this regard.
Credit and collection risk	The Appellant does not bear any collection risk. The end customer issues a SBLC/LC to the Appellant which the Appellant can bank in case the customer fails to make the payment within the credit period extended to him.
Foreign exchange risk	The Appellant receives payment from its customer in INR and makes payment to vendors/suppliers in INR. Thus, it is not exposed to any foreign exchange risk.

79. It is evident from the table above, the Appellant does not assumes any risks which might indicate that it carries out the functions of a full-fledged distributor. It only gets the flash title of the goods which are transferred from SEC Korea to the customer upon placing of the purchase order. Therefore, it can be concluded that the Appellant does not perform any function or assumes any risk as regards the value of goods recorded in the P&L of the Appellant. Considering the functional profile and business model of Appellant with respect to distribution services, the COGS can be considered as non-value-added expense. The non-value-added expenses do not form part of any value-added function and as such are not material to calculation of the profitability of Appellant. Therefore, a PLI of gross profit to only operating expenses (excluding the COGS) is appropriate in the given circumstances.

80. Thus dealing with the Ld. DR DR's contention that Berry Ratio is inapplicable because the Assessee performs ancillary services in addition to importing and selling telecom equipment we find same is not sustainable as

the decisive test for Berry Ratio's applicability is not the mere performance of ancillary services, but whether the taxpayer bears any significant risks in relation to the principal transaction of purchasing and selling goods. In the Assessee's business model, it functions as a merchanting trader obtaining only a "flash title" holding ownership for a very short period while goods transit directly from the supplier to the buyer. Orders are placed only against confirmed client orders; title passes via endorsement of a bill of lading and the Assessee never takes physical possession of the goods. The title is transferred through endorsement of a bill of lading, and the Appellant never takes physical possession of the goods. Thus where assessee merely gets a "flash title" to the goods, meaning ownership is held for a very short period while the goods are in transit directly from the supplier in one country to the buyer in another the Appellant is insulated from all substantive risks associated with the goods themselves. In such a scenario, the Cost of Goods Sold (COGS) is merely a pass-through cost and has no correlation to the value-added functions performed or the risks borne by the Appellant. The Appellant's remuneration is a reward for the functions it performs and the operating expenses it incurs to facilitate the trade. Therefore, where an entity bears no real risk in relation to the goods, the COGS is correctly excluded from the denominator, and the Berry Ratio serves as the most appropriate measure to determine the arm's length return solely on the services rendered, which are appropriately captured in the value-added operating expenses.

Consequently, the Assessee bears no substantive risks in relation to the goods, COGS is a mere pass-through cost with no correlation to value-added functions or risks borne and the Assessee's remuneration reflects only the functions performed and operating expenses incurred to facilitate the trade. Accordingly, COGS is correctly excluded from the denominator, and Berry Ratio is the most appropriate PLI to measure the arm's length return on services rendered, captured through value-added operating expenses.

81. This Tribunal in ***Samsung SDI India Pvt. Ltd. [ITA Nos. 3472 & 5475/Del/2024]*** had the occasion to examine the applicability of Berry Ratio and after considering decision in Sumitomo Corporation India (P.) Ltd. v. CIT [2016] 71 taxmann.com 290/242 Taxman 260/387 ITR 611 (Delhi) (Para 15 of Samsung SDI order), ADM Agro Industries Kota & Akola (P.) Ltd. v. ACIT [2023] 151 taxmann.com 232 (Delhi – Trib.) (Para 16 of Samsung SDI order), Mitsubishi Corporation India (P.) Ltd. v. Dy. CIT [2014] 50 taxmann.com 379/ [2015] 67 SOT 83 (Delhi - Trib.)/(ITA No. 5042/Del/2011 dated 21-10-2014) (Para 17 of Samsung SDI order), had concluded as follows;

