

ITA No. 5650/Del/2011 – Assessment Year 2007-08

2. This appeal by the assessee is directed against the order of the Assessing Officer u/s. 143(3) read with section 144C of the I.T Act for the assessment year 2007-08.

3. The grounds raised read as under:

1. *That the assessing officer erred on facts and in law in completing the assessment under section 143(3) read with section 144C of the Income-tax Act, 1961 ('the Act') at an income of Rs. 2,249,20,930 as against the returned income of Rs. 14,96,69,234.*
2. *That the assessing officer erred on facts and in law in making an addition of Rs. 62,205,874 on account of the alleged difference in the arm's length price of the 'international transactions' of (i) Payment of Trademark fees, (ii) Creating of AMP intangible and (iii) export of goods entered into by the appellant with its associated enterprise, on the basis of the order passed under section 92CA(3) read with section 144C(5) of the Act by the Transfer Pricing Officer ("the TPO").*
3. *That the assessing officer/DRP erred on facts and in law in holding that arms length price of the international transactions regarding payment of trademark fees of Rs. 2,83,23,000 to be Nil, allegedly on the basis that no recognizable benefit has been passed to the appellant and therefore there was no rationale for paying this trademark fees to the AE.*
 - 3.1 *That the assessing officer/DRP erred on facts and in law in not appreciating that the payment of trademark fees was validly benchmarked applying TNMM as most appropriate method and that no adverse inference could be drawn on this account.*
 - 3.2 *That the assessing officer/DRP erred on facts and in law in computing adjustment on account of international transaction of payment of trademark fee without applying any prescribed methods under the Transfer Pricing regulations.*

- 3.3 *That the assessing officer/DRP erred on facts and in law in holding that the entire arrangement of the payment of trademark fee is designed to shift profits outside India and grossly misunderstood and misinterpreted the facts of the trademark fee agreement entered into between the appellant and its AE (Goodyear USA).*
- 3.4 *That the assessing officer/DRP erred on facts and in law in not appreciating that the international transaction of payment of trademark fees was undertaken wholly and exclusively for the purpose of business of the appellant.*
- 3.5 *That the assessing officer/DRP erred on facts and in law by not appreciating that the AE has not charged trademark fee from the appellant in earlier years because of its non capability to pay the same due to adverse financial condition and the AE was assisting the appellant in maintaining a competitive end customer price in times of its financial constraints.*
- 3.6 *That the assessing officer/DRP erred on facts and in law in not appreciating that the trademark fee paid by appellant to its AE is far below as compared to the trademark fee paid by other non-manufacturing and manufacturing subsidiaries of Goodyear USA.*
- 3.7 *That the assessing officer/DRP erred on facts and in law in not appreciating that the trademark fees paid by the appellant to the AE (1% of the net domestic sales and 2% of the net export sales) is within the limits prescribed by the Reserve Bank of India (RBI).*
- 3.8 *That the assessing officer/DRP erred on facts and in law in comparing the other subsidiary (Goodyear South Asia Tyres Private Limited, Aurangabad, Maharashtra, hereinafter referred as "Goodyear Aurangabad") of Goodyear USA with the appellant, with reference to trademark fees even when business dynamics and commercial realities (end customer profile, need to be associated with a valuable brand, etc.) in both the companies are entirely different to warrant a comparison with each other.*
4. *That the assessing officer erred on facts and in law in making transfer pricing adjustment amounting to Rs. 2,83,23,000 in relation to the*

advertisement, marketing and sales promotion expenses (hereinafter referred to as 'the AMP expenses') incurred by the appellant.

- 4.1 That the assessing officer erred on facts and in law in not appreciating that expenditure on advertisement and brand promotion, unilaterally incurred by the appellant, could not be regarded as a 'transaction' in absence of any understanding / arrangement between the appellant and the associated enterprise and therefore cannot be termed as an 'international transaction' between the associated enterprise*
- 4.2 That the assessing officer erred on facts and in law in not appreciating that the AMP expenses, etc., incurred by the appellant in India cannot be characterized as an 'international transaction' as per section 92B, so as to invoke the provisions of section 92 of the Act.*
- 4.3 That the assessing officer erred on facts and in law in not appreciating that in the absence of any understanding / arrangement between the appellant and the associated enterprise, the associated enterprise was under no obligation to reimburse the AMP expenses incurred by the appellant for sale of its products to the dealers.*
- 4.4 That the assessing officer erred on facts and in law in holding that AMP expenses incurred by the appellant resulted in promotion of brand owned by the associated enterprise, thereby creating marketing intangibles whose ultimate benefit inured to the associated enterprise.*
- 4.5 That the assessing officer erred on facts and in law in holding that the appellant has developed marketing intangible for the associated enterprise in India by performing all functions and by bearing all economic costs and risks.*
- 4.6 That the assessing officer erred on facts and in law in not appreciating that advertisement and marketing expenses incurred by the appellant is not on behalf of or for the benefit of the AE, any benefit to the AE being only incidental.*
- 4.7 That the assessing officer erred on facts and in law in not appreciating that the AMP expenses incurred by the appellant, did not result in creation of any marketing intangibles; much less on account of the AE.*

- 4.8 *That the assessing officer erred on facts and in law in not appreciating that the power of the TPO is restricted to the determination of arm's length price of international transactions by applying any of the prescribed method and not to make disallowance of business expenses incurred by the appellant.*
- 4.9 *That the assessing officer erred on facts and in law in not appreciating that "bright line limit" is not a prescribed method under the purview of section 92C of the Act.*
- 4.10 *That the assessing officer erred on facts and in law in applying Bright Line Test ("BLT") for computing adjustment on account of expenditure on advertisement and brand promotion expenses without appreciating that in absence of specific provision under the Transfer Pricing Regulations in India., adjustment on account of the arm's length price of the advertisement and brand promotion expenses could not be made.*
- 4.11 *That the assessing officer/DRP erred on facts and in law in not appreciating that the expenditure incurred by the appellant on marketing and advertisement is 1.37% of sales and 2.26% of sales after including payment of trademark fees which is substantially lower than that of expenditure (3.56% of sales) made by comparable companies on marketing and advertisement.*
- 4.12 *Without prejudice, even applying BLT, the assessing officer/DRP erred on facts and in law in not considering any comparables for determining arms length AMP expenditure.*
- 4.13 *That the assessing officer/DRP erred on facts and in law in making adjustment to the income of the appellant of Rs. 2,83,23,000 on account of the arm's length price of the alleged international transaction AMP expenses, holding that instead of payment of the trademark fee to the AE of Rs. 2,83,23,000 the appellant should receive the said amount for creating and developing marketing intangibles in India.*
- 4.14 *That the assessing officer/DRP erred on facts and in law in relying upon the decision of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. vs. Addl. CIT, TPO, New Delhi. [in W.P.(C) 6876/2008 [WP(C)*

6876/2008], which has been set aside by the Supreme Court in a Special Leave Petition filed against the decision of the Hon'ble High Court.

- 4.15 Without prejudice that the assessing officer erred on facts and in law, in not appreciating that the AMP expenses incurred by the appellant was appropriately established to be at arm's length applying Transactional Net Margin Method (TNMM) on entity-wide basis.*
- 5. That the assessing officer /DRP erred on facts and in law in not reducing export incentive amounting to Rs. 62,92,772 from the cost of goods sold for computing gross profit margin for determining the arm's length price.*
- 5.1 That the assessing officer /DRP erred on facts and in law in holding that incentive received in respect of export of finished goods, should not be taken into account for determining the profit/cost in respect of the international transaction of export.*
- 5.2 That the assessing officer / TPO erred on facts and in law in ignoring that the Global Transfer Pricing Policy of the group company provides for reducing the cost of merchandise by the export incentives available to the exporting entity.*
- 6. That the assessing officer erred on facts and in law in disallowing Rs. 79,65,320 being 20% of the expenditure amounting to Rs. 3,98,26,598 incurred on repair and maintenance of the plant and machinery on ad hoc basis holding the expenditure to this extent to be of capital in nature.*
- 6.1 That the assessing officer erred on facts and in law in not appreciating that the aforesaid expenditure on repair and maintenance of plant and machinery did not result in acquisition of / bringing into existence any capital asset and were not expenditure incurred in the capital field.*
- 6.2 Without prejudice, that the assessing officer erred on facts and in law in not allowing depreciation on the aforesaid amount of Rs. 79,65,320 held to be capital expenditure.*
- 7. That the assessing offer erred on facts and in law in disallowing the sum of Rs.17,72,000 being the provision for warranty holding the same to be contingent liability.*

8. *That the assessing officer erred on facts and in law in making ad-hoc disallowance of Rs. 33,08,500 allegedly on account of increase in the expenditure on advertisement and marketing expense as compared to previous year.*

8.1 *Without prejudice, the assessing officer erred on facts and in law in disallowing advertisement and marketing expense for which a transfer pricing adjustment has been made to the income of the appellant by the TPO, thereby resulting in double disallowance in respect of same expenditure.*

9. *That the assessing officer erred on facts and in law in levying interest under Section 234B and Section 234C of the Act.*

10. *That the assessing officer erred on facts and in law in initiating penalty proceedings under Section 271(1)(c) of the Act.*

4. Ground No. 1 and 2 is general

5. **Ground No. 3 to 3.8 - Transfer pricing issue w.r.t. to payment of trademark fee**

The appellant is a public limited company engaged in the business of manufacture and sale of automobile tyres, tubes and flaps in the brand name of 'Goodyear'. The appellant is a subsidiary company of Goodyear Tyre and Rubber Company (GTRC), USA.

