

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-2' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI KULDIP SINGH, JUDICIAL MEMBER

SA No. 856/DEL/2018

&

ITA No. 883/DEL/2016  
[A.Y 2011-12]

M/s Sony Mobile Communications  
[India] Pvt. Ltd  
A-31, Mohan Cooperative Indl. Estate  
Main Mathura Road, New Delhi

Vs.

The J.C.I.T  
Special Range - 8  
New Delhi

PAN : AAKCS 7996 N

ITA No. 2106/DEL/2016  
[A Y 2011-12]

The J.C.I.T  
Special Range - 8  
New Delhi

Vs.

M/s Sony Mobile Communications  
[India] Pvt. Ltd  
A-31, Mohan Cooperative Indl. Estate,  
Main Mathura Road, New Delhi

PAN : AAKCS 7996 N

(Applicant)

(Respondent)

Assessee By : Shri Nageshwar Rao, Adv  
Shri Sandeep S. Karhail, Adv

Department By : Shri H.K. Choudhary, CIT-DR

Date of Hearing : 09.05.2019

Date of Pronouncement : 14.05.2019

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-**

The above two cross appeals by the assessee and revenue are preferred against the order dated 28.01.2016 framed u/s 144C r.w.s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] pertaining to assessment year 2011-12.

2. The quarrel revolves around the Transfer Pricing adjustment made on account of Advertisement, Marketing and Promotion [AMP] spend while determining the Arm's Length Price [ALP] in respect of international transaction

3. The quarrel can be understood from the following operative part of the impugned assessment order:

"3.1 During the year under consideration the assessee had undertaken international transactions with its associated enterprises. As the value of the international transaction was more than Rs. 15 crores, with the previous approval of CIT, Delhi-III and in accordance with the provisions of section 92CA of the I.T. Act, the international transactions entered into by

the assessee with the Associated Enterprises was referred to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price.

3.2 The TPO passed an order u/s 92CA(3) on 29/01/2015, wherein he has determined that an adjustment of Rs. 35,75,26,343/- should be made to the value of international transactions entered into by the assessee company. A copy of the order was already issued to the assessee company. Therefore, as per TPO order under section 92CA(3) dated 29/01/2015, a sum of Rs. 35,75,26,343/- was proposed to be added to the income of the assessee in the draft assessment order dated 09/03/2015 issued u/s 144C of the I.T. Act. The order dated 29/01/2015 of the TPO is being made part of this order as per Annexure - 1

3.3 The assessee filed objections before the Hon'ble Dispute Resolution Panel- 2 against the draft assessment order u/s 144C of the Act. The Dispute Resolution Panel-2, vide their directions u/s 144C(5) of the I.T. Act issued on 28/12/2015, received by the ACIT, Circle-24(1) on 30/12/2015 have decided the objections of the assessee. The directions dated 28/12/2015 of the DRP is being made part of this order as per Annexure - 2.

3.4 The DRP has issued directions in respect of computation of Arm's Length Price of International Transactions entered into by the assessee. The directions of the DRP were forwarded to the Transfer Pricing Officer for making revised computation of the adjustments to be made in the case of the assessee. The TPO vide letter dated 27/01/2016 has computed the revised adjustment to Rs.5,90,87,389/- instead of Rs.35,75,26,343/- as was determined in the draft assessment order. The letter dated 27/01/2016 is made part of this final order as Annexure-3.

3.5 In view of the above, giving effect to the direction of Hon'ble Dispute Resolution Panel-2, New Delhi an addition of Rs. 5,90,87,389/- is being made on account of Transfer Pricing Adjustment.

3.6 Since I am satisfied that the assessee has furnished inaccurate particulars of its income, penalty proceedings under section 271(l)(c) are initiated separately.

*(Addition of Rs.5,90,87,389/-)*

4. The assessable income is proposed to be computed as under:

Total income as per return of income	Rs.	20,66,73,870/-
Add: As discussed in para 3 above	Rs.	5,90,87,389/-
Total income	Rs.	26,57,61,259/-
Rounded off	Rs.	26,57,61,260/-

4. Both the assessee and the Revenue are in appeal before us.
5. At the very outset, the ld. counsel for the assessee stated that the entire dispute has been settled in favour of the assessee and against the revenue by the Tribunal vide order dated 26.07.2018 in ITA No. 6410/DEL/2012. It is the say of the ld. counsel for the assessee that the matter travelled upto the Hon'ble High Court of Delhi and the Hon'ble High Court, vide order dated 05.02.2019 in ITA No. 123/2019 & CM No. 5324-25/2019 dismissed the appeal of the Revenue.
6. The ld. DR, while strongly supporting the order of the TPO, could not bring any distinguishing decision in favour of revenue.
7. Before proceeding any further and considering the order of the Tribunal and the Hon'ble High Court [supra] it would be pertinent to understand the facts of the appeal under consideration.
8. The business profile of the assessee and its Associated Enterprises [AEs] are similar to the business profile considered by the Tribunal in ITA No. 6410/DEL/2012 for assessment year 2008-09.