> *14. Heard the contentions of both parties and perused the material available on record. From the facts, it is seen that the assessee though has started commercial production that continue only for one month and did the trading of the products that mobile 15 | P a ge ITA No.3472 & 5475/Del/2024 batteries for the remaining periods for the previous year. The assessee cannot treated as a normal trader who is doing trading activity of various goods of number of customers rather the assessee is working in special environment and it had purchased goods from a single supplier and sole to only one customer that too on order to order basis wherein when the assessee gets the order from customers, the corresponding order is placed to the supplier for the supply of goods. In other words, assessee enters into a purchase contract*

with only one supplier i.e. Elentec and sells the goods to only one customer. Though, technically, the assessee had entered into purchase and sale contracts for buying and selling goods, however, in reality, the assessee merely acts as a facilitator of buying and selling of goods between the supplier and customer. As per the business model, the goods purchased from Elentec are sold to SEIL. Thus, the goods never come to assessee's inventory and nor stored in any warehouse of the assessee. It is also a fact on record that both the seller and buyer are pre-determined and prices of the good i.e. mobile battery is pre-fixed. The assessee only provides logistics and certain administrative functions. Hence, the role of the assessee is limited. In this process, the assessee has made no value addition to the goods and kept his margin to meet out the cost incurred such as transportation, handling and certain administrative charges. Since the assessee is not maintaining any inventory therefore, there is no investment on this count and amount outstanding to the customer against the supplies is paid within prescribed time limit and the cost of funds involved has been taken care in the in the margin retained by the assessee. From the perusal of the financial statement, it is seen that the assessee has not incurred any cost on account of finance charges i.e. no interest is paid to financial institutions or banks which further prove that the assessee is having sufficient funds. Under these circumstances, it can be held that the assessee is a low risk distributor.

15. *The Hon'ble Delhi High Court in the case of Sumitomo Corporation India (P.) Ltd. vs CIT (supra) while considering the application of Berry ratio has observed as under:-*

45. "Traditionally, the denominator of the ratio only comprised of selling, general and administration expenses. However, the Treasury Legislation of USA also included depreciation as a part of the Operating Expenses used as a denominator in the berry ratio. As is apparent, Berry ratio has limited applicability; it can be used effectively only in cases where the value of goods have no role to play in the profits earned by an Assessee and the profits earned are directly linked with the operating expenditure incurred by the Assessee. In other words, the operating expenditure incurred by the Assessee effectively captures all functions performed and risks undertaken by the Assessee. Thus, in cases where an Assessee uses intangibles as a part of its business. Berry ratio would not be an apposite PLI as the value of such tangibles would not be captured in the operating cost and, therefore, it would not be appropriate to compute the ALP based on net profit margin having regard to the operating cost as a relevant base. Similarly, Berry ratio would not be an appropriate PLI for determining ALP in cases of Assessees who have substantial fixed assets since the value added by such assets would not be captured in Berry ratio.

"46. It can be seen from the above that the Berry ratio can be used only in very limited circumstances and the limitations that we have listed above are by no means exhaustive. There is also a view expressed that use of Berry ratio as a PLI results in indicating less than fair ALPs in tax jurisdiction where the Assessees have a lower bargaining power. In the

aforesaid context, in our view, the TPO had correctly reasoned that Berry ratio could not be used as a PLI in cases of Assessees which were using intangibles. However, we find that there was no cogent material for the TPO to hold that the Assessee had developed supply chain and human resources intangibles. In any event, there was no material to conclude that costs of such intangibles were not captured in the operating expenses.

47. In our prima facie view, the third reason stated by the TPO, that is, the rate of commission paid to the Assessee is based on the value of the goods, would be a valid reason to reject the use of Berry ratio because Berry ratio can only be applied where the value of the goods are not directly linked to the quantum of profits and the profits are mainly dependent on expenses incurred. The fundamental premise being that the operating expenses adequately represent all functions performed and risks undertaken. For this reason Berry ratio is effectively applied only in cases of stripped down distributors; that is, distributors that have no financial exposure and risk in respect of the goods distributed by them."

16. *The coordinate Delhi bench of Tribunal in the case of Adm Agro Industries Kota & Akola P.Ltd, Vs. ACIT, Circle-1(1) , New Delhi in ITA No. 2281/Del/2022 vide order dt. 13.06.2022 under similar circumstances held the berry ratio applicable for PLI by making following observations:*