The appellant has during the year, inter alia, entered into the transaction of payment of trade mark fee of Rs.2,83,23,000, as per the Trademark License Agreement entered between Goodyear, USA and the appellant.

It was submitted by the appellant before the TPO, that the appellant was granted a non-exclusive, non-transferable, and non sub-licensable right and license to use the name "Goodyear" in its company name, and to use the Licensed Trademarks in respect of all the products, services, advertising and

promotional materials dealt in by the appellant Company. In consideration of the rights and licenses granted to Goodyear India, the assessee had agreed to pay Goodyear USA, a trademark fee calculated as 1% of the (net) domestic sales and 2% of the (net) export sales of its manufactured products.

It was also submitted before the TPO that the assessee has for the purpose of benchmarking of aforesaid international transaction of payment of trade fees has applied TNMM as the most appropriate method with Operating Profit/Sales (OP/Sales%) as the PLI. The assessee has arrived at a set of 6 comparable companies with an average margin of 2.77% (considering multiple year data) as against the appellant's margin in this segment at 6.96%.

6. However, The TPO in the transfer pricing order rejected the transfer pricing analysis undertaken by the assessee and accordingly computed an adjustment on account of international transaction of payment of trademark fee of Rs.2,83,23,000/- by applying CUP method as most appropriate method. The TPO held that there is no recognizable benefit that has been passed to the appellant and accordingly there was no rationale for payment of this trademark fee to the AE. The TPO further held that the payment of trademark fee for the first time during the previous year was designed to shift profits out of India. The TPO accordingly determined the arm's length price of the international transactions of payment of royalty at NIL by applying CUP method. The order passed by the TPO was upheld by the Dispute Resolution Panel on appeal made by the appellant before the DRP.

7. In this regard, the appellant has submitted the following before us:

(i) Payment of Trademark fee from FY 2006-07:

The appellant has been using the 'Goodyear' trade name as its company name and associated trademarks in respect of all its manufactured products since its inception. However, as an exception, since the appellant was recovering from financial difficulties in its earlier year, the payment of trademark fee was waived off by Goodyear USA until financial year 2006-07. The arrangement for payment of Trade Mark Fees in consideration for use of the "Goodyear" trade name and associated trademarks by the appellant was formalized by way of the "Trademark License Agreement" dated October 1, 2006 (the Agreement) and the trademark fee was paid by the appellant to Goodyear USA only during the financial year 2006-07.

In terms of the agreement, Goodyear USA granted Goodyear India, a non-transferable, and non sub-licensable right and license to use the name "Goodyear" in its company name, and to use the Licensed Trademarks in respect of all the products, services, advertising and promotional materials dealt in by the appellant company. In consideration of the rights and licenses granted to Goodyear India, Goodyear India agreed to pay Goodyear USA, a trademark fee calculated as 1% of the (net) domestic sales and 2% of the (net) export sales of its manufactured products. This arrangement, it is submitted, was expressly allowed by the Reserve Bank of India (RBI) under the automatic route.

Further, it would be noted that as per the Goodyear Group's global practice, the other manufacturing locations pay a consolidated royalty at the rate of 5% of sales for use of technology and Goodyear trade name and trademarks. On the other hand the appellant has started to pay a modest royalty of 1% on domestic sales and 2% on export sales, for use of Goodyear trademark and trademarks. The appellant does not pay any royalty for provision of technology by Goodyear USA.

Goodyear USA was supporting the appellant by providing the right/ license to use the valuable Goodyear trade name and associated trademarks in earlier years free of charge. During these years, Goodyear USA actually assisted the Company in keeping its end customer pricing competitive and achieving a higher market penetration / demand by waiving off the trademark fee, however at the same time still providing it with the right to use the Goodyear trade name and associated trademarks.

It would be appreciated that merely because for use of 'Goodyear' trade name a trademark fee was not charged by Goodyear USA from Goodyear

India in the earlier years cannot lead to the inference that the said intangible itself was not valuable.

The contention of the TPO that the brand name 'Goodyear' was of no value, is contrary to facts on record, in as much as, the appellant has earned significant profit year after year from the use of trademark 'Goodyear' for selling its products in India, as would be evident from the profitability trend of the appellant for the past few years as under:

(Amount in Rs. 000')

Particulars	Financial Years			
	2003-04	2004-05	2005-06	2006-07
Total sales	6,747,593	7,273,997	7,701,819	9,776,898
Operating Profit (OP)	28,860	102,813	217,792	620,066
OP/Sales	0.43%	1.41%	2.83%	6.34%*

**After taking into account trademark fees paid / payable for the year.*

It would be appreciated that the mere fact that, on account of loss in the earlier years, Goodyear USA did not charge royalty for allowing use of trademark 'Goodyear' from the appellant, cannot be held against the appellant and would not constitute a bar in charging royalty for use of the intangibles in the relevant previous year.

(ii) Erroneous conclusion that 'Goodyear' brand was weak/worthless:

The TPO in the transfer pricing order disallowed the payment of trademark fee of Rs. 2,83,23,000 on the ground that there is no recognizable benefit that has been passed to the appellant and accordingly there was no rationale for payment of this trademark fee to the AE. The TPO further held that if indeed some benefit was accruing to Indian company, due to the trademark then, the Indian company should not have been in losses for so many years.

In this regard, kind attention of the Hon'ble Members is invited to the business and economic circumstances/ reasons under which the Indian company operated during the years it made losses.

Beginning FY 2000-01, the Indian Tyre industry witnessed a sharp increase in prices of raw materials like synthetic rubber, natural rubber etc. and

such price increase continued till around FY 2005-06. Due to intense competition in the market, where overall production was more than the domestic demand, the appellant company could not pass on the cost increase to its end customers and hence the same had an adverse impact on its operating margin.

Further, during FY 2000-01, the company heavily expanded its Rear Farm Tyre business and made huge investments for the same. Since the returns of such investment could only be reaped after a time lag, in the interim, the high depreciation cost led to an adverse impact on the operating margins of the appellant company.

Other major reasons for the company to incur losses at the operating level were slowdown in the Indian economy and impact of local government levies like the Haryana Local Area Development Tax (HLADT).

It would be appreciated that all of the above business/ industry factors are valid reasons why the appellant company made losses in its earlier years of operation. It is imperative to understand that “Goodyear” trade name is a valuable intangible, but it does not imply that simply because Goodyear India uses the “Goodyear” trade name, it cannot ever make losses. This would be a totally unrealistic expectation. Had this been the case, no company with a strong brand name / equity would ever make losses.

*To substantiate the point that the “Goodyear” name is valuable, several articles and press releases that clearly bring out the fact that “Goodyear” is one of the world’s most popular and well-known brands have been placed on record before the TPO. Further, in the Industry Analysis section of the TP Study report of the appellant for the year, it is stated on page 9 that “Globally, the tyre industry is highly competitive with the top three players viz. Bridgestone, Goodyear and Michelin constantly jostling for the top spot”. This clearly substantiates the fact that the **“Goodyear” trade name is a very strong name in the global tyre industry.***

*It would also be pertinent to mention that Goodyear USA does not license the “Goodyear” trade name and associated trademarks to any third party for the same / similar products. However, **Goodyear USA does license use of the “Goodyear” trade name to third parties for different products which do not relate to Goodyear's core and continuing businesses,** for instance apparel, shoes, sports and leather accessories etc. These **third***

parties normally pay fixed brand usage fees or royalties as a percentage of their sales to Goodyear USA for using the “Goodyear” name on their products. This fact alone establishes beyond doubt that the “Goodyear” name is a valuable intangible. This is because no third party would ever pay for something that was not valuable.