9. During the year under consideration, the assessee entered into the following international transactions with the AEs:

S.No	Type of international transaction	Method used by Assessee		Total value of transaction (Rs.)
		MAM	PLI	
1.	Purchase of Mobile Handsets & Spares	TNMM	OP/Sales	5,815,076,882
2.	Business Promotion expenses paid			20,687,701
3.	Cost Recharges paid/payable	CUP		677,049
4.	Cost Recharge			424,640,697

10. The functions performed by the assessee are marketing and distribution of mobile phones/technology products and provision of repair and maintenance services. In carrying out its business, the assessee used the brand name, trade mark, know how technical data, operating/quality standards, etc developed/owned by the AEs. The trade name 'Sony Ericsson is owned by overseas group companies. The Indian entity is a distributor of branded products, the brand being owned by the overseas supplier. The sale of a branded products to a distributor carries with it the stated or implied right to use the supplier's trade mark or trade name only for the purpose of reselling

the supplier's products. As per the TP report, the assessee undertakes the market risk, product liability risk, credit risk, manpower risk and foreign currency risk.

11. During the course of TP assessment proceedings, it was noticed that the assessee had incurred huge costs on AMP. It is seen from the audited financials of the company that it does not own any intangibles in the nature of brand name or marketing intangibles. It was found that the following expenses relating to AMP were incurred:

Advertisement expenses	Rs. 27,980,240
Business Promotion and Selling expenses	Rs. 668,216,561
Total AMP	Rs. 845,257,786
Sales	Rs. 6,812,468,061
AMP/Sales %	12.41%

12. The TPO was of the firm belief that expenditure of AMP has been incurred exclusively to promote products of the AEs bearing the brand /trade name Sony Ericsson, which is beneficially owned by the AE. According to the TPO, such expenditure has necessarily resulted into brand building and increased awareness of the products bearing the brand/trade name Sony Ericsson.

13. In this context, the assessee's submissions were as under:

"a) The AEs are the owners of the "Sony Ericsson" brand.

*b) The assessee purchases the products at resale price minus transfer price. The price is adjusted according to the price level development in the market and operating cost changes in the sales subsidiary. Accordingly the pricing of products between the assessee and the AE is regulated in a manner that ensures that the assessee earns an arm's length return with respect to its distribution activity. Therefore, on the price level development in the market, if at the year end the assessee is not able to achieve arm's length return with respect to the distribution activity then as per the policy it receives credit notes from the AE to achieve an arm's length return on sales.*

*c) During the relevant assessment year the assessee received a credit note of Rs. the AE to in order to achieve an arm's length result.*

d) During the course of proceedings for FY 2009-10 it was noted that there was an agreement between the overseas AE and the assessee. A Distribution Agreement dated 01.06.2007, was furnished by the assessee along with letter dated 28.05.2013 during the proceedings for last year.

e) The assessee has not made any payment to its AE for using the brand name.

f) The advertisement and marketing activity of the assessee is the party of its distribution activity.

14. The OP/OR shown by the assessee is at 2.07% which is compared with OP/OR of the comparables at (-) 0.12%. In doing so, the assessee has included the credit notes amounting to Rs. 42,46,40,697/- received which represents business model arrangement of the assessee.

15. The TPO was of the opinion that the pricing arrangement between the assessee and its AEs appears to be more of reimbursement of excess price charged by the AEs which, later on, is credited to the assessee's account by way of credit. The TPO was of the firm belief that the credit notes amounting to Rs. 42,46,40,697/- have no relation to with the expenditure that the assessee has incurred on the AMP for which no compensation/reimbursement has been made by the AE. The TPO concluded by holding that this is an international transaction within the meaning of sec. 92B(1) r.w.s 92F(v) of the Act.