22. At this stage, it is necessary to look into the relevant statutory provisions relating to determination of ALP of international transactions with AEs. Section 92 of the Act provides for computation of income having regard to the ALP of international transactions with AE. Section 92C of the Act provides the methods for computation of ALP. TNMM is one of the approved methods for computing ALP. Rule 10B(1)(e) lays down the mechanism for computation of ALP under TNMM. On a holistic reading of Rule 10B(1)(e), it becomes clear, the computational mechanism is in several steps. In the first step, the net profit margin of the enterprise (in the present case, the assessee) realised from the international transaction with AE has to be computed in relation to cost incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base. In the second step, the net profit margin realised by an enterprise (in the present case, comparables) from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base. In the third step, necessary adjustments, if any, is made to the profit margin of comparables to take care of the differences that may be arising in the margin of the controlled transactions, which could materially affect the amount of net profit margin in the open market. In the fourth and fifth steps, the net profit margins of the controlled and uncontrolled transactions are compared and the ALP is determined. Thus, as could be seen from the computational mechanism provided in rule 10B(1)(e), it is not rigid but flexible. The net profit margin of the assessee can be computed not only *in relation to cost incurred or sales effected or assets employed, but, having regard to any other relevant base also. The expression "any other relevant base" is wide enough to align the computation of margin of the assessee and the comparables.*

23. Thus, if we go by the provision of rule 10B(1)(e), the return on value added cost, otherwise known as berry ratio, is not completely excluded from its purview. It can be a relevant base for computing the margin. The berry ratio in simple terms means a ratio of gross profit to operating expenses. Therefore, where operating expense is considered as a relevant base, there would be no difficulty in using berry ratio as PLI in terms of Rule 10(B)(1)(e). In case of Sumitomo Corporation India Pvt. Ltd. (supra), Hon'ble jurisdictional High Court, while considering applicability of berry ratio, has observed that it can be used effectively only in cases where the value of goods have no role to play in the profit earned by a assessee and the profits earned are directly linked with the operating expenditure incurred by the assessee. The operating expenditure incurred by the assessee effectively captures the functions performed and risk undertaken by the assessee. Thus, in a case where assessee uses an intangible as a part of its business, berry ratio may not be an appropriate PLI, as the value of such intangible would not be captured in the operating cost. Similarly, berry ratio is not appropriate PLI for determining the ALP in cases where the assessee may be having substantial fixed assets since, the value added by such assets would not be captured in berry ratio. However, it can be applied where the operating expense adequately represent all functions performed and risks undertaken. Thus, the Hon'ble High Court held that berry ratio is effectively applied only in case of stripped down distributors who have no financial exposure and risk in respect of the goods distributed by them. Various other decisions cited by learned Sr. counsel lay down the ratio that Rule 10(B)(1)(e) does not completely rule out applicability of berry ratio.

24 ……

25 …..

26. On examination of facts on record, we find that the aforesaid submissions of learned Departmental Representative are extraneous to the issue at hand. Admittedly, in the TP study report, the assessee had furnished segmental information regarding both the merchanting trades segment and physical trade segment. The TPO has also accepted the segmental analysis of the assessee. In fact, he has accepted the transactions in trading segment to be at ALP. As discussed earlier, the only variation, he has made in merchanting trades segment, is in relation to PLI of the assessee. Thus, neither the TPO nor DRP have made any adverse comment regarding the merchanting trades segment. Further, when there is no allegation either by RBI or any other regulatory authority regarding merchanting trades segment of the assessee, in our view, learned Departmental Representative cannot give a new dimension to the entire issue by making allegations which are not borne out on record. At this stage, learned Departmental Representative cannot improve upon the case of the TPO or learned DRP by enlarging the *scope of the appeal. Thus, considering the fact that in the PLI of the comparables, cost of goods is not included in the denominator, in our view, the same would also apply to the assessee. Hence, cost of goods cannot form part of the denominator of PLI. Accordingly, we direct the Assessing Officer to compute the ALP by applying PLI of operating profit to value added cost, excluding the cost of goods. Grounds are allowed.*

17. *This view is further supported by the judgement of Mitsubishi Corporation India (P.) Ltd. vs CIT (supra) and various other judgments which are relied upon by the assessee.*

18. *In view of the above-mentioned facts, we are of the view that the Berry ratio is applicable in the present case as PLI and the assessee in para 36 of its written submissions as reproduced above has stated that if the same is applied to the final set of comparables, the assessee is working of ALP is at bar and no adjustment is required to be made which in our opinion, is correct and therefore, we hold the assessee approach of computing the Alp on the distribution operations based on Berry ratio as PLI is correct and directed to delete the adjustment made by AO/TPO on this count. Thus, Ground Nos. 4 to 7 raised by the assessee are allowed.*