Reference in this regard is made to the decision of Delhi Bench of Tribunal in the case of Maruti Suzuki Limited, reported in ITA No. 5237/Del/2011 (assessment year 2005-06). In this case, the assessee, Maruti Suzuki Limited made a payment of Rs. 198.58 crore to its associated enterprise, Suzuki Motor Corp., in terms of license agreement which provided the assessee right to use technical assistance in the form of license information and license trade mark of ‘Suzuki’ for the technological development and sales of products and parts. However, bifurcation of payment for technical assistance and license trade mark was not done by the assessee in the said license agreement.

The TPO, in this case too, observed that at the time of commencement of business, since the ‘Suzuki’ brand was lesser known brand in India, it has piggybacked the brand name ‘Maruti’ which was an established brand and therefore, there was no case for the assessee to have paid any brand royalty to SMC Japan for ‘Suzuki’ brand.

Hon’ble Delhi Bench of Tribunal, while deleting the disallowance of payment of royalty made by the TPO/DRP, held as under:

“14. Another aspect of the assessee’s submissions in this regard is that the TPO has erroneously concluded that Suzuki brand was weak/worthless. In this regard, assessee has submitted that TPO has erred in failing to appreciate SMC’s stature, standing and reputation in the small car segment of the motor car industry not only in Japan, but all over the world. The SMC’s brand/logo/trade mark has a well established value in the small car segment. **The license agreements in this regard have entitled the assessee to manufacture and sell the world renowned car models. The association of the Suzuki trade mark with that of the assessee not only brought an international flavor to the Maruti brand but also helped the assessee in projecting itself as a company which is associated with a global automotive giant. We agree with the assessee’s submission that the decision to use Suzuki name / brand was taken by the assessee in order to advance its own commercial**

interest. No question arises of the assessee company having conferred any benefit on Suzuki Motor Corporation Japan by using its name in conjunction with Maruti nor of any Transfer Pricing adjustment on this basis. We agree with assessee's submission of the assessee that Suzuki brand is an international renowned global brand. This can be substantiated by the Report of top 500 brands available on internet."

Following the order passed for the assessment year 2005-06, Hon'ble Delhi Bench of Tribunal in the appeal for assessment year 2006-07, bearing ITA No. 5120/Del/2010 too, deleted the transfer pricing adjustment made on account of payment of royalty.

In view of the same, it cannot be anybody's case that the "Goodyear" name has no beneficial impact whatsoever on Goodyear India. "Goodyear" is a valuable name and Goodyear USA, which owned and developed the same over years, would certainly charge those who were licensed the right to use it.

(iii) Benchmarking of payment of royalty applying TNMM

The international transactions entered into by the appellant have been aggregated for the purpose of benchmarking applying the Transactional Net Margin Method (TNMM) as the most appropriate method. In the Transfer pricing report, the appellant had selected TNMM as the most appropriate method. In respect of the international transactions related to the manufacturing segment the appellant has chosen TNMM as the most appropriate method with Operating Profit/Sales (OP/sales%) as the PLI. The appellant has arrived at a set of 6 comparables with an average margin of 2.77% using multiple year data as against the appellant's margin in this segment at 6.96%. For its trading segment the appellant has chosen TNMM as the most appropriate method and Operating profit/Total cost (OP/TC%) as the PLI. The average margin of the 7 comparables is 0.94% as against the appellant's margin of 5.12%.

Since the operating margin of the appellant is higher than the comparables, the international transactions entered into by the appellant are to be considered being at arm's length applying TNMM as the most appropriate method. It is submitted that for the purpose of applying TNMM, the operating profit margin of appellant from the manufacturing segment as a

whole was considered wherein payment of royalty to associated enterprises was taken as cost.

In the case of the appellant, it is nobody's case that the company has entered into diverse activities. The international transactions of the appellant primarily relate to its business of manufacturing of tyres and such international transactions are closely interlinked or inter-twined. It would also not be possible to determine separately profit from the international transactions of payment of trademark fees.

It is pertinent to note here that the royalty relates to the entire turnover/production of the appellant and constitutes an essential part of the cost of sales. The entire business model of the appellant is based on the licenses granted by the associated enterprise to manufacture the tyres which have been highly successful and renowned throughout the world, and for providing all the I.P. rights and technology necessary for the same, for which the royalty payment has been made. Without which, the appellant's business will cease to exist and its entire operations would come to a halt.

Accordingly, since the entire operation of the appellant is based on rights and licenses to manufacture the automobile tyres and tubes, for which royalty is being paid, the royalty payments cannot be separately evaluated.

Hon'ble Delhi Bench of Tribunal, in a similar case of Maruti Suzuki India Limited vs. ACIT (ITA No. 5237/Del/2011), for assessment year 2005-06, too, held as under:

"13.1 Thus, we agree with the submission of the appellant's counsel that the entire business model of the appellant is based on license from SMC, Japan for which royalty has been paid. Without such technology supply the appellant's business will cease to exist and its entire operations would come to a halt. Thus, we agree with the appellant's submission TPO has arbitrarily divided the license agreement of the appellant without appreciating that all the license agreement is a single in severable agreement."

In view of the aforesaid, it would be appreciated that the royalty has been paid by the appellant in pursuance of the license agreement to manufacture the products. It is submitted that in the absence of such an agreement, the

appellant would not have been able to manufacture and sell its products, which is the cornerstone of its business.

Accordingly since the entire operation of the appellant is based on the rights and licenses to manufacture the automobile tyres and farm tyres, for which royalty is being paid, the royalty payments cannot be separately evaluated. Therefore entity wise TNMM has appropriately been applied as the most appropriate method.

Rule 10A(d) provides that closely linked transaction can be considered together. Further, para 3.9 of the revised OECD guidelines on transfer pricing states that:

*"3.9 Ideally, in order to arrive at the most precise approximation of fair market value, 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** 1. 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 or methods.** 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."*

It is pertinent to note here that the royalty relates to the entire turnover/production of the appellant and constitutes an essential part of the cost of sales in its manufacturing segment.

The Hon'ble Delhi Court, while adjudicating the batch of appeals against the transfer pricing adjustment on account of AMP expenses, in the case of Sony Ericsson Mobile Communications India Pvt Ltd vs CIT (ITA No

16/2014) reported as 374 ITR 118, upheld clubbing of closely linked transactions for undertaking benchmarking analysis applying entity wide TNMM holding as under:

“80. The use of expression class of transaction functions performed by the parties in Section 92C(1) illustrates to the contrary, that the word transaction can never include and would exclude bundle or group of connected transactions. More important would be reference to meaning of the term transaction’ in Section 92F, clause (v), which as per the said definition includes an arrangement or understanding or action in concert whether or not the same is formal or in writing, whether or not it is intended to be enforceable by legal proceedings. Rule 10A in clause (d) states that –for the purpose of this Rule and Rules 10AB and 10E, the term transaction’ would include a number of closely linked transactions. This Rule in positive terms declares that the legislative intent is not to deviate from the generic rule that singular includes plural. The meaning or definition of the expression transaction’ in clause (d) to Rule 10A read with sub-section (1) to Section 92C, therefore, does not bar or prohibit clubbing of closely connected or intertwined or continuous transactions. This is discernible also from sub-rule (2) to Rule 10B quoted above. The sub-rule refers to services provided, functions performed, contractual terms (whether or not such terms are formal or in writing) of the transactions’ which lay down explicitly or impliedly the responsibilities, risks and benefits to be divided between the respective parties to the transactions. Use of plurality by way of necessity and legislative mandate is evident in the said Rule.

81. Similarly, sub-rule (3) to Rule 10B refers to transactions being compared or comparison of the enterprises entering into such transactions likely to affect the price or cost charged etc. A reading of Rule 10C reassures and affirms that the general principle of plurality is not abandoned or discarded.