16. Accordingly, show cause notice was issued to the assessee vide letter dated 12.12.2014. We find that the entire exercise is in sync with the exercise done in assessment year 2008-09.

17. The list of 23 companies which were qualitatively analysed for using them as comparable, are as under:

S. No.	Company Name	Sales	Selling & distribution expenses	AMP/Sales Ratio
1	Compuage Infocom Lid.	1314.7	0	0.00%
2	Computer Point Ltd.	109.92	0.03	0.03%
3	Dynalog (India) Ltd.	37.82	1.68	4.44%
4	Kandioners Sales Pvt Ltd.	15.46	0.04	0.26%
5	Lalani Computech Ltd.	17.54	0.14	0.80%
6	Redington India) Ltd.	7905.3	16.97	0.21%
7	Savex Computers Ltd.	1867	11.33	0.61%
8	Vivek Ltd.	335.06	13.91	4.15%
	Average			1.31%

Companies identified as comparables by the assessee after updation of margins are also analysed as below:

1.	Spice Mobility Limited	Discussed below in Annexure 1
2.	Compunics Information Systems Ltd	No data for F.Y. 20110-11
3.	General Sales Limited	No data for F.Y. 20110-11
4	Munoth Industries Ltd	It is accepted as comparable

5.	Wep Peripherals Limited	As per the annual report the entire sales is on account of manufactured goods even though the expenditure shows the purchase of traded goods. In the absence of accurate data this company is not being considered as comparable.
6	Aanchal Computers Limited	It is accepted as comparable.
7	Compuage Infocom Limited	Discussed below in Annexure 1
8	Redington (India) Limited	Discussed below in Annexure 1
9	SreeBiharii mills Limited	No data for FY2010-11,
10	Beetel Teletech Ltd	Discussed below in Annexure 1
11	Cerebra Integrated Technologies Ltd	Data availability is for September 2010 ending. Since the data for March ending is not available, this company is rejected.
12	HCL Infosystem Limited	Discussed below in Annexure 1
13	Jupiter International Limited	The data of AMP for trading segment is not available and thus it is not being considered as comparable..
14	Priya Limited	Discussed below in Annexure 1
15	Salora International Limited	Discussed below in Annexure 1

18. The list of companies finally selected as comparables alongwith calculation of AMP/Sales ratio is as under:

<i>S. No.</i>	<i>Company Name</i>	<i>Sales</i>	<i>Selling &amp; distribution</i>	<i>AMP/Sales Ratio</i>
1	<i>Compuage Infocom Ltd.</i>	<i>1314.7</i>	<i>0</i>	<i>0.00%</i>
2	<i>Computer Point Ltd.</i>	<i>109.92</i>	<i>0.03</i>	<i>0.03%</i>
3	<i>Dynalog (India) Ltd.</i>	<i>37.82</i>	<i>1.68</i>	<i>4.44%</i>
4	<i>Kandtioneers Sales Pvt</i>	<i>15.46</i>	<i>0.04</i>	<i>0.26%</i>
5	<i>Lalani Computech Ltd.</i>	<i>17.54</i>	<i>0.14</i>	<i>0.80%</i>
6	<i>Redington (India) Ltd.</i>	<i>7905.3</i>	<i>16.97</i>	<i>0.21%</i>
7	<i>Savex Computers Ltd.</i>	<i>1867</i>	<i>11.33</i>	<i>0.61%</i>
8	<i>Vivek Ltd.</i>	<i>335.06</i>	<i>13.91</i>	<i>4.15%</i>
9	<i>Munoth Industries</i>	<i>12.84</i>	<i>0.11</i>	<i>0.86%</i>
	<i>Aangha! Computers</i>	<i>8.60</i>	<i>0.03</i>	<i>0.35%</i>
	<i>AVERAGE</i>			<i>1.17%</i>

19. In its submissions, the ld counsel for the assessee strongly argued that as per the business model followed by it, an OP/sales margin of 2.07% has been earned which was higher than the Arm's Length Margin of (-)0.12% accepted by the TPO. It was further contended that the assessee has been remunerated for all its functions together by way of gross margin and credit notes instead of the AMP function being isolated and remunerated as a service fee.