82. We find substance in the contention of ld. Counsel that the Ld. TPO/DRP's rejection of Berry Ratio is fundamentally flawed as the Ld. TPO has misconstrued the FAR profile of the Assessee and has recorded that the Assessee has performed functions of a full-fledged risk bearing distributor. These findings of Ld. TPO/Ld. DRP are completely contrary to the functions assumed/risk assumed in this segment. The Ld. DRP has negatived the fact that the goods are directly supplied by SEC Korea on high sea sales basis and that the Assessee does not have any warehousing/inventory facilities without any basis. The Assessee does not undertake any procurement, warehousing, distribution or logistics functions as asserted by the Ld. DRP. The functional and risk profile of the Assessee, as considered by us above, establish that the Ld. DRP has made mere bald assertions to reject the application of the Berry Ratio. Therefore, the finding in the final

assessment order based on such unsubstantiated assertions is liable to be set aside. Assessee does not have intangibles/substantial assets for this particular segment and is not exposed to any significant risk in respect of its distribution business in the networking segment. Further, all the expenses relating to depreciation, rent and insurance, after sales service expenses and other miscellaneous operating expenses have been included in the cost base while computing GP/VAE of the Assessee, thereby, effectively capturing the functions performed and risk undertaken by the Assessee in relation to its business.

83. Then coming to the contention of ld. DR, for maintaining consistency with the aggregated benchmarking approach adopted by the Assessee in AY 2016-17, we are of considered view that Transfer pricing study has to be relative and contemporary to assessee's business for the year under consideration and assesse cannot be estopped from taking remedial measures for any prejudices causes to its interest due to a particular approach being adopted in earlier years. It is no longer *res integra* that there is no estoppel against law. Reliance can be placed on **CIT Madras v. MR. P. Firm, Muar [1965] 56 ITR 67 (SC) and CIT v. Bharat General Reinsurance Co. Ltd. [1971] 81 ITR 303 (Del.).** Thus assessee cannot be precluded from adopting a method different from that employed in earlier years, if such method is demonstrably more appropriate and scientific in capturing the economic substance of the underlying transactions. In the preceding years, i.e., AY 2015-16 and AY 2016-17, although the Assessee had adopted an aggregated

benchmarking approach in respect of the networking segment, the said approach itself was undermined by the erroneous benchmarking undertaken by the Ld. TPO, who benchmarked the Assessee's distribution dominated networking segment by adopting service companies as comparables. The Assessee's selection of TNMM with distribution companies as comparables was, at that time, found to be the most appropriate alternative available to benchmark the Assessee's functional profile as a distributor by this Tribunal as well.

84. We thus find substance in the contention that at the relevant time, jurisprudence on the appropriateness of Berry Ratio as a PLI was under consideration. However, with the subsequent development of law, including judgements by the Hon'ble High Courts and this Tribunal, Berry Ratio has now been recognised as an appropriate PLI and guidance has been provided by this Tribunal as well on the application of Berry Ratio. Thus for the year under consideration, i.e., AY 2017-18, if the Assessee adopted a more refined and scientifically accurate segregated approach, same cannot be pitched out on assertion to maintain consistency. Thus we find no error in approach that the distribution transactions were benchmarked under the "Other Method" with Berry Ratio as the PLI, using distribution companies as comparables, while the transactions pertaining to availment of services were benchmarked separately under TNMM with OP/OC as the PLI, using SEC PO as the tested party and service companies as comparables. Thus the Assessee ought not to be compelled

to adhere to the methodology followed in earlier years merely on grounds of consistency unless any defect is pointed out in the methodology adopted for the year under consideration.

85. In view of above discussion we are of the considered view that the approach of assessee to apply Berry Ratio as most appropriate PLI, should be sustained for this AY 2017-18. Accordingly, we allow the grounds of appeal No. 12 to 14 taken by the assessee, in AY 2017-18.

86. As a sequel to aforesaid determination of grounds, **both appeals are allowed,** with consequences to follow, for re-computation of ALP of impugned transaction, as per the directions above. The stay applications become infructuous and are dismissed.

Order pronounced in the open court on 12.08.2026

Sd/-	Sd/-
NAVEEN CHANDRA	**ANUBHAV SHARMA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Delhi
Dated: 12.08.2026

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