82. There is considerable tax literature and text that CUP Method, i.e. Comparable Uncontrolled Price Method, RP Method, i.e. Resale Price Method and CP Method, i.e. Cost Plus Method can be applied to a transaction or closely linked, or continuous transactions. Profits Split Method and TNM Method grouped as ‘_transactional profit methods’, can be equally effective and reliable when applied to closely linked or

continuous transactions. Thus, it would be inappropriate to proceed with the arm's length computation methods, with a pre-conceived suppositions on singularity as a statutory mandate. Clubbing of closely linked, which would include continuous transactions, may be permissible and not ostracized. Aggregation of closely linked transactions or segregation by the assessed should be tested by the Assessing Officer/TPO on the benchmark and the exemplar; whether such aggregation/ segregation by the assessed should be interfered in terms of the four clauses stipulated in Section 92C(3) of the Act, read with the Rules. It would, among other aspects, refer to the method adopted and whether reliability and authenticity of the arm's length determination is affected or corrupted.

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91. In case the tested party is engaged in single line of business, there is no bar or prohibition from applying the TNM Method on entity level basis. The focus of this method is on net profit amount in proportion to the appropriate base or the PLI. In fact, when transactions are inter-connected, combined consideration may be the most reliable means of determining the arm's length price. There are often situations where closely linked and connected transactions cannot be evaluated adequately on separate basis. Segmentation may be mandated when controlled bundled transactions cannot be adequately compared on an aggregate basis. Thus, taxpayer can aggregate the controlled transactions if the transactions meet the specified common portfolio or package parameters."

The Hon'ble High Court further held that if the Indian entity has satisfied Transactional Net Margin Method (TNMM), i.e., as long as the operating margins of the Indian enterprise are higher than the operating margins of comparable companies, no adjustment with respect to individual transactions is permitted. The Hon'ble Court held as under:

"101. However, once the Assessing Officer/TPO accepts and adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would as noticed above, lead to unusual and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the inter-linked transaction. This would be also in consonance with Rule 10B(1)(e).

which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the assumption that functions, assets and risk being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible.

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126.....The question, therefore, when a subsidiary entity engaged in distribution and marketing incurs AMP expenses, is to ascertain whether the subsidiary AE entity has been adequately and properly compensated for undertaking the said expenditure. Such compensation may be in the form of lower purchase price, non or reduced payment of royalty or by way of direct payments to ensure adequate profit margin. This ensures proper payment of taxes and curtails avoidance or lower taxes of the Indian subsidiary as a separate juristic entity.

127. We agree and accept the position in the portion reproduced above in bold and italics.

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(i) Where the Assessing Officer/TPO accepts the comparables adopted by the assessed, with or without making adjustments, as a bundled transaction, it would be illogical and improper to treat AMP expenses as a separate international transaction, for the simple reason that if the functions performed by the tested parties and the comparables match, with or without adjustments, AMP expenses are duly accounted for. It would be incongruous to accept the comparables and determine or accept the transfer price and still segregate AMP expenses as an international transaction.

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(iv) The assessed, i.e. the domestic AE must be compensated for the AMP expenses by the foreign AE. Such compensation may be included or subsumed in low purchase price or by not charging or charging lower royalty. Direct compensation can also be paid. The method selected and comparability analysis should be appropriated and reliable so as to include the AMP functions and costs. ”

Various benches of Tribunal in the following cases also upheld the use of entity level profit applying TNMM for the purpose of benchmarking international transactions which are interlinked or intertwined:

- (i) McCann Erickson India Pvt Ltd vs Addl CIT (ITA No 5871/Del/2011)*
- (ii) Atul Ltd vs ACIT (ITA No 3118/Ahd/2010)*
- (iii) Toyota Kirloskar Motor (P) Ltd. vs. ACIT (ITA No. 1315/Bang/2011)*
- (iv) Panasonic India Pvt Ltd vs Income Tax Officer (ITA No.1417/Del/2008)*
- (v) Hindustan Unilever Ltd. vs. ACIT (ITA No.7868/Mum/2010)*
- (vi) Amphenol Interconnect India Pvt. Ltd. vs. DCIT (ITA No.1486/PN/2010)*

Hon'ble member's attention is also invited to the following decision of the Hon'ble Tribunal, wherein, payment of royalty has been considered to be at arm's length price, applying TNMM:

- Lumax Industries Ltd. vs. ACIT (ITA No. 4456/Del/2012) - The finding of the Hon'ble Tribunal was upheld by the Hon'ble Delhi High Court*
- DCIT vs. CLSA India Limited – (ITA No. 2362/Mum/2011)*
- Cadbury India Limited vs. ACIT – (ITA No. 7408/Mum/2010)*
- Thyssen Krupp Industries India Pvt Ltd vs ACIT (ITA No 7032/Mum/2011)*

It is respectfully submitted that transaction of payment of royalty was considered by the appellant as closely linked with other transactions of the manufacturing segment such as import of raw material & service parts etc. and such transactions were therefore rightly benchmarked on an aggregate basis. However, the TPO, without assigning any reason which could justify separate benchmarking of transaction of payment of royalty, arbitrarily disregarded the benchmarking analysis applying TNMM undertaken by the appellant and proceeded to evaluate the transaction of payment of

trademark fees on a stand-alone basis.

Section 92C(1) of the Income-tax Act provides five methods for determination of arm's length price of an 'international transaction'. The mandate of the TPO, it is respectfully submitted, is limited to application of any of the five prescribed methods as the most appropriate method.

The aforesaid has been clarified by the CBDT in Instruction No. 3 of 2003 dated 20-05-2003. Reliance is also placed on the following decisions of the Hon'ble Benches of the Tribunal wherein it has been held that the mandate of the TPO is to determine the arm's length price of the International transaction applying one of the prescribed methods:

- *CIT vs. EKL Appliances Ltd (ITA Nos.1068 & 1070/2011((Delhi High Court)*
- *LG Electronics India Pvt. Ltd., vs. ACIT (ITA No.5140/Del/2011)*
- *CA Computer Associates Pvt. Ltd. vs. DCIT (ITA Nos. 5420 and 5421/Mum/2006), (Affirmed by the Hon'ble Mumbai High Court)*
- *Nimbus Communications Ltd vs ACIT (ITA No 2361/Mum/2007*
- *Dresser Rand India Pvt Ltd vs Addl. CIT (ITA No 8753/Mum/2010)*
- *Thyssen Krupp Industries India Pvt Ltd vs ACIT (ITA No 7032/Mum/2011)*
- *Hero Motocorp Ltd vs Addl CIT (ITA No 5130/Del/2010)*
- *Kodak India Pvt Ltd vs ACIT (ITA No 7349/Mum/2012)*
- *AWB India Pvt Ltd vs Addl CIT (ITA No 4454/Del/2012)*

Attention in this regard is invited to the decision of Hon'ble Delhi High Court in the case of CIT vs. Reebok India Co Ltd (ITA no 213/2014), wherein, while upholding the decision of Delhi Tribunal in deleting the adjustment made by the TPO with respect to transaction of payment of royalty, held as under:

"185. Royalty payable for availing the right to use would depend upon corresponding price, which would have been paid by an independent or unrelated enterprise. This is judged by applying comparables. TPO has not rejected the quantum of royalty on the said principle. The reasoning given by the TPO is not only erroneous for the reasons stated above, but is also contrary to the Rules. Depending upon the method selected, net profit or gross profit of the assessed has to be compared with profit margins of related enterprise. The formula prescribed under the Rules does not accept the ratiocination adopted and applied by the TPO."

In view of the aforesaid it is respectfully submitted that the adjustment made by the TPO is unjustified and liable to be deleted.

(iv) Comparison of Goodyear India Limited and Goodyear Aurangabad

The learned TPO in its order held that no payment of trade mark fee is required to be made by the appellant to Goodyear, USA, since the other group entity in India, i.e., Goodyear Aurangabad was not making any such payment to Goodyear USA.

At the outset it is respectfully submitted that it is beyond the intention of the transfer pricing regulations to compare the international transactions entered between two associated enterprises with another related party transaction. Therefore, international transactions entered between Goodyear USA and the appellant cannot be compared with the international transaction entered between Goodyear USA and Goodyear, Aurangabad.