20. After considering the submissions of the assessee, the TPO observed as under:

“10.3 The arguments of the assessee have been examined on the aggregated benchmarking analysis for AMP. It would be -in order to first briefly set out the law on aggregation of transactions. Section 92C(1) refer to arm's length price in relation to an international transaction. Rule 10B(l)(e) read with section 92C deals with TNMM and it refers to only net profit margin realized by enterprise from an international transaction or a class of such .transaction. Hon'ble ITAT in case of UCB India (P) Ltd. V ACIT (2009} 30SOT 95 (Mumbai) after referring to the OECD Guidelines and the provisions of law, while examining applicability of TNMM at entity level or at transaction by transaction basis has held that under TNMM an international transaction or a class of such transactions should be evaluated on standalone basis.

10.4 It was was also held in the case of Star India P. Limited 2008-TIOPL-426-ITAT-Mum that International transaction is to be examined separately and ALP should be determined (It was held in the case of Twinkle Diamond (2010-TII-09-ITAT-Mum-TP) 2009-TII-02-ITAT-Mum-TP) that TNMM does not permit the AO to compare level profits and make adjustments under Chapter X. It was further held that it comparison of net profit margin realized from an international transaction or aggregate of class of international transactions.

10.5 Here, on the issue of evaluating the transactions on transaction to transaction basis, the Revised OECD Guidelines may be referred to. Relevant part of the guidelines is reproduced below:

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. Examples may include some long-term contracts for the supply of commodities or services,

2. rights to use intangible property, and 3. pricing a range of closely-linked products (e.g. in a product line] when it is impractical to determine pricing for each individual product or transaction. Another example would be the licensing of manufacturing know-how and the supply of vital components to an associated manufacturer; it may be more reasonable to assess the arm's length terms for the two items together rather than individually. Such transactions should be evaluated together using the most appropriate arm's length method.

A further example would be the routing of a transaction through another associated enterprise; it may be more

appropriate to consider the transaction of which the routing is a part in its entirety, rather than consider the individual transactions on a separate basis.

The above guidelines in very clear terms point out that ideally the transactions should be benchmarked using transaction by transaction approach.

10.6 The fundamental rule for benchmarking under Indian Transfer Pricing regulations is to benchmark based on a transactional approach. There should be some prior understanding, design or commercial logic as to why two transactions can be clubbed or set off against each other. Since the assessee company has not been able to demonstrate that there is any logic or rationale for aggregation or that the transactions of the advertisement expenditure and the other transactions in the distribution activity are inter-dependent, the clubbing of transactions cannot be allowed. It is therefore held that the international transaction of "creation and development of local marketing intangible" shall be benchmarked separately.

10.7 The contention on behalf of the assessee that if the overall profit of the Indian entity is than the comparable cases then it should be presumed that the foreign enterprise 'supplied goods at relatively low price to make up for the AMP expenses Incurred in India towards brand promotion. There are no roots

for such a presumption. In order to take benefit of such a contention the assessee is required to directly prove the fact of cheap purchases for the overall higher net profit rate. This fact can be established by demonstrating that the foreign AE charged a specially low price from the assessee in comparison with that charged for the similar goods supplied to other independent entities dealing with it in India or in case there is no other independent entity in India, then the price charged for similar goods from other foreign parties. It can also be proved by showing that goods with identical features are available in the Indian market at a higher price. The fact that the assessee has a better gross/net profit rate in comparison with her comparable entities is not decisive in itself of the assessee having purchased the goods at a concessional rate from its foreign AE as a compensation for its incurring AMP expenses towards the promotion of their brand. "

21. With the above observations, the TPO dismissed the claim of the assessee by stating that the credit notes issued by the AEs have no relation with the expenditure that the assessee has incurred on the AMP for which no compensation has been received by the assessee and further rejected the arguments of the assessee that by way following trade business model, the assessee has been suitably compensated for its efforts in creating and developing marketing intangibles.

22. Applying the Bright Line Test, the TPO selected the following comparables for AMP analysis and thereafter determined the ALP in respect of AMP expenses:

S.No	Particulars	AMP/Sales
i,	Dynalog (India] Ltd.	4.44
ii.	Lalani Computech Ltd.	0.80
iii.	Savex Computers Ltd.	0.61
iv.	Vivek Ltd.	4.22
V,	Munoth Industries	0.86
vi,	Infiniti Retail Ltd.	2.17
	<b>Average</b>	<b>2.18%</b>

19. Computation of ALP i.r.o AMP Expenses:

20.1 Thus, in view of the above discussion, the amount which represents the bright line and the amount that should have been compensated to the assessee company are computed hereunder

Particulars	Amount in INR
Total sales	6,812,468,061
Arm's length level of AMP exp. {% of sale}	2.18%
Arm's length AMP	148,511,804
Amount actually spent on AMP exp.	845,257,786
Amount spent in excess of bright-line' and on creation of	696,745,982
Mark-up @ 12.26%	85,421,057
Total ALP reimbursement	782,167,040
Amount of reimbursement received	424,640,697
The amount by which the assessee company should have been reimbursed by A.E, and for which the adjustment is proposed to be made	<b>357,526,343</b>

23. Objections were raised before the DRP and after considering the facts and submissions and after analysing the comparables, the DRP concluded as under:

"Based on these figures, the calculation of segmental margin with AMP as separate segment in the cusp of the assesses as given below

Particulars	Distribution	Total AMP
Operating income	A B	
Operating Expenses (Excluding AMP and S & D)	625,49,95,909	
Selling and Distribution expenses (as per remand report)	47,82,21,579	
Advertisement, Marketing and Promotion expense ("AMP") -		36,70,36,207
Total Operating Expenses	673,32,17,488	
Operating margin/sales (Arms Length)	As per the final comparables selected (2.65% as per the discussion above)	
This figure is total operating expenditure less selling and distribution expenses as per P&LA/c.		

Based on the above segmental data of operating expenses (excluding AMP) for the assesses and the average margin of the comparables identified, the sales figure for distribution segment is identified so that the margin of this segment is at arm's length. After determining the value of sales, the balance figure of sales would correspond to the sales attributable to AMP function. Considering the value of resultant sales and the total AMP cost of Rs. 36,70,36,207/-, the profit margin of AMP

segment is identified and tested against the comparables, which are engaged in providing services in the nature of AMP activity, it is further seen that the amount of AMP expenditure is shown in the books of account at net value. An amount, of Rs, 42,46,40,890/- is received as reimbursement by the assessee on account of advertisement and merchandising costs. Accordingly, the total value of AMP expenditure incurred by the assessee is Rs. 36,70,36,207/. This value will be considered for the purpose of determination of costs to AMP segment and a credit of its, 42,46,40,690/- is required to be allowed to the assessee. While determining the final adjustment such an approach is upheld by the tribunal in the case of Casio India Company Pvt. Ltd in ITA No.4726/Del/2010 [para 16 and 17 of the judgment],

17. The assessee has not submitted any search process in which the return on AMP activity is calculated. In the absence of sufficient time with this office to carry out a search process in this regard, the search is being submitted by this office also. However, a search may be got conducted in this regard. Depending upon the margin of AMP function in the case of the assessee, an adjustment may or may not result

### Conclusion

18. On the basis of discussion made above, the objections of this office in respect of the submission of letter by the assessee can be summarized as below;

- i The primary reliance is placed on the analysis carried out by this office in the TP order the TP commissioner rate has recommended filing SIP before the Hon'ble Supreme Court of India on this issue against the order of Hon'ble High Court,
- ii Without prejudice, the comments of this office are limited to the contention of the assessee regarding the applicability of the judgment of the High Court in the case of Sony Ericsson for benchmarking of AMP Expenditure
- iii In view of the non furnishing of suitable comparables for carrying out comparability analysis using aggregated approach by the taxpayer and non availability of sufficient time with this office, the segregated approach is required to be followed,
- iv The analysis is required to be carried out for each segment separately,
- v The comparables identified by the assessee for the segment are not appropriate and contention i.r.o the comparables are already made above, It is again reiterated that the comments are made in few of the limited time available and should not be considered as exhaustive and stand of this office
- vi For determination of arm's length price corresponding to AMP Junction, the distribution related return is identified for the segment on the basis of comparables. For this purpose the expenditure considered is total expenditure without AMP, as discussed in detail above,

vii After ascertaining the distribution related return for the 'segment, the remaining return shown by the assessee is attributed to AMP function and the same is benchmarked using comparables.

viii. In case the return is more than the comparables, no adjustment is to be carried out else the adjustment would be made to consider the transactions at arm's length".

24. Having understood the factual matrix as discussed hereinabove, we find that the facts are identical to the facts considered by the Tribunal in assessment year 2008-09 in ITA No. 6410/DEL/2012. But the only distinguishing factor is that in assessment year 2008-09, the TPO had taken all the comparables used by the assessee in its TP study report whereas in the year under consideration, common comparable is Munoth Industrial Ltd. Except for this, facts relating to business profile, international transactions and AMP spend are identical to the facts of assessment year 2008-09 with the difference in figures only.