The third Member Bench of the Mumbai Tribunal, in the case of Tecnimont ICB Pvt. Ltd. vs. ACIT (ITA No. 4608 & 5085/Mum/2010), wherein, while explaining the import of clause (i) of Rule 10B(e) of the Act, held that the Rules strictly provides that an uncontrolled transaction shall be a transaction undertaken between two unrelated parties and cannot be given a wider term to include transaction entered between two other related parties, as under:

“14. What is an ‘uncontrolled transaction’ has been clearly defined under Rule 10A(a) to mean ‘a transaction between enterprises other than associated enterprises whether resident or non-resident’. A plain reading of the meaning given to the expression ‘uncontrolled transaction’ leaves no room for any doubt that it is a transaction between two non-associated enterprises. If the transaction is between two associated enterprises, it goes out of the ambit of ‘uncontrolled transaction’ under Rule 10A. When section 92C is read along with Rule 10B(e) and 10A, it becomes abundantly clear that in computing ALP under the transactional net margin method, a comparison of the assessee’s net profit margin from international transactions with its AEs has necessarily to be made with that of the net profit margin realized by the same enterprise or an unrelated enterprise from a

comparable but definitely uncontrolled transaction, i.e., a transaction between non-associated enterprises. There is no statutory sanction for roping in a comparable controlled transaction for the purposes of benchmarking. When it has been clearly mandated in all the relevant methods for determining ALP that the comparison has to be made by the enterprise's international transaction with comparable uncontrolled transaction, by no sheer logic a comparable controlled transaction can be employed for the purposes of making comparison. There is no warrant for diluting the prescription given by the statute or rules when such prescription itself serves the ends of justice properly and is infallible. If the view of the Revenue that a controlled transaction should not be shunted out for the purposes of benchmarking, is accepted, then all the relevant provisions contained in Chapter X in this regard, will become otiose. If such a contention of making comparison with a comparable controlled transaction is taken to its logical conclusion, then there will never arise any need to take up any case for transfer pricing scrutiny. The reason is obvious. ALP is determined for application in respect of transactions between two AE so that the profit likely to arise from such transactions is not under-reported vis-à-vis from similar transactions with third parties. If the comparison is made again with net profit margin realized from transactions between two AEs, instead of third parties, it may demonstrate the same cooked results in both the situations, thereby leaving no scope for any adjustment. In this eventuality, the very object of such provisions will be frustrated. Thus, it follows that the ALP can be determined only by making comparison with a comparable uncontrolled transaction and not a comparable controlled transaction."

The aforesaid decision in the case of Tecnimont (supra), was also followed by the Mumbai Bench of Tribunal in the case of ACIT vs. Fuchs Lubricants (India) Pvt. Ltd. in ITA No. 7629/Mum/2010.

It is further humbly submitted, that although Goodyear Aurangabad did not pay any trademark fee to Goodyear Group during the financial year 2006-07, Goodyear group was compensated in as much as majority (around 60%) of the sales of Goodyear Aurangabad during the year were exported to the AEs and only around 40% of sales were to third parties. On the contrary, majority (around 98%) of the sales of Goodyear India during the year were to third parties and only around 2% of the sales were to the AEs. Thus the

business dynamics and commercial realities (end customer profile, need to be associated with a valuable brand, etc.) in both the companies were entirely different to warrant a comparison with each other.

It would be appreciated that there is no bar under the Act to have transactions with the group companies. The settled position of law is that the reasonableness of the expenditure has to be seen from the point of view of businessman and not that of the Revenue, as laid down repeatedly in the following cases:

- *CIT vs. Malayalam Plantations Limited: 53 ITR 140 (SC)*
- *CIT v. Walchand & Co. etc. (1967) 65 ITR 381*
- *J K Woollen Manufacturers v. CIT: 72 ITR 612(SC)*
- *CIT v. Birla Cotton Spg. And Wvg. Mills Ltd.: 82 ITR 166 (SC)*
- *CIT Vs. Dhanrajgirji Raja Narasingirji 91 ITR 544*
- *Madhav Prasad Jatia v. CIT U.P.: 118 ITR 200 (SC)*
- *CIT Vs. National Rayon Commercial Co. Ltd. 193 ITR 744*
- *S.A. Builders Ltd. vs. CIT : 288 ITR 1 (SC)*
- *CIT V. Bharti Televentures Ltd: 331 ITR 502 (Del)*
- *CIT vs. Padmani Packaging (P) Ltd. : 155 Taxmann 268 (Del)*
- *CIT v. Rockman Cycle Industries Ltd.: 331 ITR 401 (P&H) (FB)*
- *CIT vs. EKL Appliances Ltd. : ITA No. 1068/2011 & 1070/2011(Del HC)*
- *CIT v. Dalmia Cement (P.) Ltd: 254 ITR 377 (Del)*
- *CIT vs. Dalmia Cement (B) Ltd. (supra), (Del)*

It is respectfully submitted that as long as an item of expenditure has been incurred wholly and exclusively for the purpose of business of the appellant, whether or not such expenditure actually benefits the appellant is an irrelevant consideration for the purpose of determination of ALP.

Reliance is placed on the decision of DCIT vs Ekla Appliances: 345 ITR 241, Wherein the Hon'ble Tribunal held that the TPO cannot challenge the judgment of the assessee as to the source from which the technology is to be obtained and at what cost etc. The Hon'ble Delhi High Court while upholding the decision of the Hon'ble Tribunal held that as long as an expense is incurred wholly and exclusively for the purpose of business, it is irrelevant as to whether such expenditure actually results in profit or not. The Hon'ble High Court held as under:

“21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred “wholly and exclusively” for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines, in the paragraphs which we have quoted above.”

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So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised.”

Reliance in this regard is also placed on the decision of Hon’ble Delhi High Court in the case of CIT vs. Reebok India Co Ltd (ITA no 213/2014), wherein, while deleting the adjustment made by the TPO with respect to transaction of payment of royalty, held as under:

“187. The Tribunal in the impugned order, therefore, had rightly applied the test of commercial expediency and has recorded that the assessed was free to conduct business in the manner it deems fit. We hasten to add that two exceptions have been carved out in the case of EKL Appliances Limited (supra), but the exceptions have not been invoked, nor are the conditions satisfied.”

Hon’ble Delhi High Court in the case of CIT vs Cushman and Wakefield (India) Pvt Ltd. (ITA 475/ 2012) has held that the authority of the TPO is to conduct a TP analysis to determine the ALP and not to determine whether the tax payer derives a benefit from the service. The Hon’ble Delhi High Court has opined that the determination of benefit to the tax payer is in the domain of the AO. The Hon’ble High Court held as follows:

“34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in Dresser-Rand India Pvt. Ltd. v. Additional Commissioner of Income Tax, 2012 (13) ITR (Trib) 422.....

*..... 35. The TPO’s Report is, subsequent to the Finance Act, 2007, binding on the AO. Thus, **it becomes all the more important to clarify the extent of the TPO’s authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise – of factual verification is retained by the AO under Section 37 in this case. Indeed, this is not to say that the TPO cannot – after a consideration of the facts – state that the ALP is ‘nil’ given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure. That decision is outside the authority of the TPO....**”*

Various benches of Hon’ble Tribunal too, in the following cases, applied the aforesaid principle laid down by the Delhi High Court in the case of EKL Appliances (supra):

- Kirby Building Systems India Ltd vs. Addl CIT (ITA 1975/ HYD/ 2010)
- Dresser Rand India Pvt Ltd vs Addl. CIT (ITA No 8753/Mum/2010)Indigene Pharmaceuticals vs. ACIT (ITA No.1541Hyd/2011 & 1874/Hyd/2012)
- Honda Siel Power Products Ltd. vs. DCIT (ITA 5713/ Del/ 2011)
- LG Polymers India Pvt Ltd vs Addl. CIT (ITA No 524/Vizag/2010)
- Ericsson India Pvt. Ltd. vs. DCIT (ITA No. 5141/Del/2011)
- SC Enviro Agro India Ltd vs DCIT (ITA No 2057 & 2058/Mum/2009)
- Lumax Industries Ltd. (supra)
- DCIT vs. Air Liquide Engineering India P. Ltd. (ITA No. 1040/Hyd/2011)
- TNS India Pvt Ltd. (ITA No. 944/Hyd/2007)
- Quintiles Research (India) Private Ltd. vs DCIT (ITA 1605/Bang/2012)
- Festo Controls India Pvt. Ltd. v. DCIT

Thus, whether or not a particular expenditure has to be incurred, depends on the perception of the businessman / appellant, and the Revenue cannot seek to put itself in the armchair of the businessman to decide whether or not such expenditure should have been incurred.