25. Now we will consider the findings of the co-ordinate bench in ITA No. 6410/DEL/2012 wherein the relevant findings read as under:

"39. As mentioned elsewhere, the assessee's AEs are engaged in designing and developing new technology and products for mobile communication and over the years have successfully developed several new products and technologies. The AEs are responsible for core marketing and pricing decisions of the products. Also the AEs are responsible for undertaking the global sales and distribution functions. Therefore, in our opinion, by incurring advertisement expenses in the domestic market, the assessee could not have done any value addition to the brand name of the AE.

40. Advertisement expenditure incurred by the assessee company could not have added any value to the brand Sony Ericsson owned by the AE. Since this is the first year of business in India, the assessee had to advertise aggressively but could not be considered as expenditure incurred for brand building. At the most, the same can be considered as having been incurred for brand maintenance. As the saying goes "*Public memory is very short*", such companies have to hit the public eyes through advertisements via print, media or electronic media or any other mode of advertisement because, again as the saying goes "*Out of sight, out of mind*". Sony Ericsson being a new entrant in the mobile segment in the year under consideration, the assessee had to incur advertisement expenses to remind the general public of its existence in the domestic market. In our considered view, such advertisement expenses cannot be considered as being incurred towards brand building. As

mentioned elsewhere, the AEs own brand rights of all products and are responsible for core marketing and pricing decisions of the products and are also responsible for undertaking global sales and distribution function.

41. "Marketing" means the management process through which goods and services move from concept to the customer. It includes the coordination of four elements:

- (i) identification, selection and development of a product,
- (ii) determination of its price,
- (iii) selection of a distribution channel to reach the customer's place, and
- (iv) development and implementation of a promotional strategy.

42. Items 1, 2 and 4 mentioned hereinabove are not applicable in the case of the assessee company. Further, marketing is based on thinking about the business in terms of customer needs and their satisfaction. Marketing differs from selling because "Selling concerns itself with the tricks and techniques of getting people to exchange their cash for your product. It is not concerned with the values that the exchange is all about. And it does not, as marketing invariable does, view the entire business

process as consisting of a tightly integrated effort to discover, create, arouse and satisfy customer needs." In other words, marketing has less to do with getting customers to pay for your product as it does developing a demand for that product and fulfilling the customer's needs.

43. In the light of the aforesaid definition, the assessee has employed a team of employees for carrying out local marketing of mobile phones in India. Global recognition of the brand name "Sony Ericsson" provides support to the assessee company in its marketing effort. The assessee has also undertaken various product promotion activities such as conducting road shows, participating in industry events advertisement in all forms of media channels, etc.

44. Advertisement means a means of communication with the users of a product or service. Advertisements are messages paid for by those who send them and are intended to inform or influence people who receive them.

45. "Business Promotion Expenses" means all expenses incurred in respect of promotion of business. Though, all expenses relating to the advertisement and publicity also help to promote the sales of a business firm but there are so many expenditures which are not advertisement expenses even then they play very important role in maintaining the prestige of the business firm. For example:-

- (a) Refreshment expenses for business clients.
- (b) Gifts to the business clients on certain events.
- (c) To sell the goods to the clients at special discount for their personal use etc.

46. Though, these expenses can be booked in Advertisement and Publicity Expenses Account but to have the idea of actual expenditures on these types of expenses, a separate head as 'Business Promotion Expenses' or 'Sales Promotion Expenses' or 'Expenses With Business Clients' is created.

47. Testing the functions performed by the assessee vis a vis AMP expenses incurred by it, we do not find that the assessee has incurred AMP for the benefit of its AE. All the expenditure incurred by the assessee are in relation to its business and its promotion. Moreover, as mentioned elsewhere, the net margin is much higher than the comparables and looking from that angle also, we do not find any merit in the transfer pricing adjustments. It is incorrect to say that the amount of Rs. 73.83 crores received by the assessee by way of credit notes represents the excess price charged by AE which has been credited to the assessee. The business model of the assessee with its AE is such that the AE ensures that the assessee achieves an arms' length return on sales made by it.

48. Assuming, yet not accepting that the assessee should have been compensated by its AE towards AMP and such compensation as worked out by the TPO is Rs. 69.94 crores, then also no adjustment is required since the assessee has received credit notes worth 74.83 crores and has been suitably compensated.