8. We have heard the rival contentions in light of the material produced and the decisions relied upon. Ld. Counsel of the assessee has emphasized on the benchmarking of payment of trademark as closely linked transaction with the manufacturing segment. The Ld. Counsel of the assessee has submitted that the royalty relates to the entire turnover/production of the appellant and constitutes an essential part of the cost of sales. The entire business model of the appellant is based on the licenses granted by the associated enterprise to manufacture the tyres which have been highly successful and renowned throughout the world, and for providing all the I.P. rights and technology necessary for the same, for which the royalty payment has been made. Without which, the appellant's business will cease to exist and its entire operations would come to a halt. Accordingly, since the entire operation of the appellant is based on rights and licenses to manufacture the automobile tyres and tubes, for which royalty is being paid, the royalty payments cannot be separately evaluated. In the case of the appellant, it is nobody's case that the company has entered into diverse activities. The international transactions of the appellant primarily relate to its business of manufacturing of tyres and such international transactions are closely interlinked or inter-twined. It would also not be possible to determine separately profit from the international transactions of payment of trademark fees. Reliance in this regard is placed by the Ld. Assessee counsel on the decision of Hon'ble coordinate Bench of Tribunal, in a similar case of Maruti Suzuki India Limited vs. ACIT (ITA No. 5237/Del/2011), for assessment year 2005-06, too, held as under:

“13.1 Thus, we agree with the submission of the appellant’s counsel that the entire business model of the appellant is based on license from SMC, Japan for which royalty has been paid. Without such technology supply the appellant’s business will cease to exist and its entire operations would come to a halt. Thus, we agree with the appellant’s submission TPO has arbitrarily divided the license agreement of the appellant without appreciating that all the license agreement is a single in severable agreement.”

9. Reliance has also been placed by the assessee on the decision of Delhi Bench of Tribunal in the case of Lumax Industries Ltd. vs. ACIT (ITA No. 4456/Del/2012), wherein, in the similar case of payment of royalty, this Tribunal concluded that:

“.....the payment of royalty cannot be examined divorced from the production and sales. Royalty is inextricably linked with these activities. In the absence of production and sale of products, there would be no question arising regarding payment of any royalty. Rule 10A(d) of the ITAT Rules defines ‘transaction’ as a number of closely linked transactions. Royalty, then, is a transaction closely linked with production and sales. It cannot be segregated from these activities of an enterprise, being embedded therein. That being so, royalty cannot be considered and examined in isolation on a standalone basis.....

Royalty is to be calculated on a specified agreed basis, on determining the net sales which, in the present case, are required to be determined after excluding the amounts of standard bought out components, etc., since such net sales do not stand recorded by the assessee in its books of account. Therefore, it is our considered opinion that the assessee was correct in employing an overall TNMM for examining the royalty. The TPO worked out the difference in the PLI of the outside party (the assessee) at 4.09% and the comparables at 7.05%. This has not been shown to fall outside the permissible range.” The Hon’ble Tribunal accordingly held that the assessee was correct in applying overall TNMM for examining royalty.

10. The aforesaid decision of this Tribunal has been upheld by the Hon’ble High Court in the case of ACIT vs. Lumax Industries Ltd. (ITA No. 102/2014).

11. The assessee has also rightly made reference to the decision of Delhi High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd vs. CIT (ITA No 16/2014) reported at 374 ITR 118, wherein, the Court has upheld clubbing of closely linked transactions for undertaking benchmarking analysis applying entity wise TNMM. In fact, in the case of CIT vs. Reebok India Co Ltd (ITA no 213/2014), being part of the decision of Hon'ble High Court in the case of Sony Erickson, the Court has held as under:

"185. Royalty payable for availing the right to use would depend upon corresponding price, which would have been paid by an independent or unrelated enterprise. This is judged by applying comparables. TPO has not rejected the quantum of royalty on the said principle. The reasoning given by the TPO is not only erroneous for the reasons stated above, but is also contrary to the Rules. Depending upon the method selected, net profit or gross profit of the assessed has to be compared with profit margins of related enterprise. The formula prescribed under the Rules does not accept the ratiocination adopted and applied by the TPO."

12. Another contention of the TPO that the Goodyear Brand was weak and therefore does not require payment of royalty, is not brought out from the records. The AR of the assessee has made elaborate submission and placed evidence on record to show that 'Goodyear' brand is considered to be one of the top most acclaimed brand across the globe. Therefore, there is no merit in the allegation of the TPO that Goodyear brand has no worth and therefore, the payment made by the assessee for use of Goodyear brand is unwarranted.

13. The DRP has further added that since the sister concern of the assessee, Goodyear South Asia Private Limited, is not making payment of royalty, therefore, there shall be no payment of royalty by the assessee either. We have considered this aspect and found that there is difference in business dynamics

and commercial realities in both the companies in as much as 60% of the sales made by Goodyear South Asia Limited is made to its related parties itself. Nevertheless, the AR of the assessee has rightly pointed out that in terms of Rule 10B(1)(a) of the Rules, international transactions entered into by the assessee with its AE, Goodyear Inc. USA cannot be compared with the international transaction entered between another AE, Goodyear South Asia Pvt. Ltd. with Goodyear Inc. USA.

14. The AR of the assessee has rightly placed reliance on the decision of third Member Bench of the Mumbai Tribunal, in the case of Tecnimont ICB Pvt. Ltd. vs. ACIT (ITA No. 4608 & 5085/Mum/2010), wherein, while explaining the import of clause (i) of Rule 10B(e) of the Act, held that the Rules strictly provides that an uncontrolled transaction shall be a transaction undertaken between two unrelated parties and cannot be given a wider term to include transaction entered between two other related parties, as under:

“14. What is an ‘uncontrolled transaction’ has been clearly defined under Rule 10A(a) to mean ‘a transaction between enterprises other than associated enterprises whether resident or non-resident’. A plain reading of the meaning given to the expression ‘uncontrolled transaction’ leaves no room for any doubt that it is a transaction between two non-associated enterprises. If the transaction is between two associated enterprises, it goes out of the ambit of ‘uncontrolled transaction’ under Rule 10A. When section 92C is read along with Rule 10B(e) and 10A, it becomes abundantly clear that in computing ALP under the transactional net margin method, a comparison of the assessee’s net profit margin from international transactions with its AEs has necessarily to be made with that of the net profit margin realized by the same enterprise or an unrelated enterprise from a comparable but definitely uncontrolled transaction, i.e., a transaction between non-associated enterprises. There is no statutory sanction for roping in a comparable controlled transaction for the purposes of benchmarking. When it has been clearly mandated in all the relevant methods for determining ALP that the comparison has to be made by the

enterprise's international transaction with comparable uncontrolled transaction, by no sheer logic a comparable controlled transaction can be employed for the purposes of making comparison. There is no warrant for diluting the prescription given by the statute or rules when such prescription itself serves the ends of justice properly and is infallible. If the view of the Revenue that a controlled transaction should not be shunted out for the purposes of benchmarking, is accepted, then all the relevant provisions contained in Chapter X in this regard, will become otiose. If such a contention of making comparison with a comparable controlled transaction is taken to its logical conclusion, then there will never arise any need to take up any case for transfer pricing scrutiny. The reason is obvious. ALP is determined for application in respect of transactions between two AE so that the profit likely to arise from such transactions is not under-reported vis-à-vis from similar transactions with third parties. If the comparison is made again with net profit margin realized from transactions between two AEs, instead of third parties, it may demonstrate the same cooked results in both the situations, thereby leaving no scope for any adjustment. In this eventuality, the very object of such provisions will be frustrated. Thus, it follows that the ALP can be determined only by making comparison with a comparable uncontrolled transaction and not a comparable controlled transaction."

15. It is also not acceptable that an international transaction which is not undertaken in the preceding year, cannot be undertaken between parties subsequently. In pursuance to direction of the Bench, the appellant has submitted three documents as additional evidence, i.e. (i) certificate issued by the associated enterprise, i.e. The Goodyear Tire & Rubber Company, USA explaining the reasons for not charging royalty in the earlier years; (ii) Copy of extracts of Minutes of Board of Directors meeting dated 31.07.2006 regarding approval for execution of Trademark License Agreement and (iii) copy of an email exchanged between the appellant and the associated enterprise regarding payment of trade mark fee in July 2006. These evidences are admitted on record. The Id. DR has no objection to admit these evidences on record. In these evidences, the AE has clarified that it did not charge royalty in the earlier years

in order to support the appellant who was yet to achieve higher market share, stabilize operations, maintain competitive pricing and was recovering from financial difficulties. Subsequently, when the financial position of the assessee improved, the AE started charging royalty in consideration for allowing the assessee to use its valuable brand name. The reasons given by the AR of the assessee, for not charging royalty by the AE, prior to the year under consideration is duly corroborated from the year to year profits shown by the company. It is valid reason that the AE was not charging royalty prior to financial year 2006-07 was due to the losses incurred by the assessee and prior to year 2000, no Indian companies were allowed to pay trademark fees under automatic route. Nevertheless, the Mumbai Bench of Tribunal has, in the case of *Dresser- Rand India Pvt Ltd vs. ACIT* (ITA No. 8753/Mum/2010) held that whether the services given by the AE to the assessee, without charging consideration, on gratuitous basis in the preceding year, cannot de bar the AE from charging fee for the same services subsequently. The observations are:

“8.....When evaluating the arm'slength price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. Similarly, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is also irrelevant. The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'. The authorities below have been swayed by the considerations which are not at all relevant in the context of determining the arm's length price of the costs incurred by the assessee in cost contribution arrangement.

16. In light of the above, we conclude that there exists a direct nexus between the revenue earned by the assessee and the payment of royalty made to the associated enterprise for using brand name, and therefore, it would be

incorrect to analyze the transaction of payment of royalty in isolation. Further, the Id. DR had raised a contention that the assessee has not demonstrated how the payment for royalty beneficial to the taxpayer. We are of the opinion that, ascertaining whether a service has actually benefitted the assessee is not within the prerogative of the tax authorities. The Hon'ble Delhi High Court in *CIT v. Cushman & Wakefield (India) (P.) Ltd. (2014) 367 ITR 730(Del)* has held that the authority of the TPO is limited to conducting transfer pricing analysis for determining the ALP of an international transaction and not to decide if such services exist or benefits did accrue to the assessee. Such later aspects have been held to be falling in the exclusive domain of the AO.

17. Accordingly, in view of the aforesaid, we are of the opinion that since the operating margin of the assessee at 6.96% is higher than the comparables at 2.77%, the international transaction of payment of royalty entered into by the assessee are to be considered being at arm's length applying TNMM as the most appropriate method.

18. We therefore direct the assessing officer to delete the adjustment on this account.

19. In the result, the appeal is allowed on this ground.

Grounds No. 4-4.15 Transfer pricing issue w.r.t. to Advertising, Marketing and Promotion ('AMP') Expenses

The brief facts relating to these grounds are that during the relevant previous year incurred advertisement and sales promotion expenses (AMP) expenses amounting to Rs. 11,10,58,000 for purpose of its business.

The Transfer Pricing Officer, however, has without undertaking benchmarking analysis of AMP incurred by the appellant by applying any of the prescribed methods, held that since the 'Goodyear' brand is weak, instead of making trade mark fee computed at the rate of 1% of domestic sales and 2% of export sales, amounting to Rs 2,83,23,000, the applicant ought to have been compensated for promotion of the brand/trade name of 'Goodyear' in India (which is owned by the AE) by incurring AMP expenses. The adjustment on this account was later upheld by the DRP.

20. Against the above order the assessee is in appeal before the Tribunal.

21. The appellant has placed written submissions before us, which read as under :

Re: No international transaction

It is submitted that the AMP expenditure unilaterally incurred by the appellant in India for purpose of its business through unrelated parties, does not give rise to a 'transaction', much less an 'international transaction of provision of brand building services' between the associated enterprises, so as to be covered in the first limb of section 92B of the Act. It is respectfully submitted that the order of the TPO/AO needs to be reversed for the reasons elaborated hereunder:

Section 92(1) of the Act provides for computation of income arising from an 'international transaction' having regard to the arm's length price. Explanation to section 92(1) of the Act further clarifies that allowance of any expense or interest arising from an 'international transaction' shall also be determined having regard to the arm's length price.

Sub-section (2) of section 92 of the Act further provides for application of arm's length test in respect of 'mutual agreement' or 'arrangement' for allocation or apportionment of, or any contribution to any cost or expense incurred in connection with benefit, service or facility provided by one or more associated enterprises in an international transaction.

Section 92B(1) of the Act defines ‘international transaction’ to mean ‘transaction’ between two or more ‘associated enterprises’, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of service, etc. The said section further provides that the term ‘international transaction’ shall include a ‘mutual agreement’ or ‘arrangement’ between two or more associated enterprises for allocation or apportionment of or contribution to any cost incurred in connection with any benefit or service provided to any such enterprise.

Arm’s length test as provided in section 92, can be applied only in respect of an ‘international transaction’, as stipulated under section 92B, of the Act, which has the following two limbs:

(I) There should be a “transaction” between two or more associated enterprises.

Or

(II) There should be ‘mutual agreement’ or ‘arrangement’ between two or more associated enterprises for the allocation or apportionment of or contribution to any cost or expense incurred in connection with benefit, service or facility provided to one or more of the associated enterprises.

(A) Re: Whether there exists a ‘Transaction’?

Clause (v) of section 92F of the Act defines the term ‘transaction’ to include an arrangement, understanding or action in concert, whether or not, the same is formal or in writing, or intended to be enforceable by legal proceedings.

From conjoint reading of section 92B read with section 92F(v) of the Act, it would be appreciated that transfer pricing regulations would be applicable to any “transaction”, being an arrangement, understanding or action in concert, whether formal or in writing or whether or not enforceable by legal proceedings.

Meaning of terms “arrangement”, “understanding” or “action in concert”, as provided in the dictionary / Court rulings are extracted as under:

Arrangement:

- *Compromise. [K.J. Aiyar's - Judicial Dictionary (12th Edition) at page 125]*
- *An arrangement that you make with somebody that you can both accept: [Oxford Advanced Learners Dictionary: (New 7th Edn.) at Page 70]*
- *Settlement; adjustment by agreement. [Word – Definition.com]*

Understanding:

- *Use to introduce a condition that must be agreed before something else can happen. [Oxford Advanced Learners Dictionary: (New 7th Edn.) at page 1667]*
- *An agreement, especially of an employed or tacit nature. [Black's Law Dictionary: (8th Edn.) at page 1562]*
- *A mutual agreement, esp. of a private, unannounced or tacit kind. [Disctionary.com Unabridged (v 1.1)]*

Acting in Concert:

- *An action that has been planned, arranged and agreed on by parties acting together to further some scheme or cause, so that all involved are liable for the actions of one another – also termed concert of action. [Black's Law Dictionary: (8th Edn.) at page 307]*
- *Common intention would be action in consort in pre-arranged plan [Pradeep Kumar vs. Union Administration, Chandigarh : AIR 2006 SC 2992].*

Agreement in design or plan: In concert – Together <acting in concert with others>[Merriam-Webster Online]

'Transaction', per se, involves a bilateral arrangement or agreement between the parties. A unilateral action by one of the parties without any binding obligation and in the absence of an 'arrangement', 'understanding', or 'action in concert' (e.g. pre-arranged plan, or design agreed by parties), between the parties could not be termed as a 'transaction'.

Thus, in order to constitute a 'transaction', there has to be an 'express arrangement', 'understanding' or 'action in concert' between the parties and the same cannot be inferred or implied. In other words, to construe existence of a "transaction" or "international transaction", there must be tangible material to show actual, 'arrangement', 'understanding' or 'action in concert' even though the same may be informal or oral (not in writing). Existence of informal or oral arrangement or action in concert cannot be inferred or implied and there has to be tangible evidence on record to indicate that the parties were ad idem, i.e., there exists an express unison or meeting of minds to indicate that the parties have acted in concert. The existence of an international transaction has, therefore, to be established as a matter of fact.

In order to constitute an "international transaction" in terms of section 92B of the Act, an 'arrangement', 'understanding' or 'action in concert' must, in fact, first be shown to exist between the appellant in India and its foreign associated enterprise. This Hon'ble Court has repeatedly held that under Chapter X, the TPO has to benchmark international transactions as he actually finds and is not empowered to construct or create an international transaction [refer CIT vs. EKL Appliance Ltd. : 345 ITR 241 (paras 15 & 16) and Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT : 374 ITR 118 (para 147)].

Under the Transfer Pricing regulations, the actual transaction entered into between the assessee and the AE is to be benchmarked by the TPO and there is no scope for construing 'transaction' or 'international transaction' on the basis of assumption, suspicion or surmises. It is also not permissible to construct an 'international transaction' by undertaking a mathematical analysis and thereby inferring, implying or presuming that the parties would have been acting in concert.