49. If the AMP expenses are considered as an independent transaction and combined transaction approach is not considered, then also excessive profit derived by bench marking of distribution segment should be adjusted with alleged excessive AMP expenditure thereby providing benefit of set off. This view finds support from the judgment of the Hon'ble High Court of Delhi in its findings at clause xii at page 140 in Tax Appeal No. 16/2014 at para 136 to 146.

50. But this will only be considered when the Assessing Officer/TPO has rejected the comparables adopted by the assessee as a bundled transaction. In the case in hand, and as mentioned elsewhere, the Assessing Officer/TPO has accepted the comparables adopted by the assessee as bundled transaction and, therefore, it would be illogical and improper to treat the AMP expenses as separate international transaction as mentioned by the Hon'ble High Court in its list of findings at clause (v) at page 138 of its order.

51. To sum up, considering the guidelines/findings of the Hon'ble High Court of Delhi [supra] and considering the facts of the case in hand from all possible angles, we are of the considered view that the assessee company has been suitably compensated by its AEs and, therefore, no further adjustment is required. We order accordingly."

26. As mentioned elsewhere, the quarrel travelled upto the Hon'ble High Court and while affirming the findings of the Tribunal, the Hon'ble High Court held as under:

11. The Revenue's only argument is that for determining the comparables, ITAT relied on the TP analysis conducted by the TPO and that such an exercise was based on application of the "bright line" test, which has since been discarded. The allied submission is that the ITAT should have remitted the entire matter for fresh consideration by the TPO.

12. Having gone through the entire record, the court is of the opinion that the revenue's arguments are insubstantial and unmerited. There is no *per se* rule that in every case, the ITAT had to necessarily remit each matter. Given that the materials in the form of reports and documents were available with the ITAT, that the tribunal itself carried out the analysis, based on the record, of the facts which were disclosed before the TPO, does not result in any credence to the revenue's complaint that it was not given

sufficient opportunity. This court notices that the matters were required to be re-examined by the ITAT itself in *Sony Ericsson*, and in view of the further circumstance that the remit was pending for 3 years, the revenue's arguments have no force.

13. On the second issue, i.e. that the AMP exercise is flawed, this court again feels that the analysis carried out by the ITAT, having regard to the details pertaining to the comparable entities, is fairly exhaustive and reasonable; the findings are in Paras 39-49 of the impugned order. The ITAT's findings, consequently that since the brand under which the assessee's products were marketed were relatively unknown in India, the advertisement expenditure could not have been said to inure to the benefit of the AE, which was otherwise a well known brand overseas. Similarly, the nature of its marketing and business expenditure was considered. The revenue's grouse that the TPO had treated the AMP expenditure as a bundled one, is not also tenable. *Sony Ericsson* itself indicates that there cannot be a dogmatic approach as to whether bundled transactions of the kind ought to be segregated and that the entire issue is a fact dependent exercise. The TPO treated the transactions as a bundled one; this court holds that as such that is not a question of law. Lastly, both on the credit notes as well as the fact that in the case of comparables, the margins were in fact lower; the ITAT therefore, correctly, in the opinion of this court recorded its findings that the assessee had been suitably compensated by its AEs.

14. For the foregoing reasons, this court holds that there is no substantial question of law; the appeal is therefore dismissed, but without order on costs

27. It would not be out of place to mention here that the arguments of the revenue taken before the Hon'ble High Court are similar to the arguments taken by the Id. DR before us and we are of the opinion that the Hon'ble High Court while adjudicating the matter has already considered the grievance of the revenue while disposing of the appeal.

28. Considering the parity in the facts between assessment year 2008-09 and the year under consideration, respectfully following the findings of the co-ordinate bench, and the Hon'ble High Court, the appeal of the assessee is allowed and for similar reasons, the appeal of the revenue is dismissed.

29. Since the appeal has been disposed off, the stay petition filed by the assessee becomes otiose.

30. In the result, the appeal of the assessee in ITA No. 883/DEL/2016 is allowed whereas the appeal of Revenue in ITA No. 2106/DEL/2016 stands dismissed. The stay petition SA No. 856/DEL/2018 becomes otiose.

**The order is pronounced in the open court on 14.05.2019.**

**Sd /-**

**[KULDIP SINGH]  
JUDICIAL MEMBER**

**sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 14<sup>th</sup> May, 2019

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

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