Further, under the scheme of transfer pricing regulations as contained in Chapter X, in order to construe a 'transaction' or international transaction' onus is of the Revenue to demonstrate with reference to some positive material that the two parties have come together and there was a unison or agreement for acting together for some common purpose. [Reliance is placed on the decision of this Hon'ble Court in the case of Moser Baer India Ltd.: 316 ITR 1].

(B) Re: No mutual agreement or arrangement for allocation or apportionment of, or contribution to any cost or expense:

Sub-section (2) of section 92 of the Act provides specific provision for allocation or apportionment of, or any contribution to cost or expense, pursuant to a 'mutual agreement' or 'arrangement'. The pre-condition for invoking arm's length test as provided in sub-section (2) of section 92 of the Act is that two or more associated enterprises must enter into a mutual agreement or arrangement for allocation or apportionment of, or any contribution to, any cost or expense incurred in connection with benefit, service provided by one or more of such enterprises, in an international transaction.

Explanation to section 92B has been added by the Finance Act, 2012 w.r.e.f. 1.04.2002 to deem "international transaction" to include, inter alia,

"(b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;

.....

(d) provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service;

....."

The expression "intangible property" has been defined in clause (ii) of the said Explanation to include, inter alia,

"(a) marketing related intangible assets, such as, trademarks, trade names, brand names, logos;

.....

(j) goodwill related intangible assets, such as, institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value;

..... ”

On the facts of the present case, it would be appreciated that AMP expenses had been incurred by the appellant (s) (tax resident of India) unilaterally, at its own discretion, by way of payment to unrelated Indian parties, for purpose of its own business, having regard to local market needs. The expenditure incurred on AMP was held allowable deduction by the AO in terms of section 37(1) of the Act.

The appellant is not engaged in the business of brand building or brand promotion. Such business is not sanctioned by the objects clause as contained in the Memorandum of Association of the appellant company.

No positive tangible material has been brought on record by the Revenue to demonstrate that AMP expenditure have been incurred by the appellant at the instance, direction or at behest of the associated enterprise, so as to allege an arrangement, understanding or action in concert for incurring such AMP expenditure for rendering service of promoting brand of the overseas AE and creating marketing intangible belonging to the AE, requiring arm's length compensation.

The lower authorities have also not established existence of a mutual agreement or arrangement for allocation of apportionment of such AMP expenses incurred by the appellant for benefit of the associated enterprise.

It has further been accepted that AMP expenditure had been incurred wholly and exclusively for purposes of business of the appellant. In case any part of the expenses was incurred for third party, such expenditure was not allowable under section 37(1) of the Act as being for non-business purposes. In other words, if any part of the AMP expenses was held to have been incurred directly for the benefit of the AE, such expenditure had to be disallowed in the hands of the appellant under section 37(1) of the Act itself; there was no need to further benchmark such expenditure under the transfer pricing provisions.

The TPO held that the appellant was engaged in the business of brand promotion, even though such business is not sanctioned by the objects

clause contained in the Memorandum of Association and the carrying of such business has not been demonstrated on facts.

The enlarged definition of 'international transaction', in Explanation to section 92B of the Act, too, does not include within its purview the unilateral incurring of AMP expenses by the assessee in India, albeit using brand name / logo of the foreign AE since:

- (i) such expenditure is incurred wholly and exclusively for purposes of business of assessee in India;*
- (ii) the benefit of such advertisement enures directly to the assessee;*
- (iii) the benefit, if any, to the AE is only incidental;*
- (iv) expenditure on advertisement is revenue in nature and does not result in any enduring benefit in the capital field; the same does not result in creation of any marketing intangible;*
- (v) there is no transfer or transfer of right to use such alleged marketing intangibles in favour of foreign AE; and*
- (vi) the assessee does not provide any service(s) for market research / market development to the foreign AE.*

Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd (ITA No 110/2014 & 710/2015), while dealing with the issue of benchmarking AMP expense of assessee, in the absence of existence of an international transaction of provision of brand building services, other than being construed by applying Bright Line Test, held as under:

43. Secondly, the cases which were disposed of by the judgment, i.e. of the three Assesseees Canon, Reebok and Sony Ericsson were all of distributors of products manufactured by foreign AEs. The said Assesseees 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 of 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 Ericsson** 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.

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

It would be appreciated that mere agreement or arrangement for allowing use of their brand name by the AE on products does not lead to an inference that there is an 'action in concert' or parties were acting together to incur higher expenditure on AMP in order to render a service of brand building. In fact, such an inference would be in the realm of assumption or surmise.

To reiterate, an international transaction has to exist in the first place for the TPO to assume jurisdiction under section 92 of the Act. In other words, the TPO cannot undertake benchmarking exercise to determine whether on facts there exists an arrangement or understanding, etc., which results in an international transaction. Similarly, the TPO is not permitted to embark on benchmarking analysis of allocating the AMP expenses as attributed to the AE without there being a 'agreement' or 'arrangement' for incurring such AMP expenses.

The aforesaid view that existence of an international transaction is a sin a qua non for invoking the transfer pricing provisions contained in Chapter X of the Act, can be further supported by analysis of section 92(1) of the Act, which seeks to benchmark income / expense arising from an international transaction, having regard to the arm's length price. The income / expense must arise qua an international transaction, meaning thereby that the (i) income has accrued to the Indian tax payer under an international transaction entered into with an associated enterprise; or (ii) expense payable by the Indian enterprise has accrued / arisen under an international transaction with the foreign AE. The scheme of Chapter X of the Act is not to benchmark transactions between the Indian enterprise and unrelated third parties in India, where there is no income arising to the Indian enterprise from the foreign payee or there is no payment of expense by the Indian enterprise to the associated enterprise. Conversely, transfer pricing provisions enshrined in Chapter X of the Act do not seek to benchmark transactions between two Indian enterprises.

In view of the aforesaid submission, it is respectfully submitted that unilateral incurring of AMP expenses by the appellant does not amount to international transaction of rendering brand building service warranting benchmarking under the transfer pricing provisions.

It is further submitted that during the previous year relevant to the assessment year in consideration, the appellant had incurred, in the course of business, expenditure on advertisement and sales promotion amounting to Rs.13,09,79,000, which is 1.37% to total sales. Advertisement and promotion expenditure incurred during the past five years along with its break-up is as under:

Amounts in Rs. '000							
	Financial years						
	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
Advertisement	61,013	53,193	40,587	25,310	58,116	64,272	124,362
Sales promotion	-	-	-	-	10,499	17,993	6,617
Sales	56,650,424	5,874,873	6,325,674	6,579,923	7,133,957	7,516,871	9,582,556
Advertisement and Sales promotion as a % of Sales	0.11%	0.91%	0.64%	0.38%	0.96%	1.09%	1.37%

The expenditure incurred on advertisement and sales promotion by comparable companies selected by the appellant in the TP Study report for the year is as follows:

Company Name	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
<i>Apollo Tyres Ltd.</i>	3.02%	4.79%	3.33%	3.26%	3.29%	1.91%	2.00%
<i>Ceat Ltd.</i>	7.05%	4.04%	4.54%	4.27%	4.16%	4.38%	4.67%
<i>Falcon Tyres Ltd.</i>	6.78%	8.41%	9.26%	9.48%	7.31%	5.80%	5.51%
<i>J K Tyre & Inds. Ltd.</i>	2.59%	DNA	3.48%	4.07%	3.68%	3.28%	2.77%
<i>M R F Ltd.</i>	4.51%	4.42%	4.84%	4.66%	4.44%	3.84%	3.43%
<i>Kesoram Industries Ltd.</i>	3.92%	3.99%	3.54%	2.37%	3.22%	2.86%	2.96%
Mean	4.65%	5.13%	4.83%	4.69%	4.35%	3.68%	3.56%

Even otherwise, it would be appreciated, that during the year under consideration, the appellant has spent 1.37% of its sales on advertisement and sales promotion while comparable companies spent an average of 3.56% of their sales on advertisement and sales promotion, i.e. about three times of the AMP expenditure of the appellant.

The fact that AMP expenses incurred by the appellant are lower than that of the other comparable companies clearly establishes that such expenses are incurred in routine, i.e., in the course of carrying on of the appellant's business of manufacture and trading of automobile tires. Such expenses cannot, therefore, be construed as resulting in any benefit in the form of creation of marketing intangibles for the associated enterprise.

Even otherwise, Hon'ble High Court in the case of Maruti (supra), on the issue whether such adjustment on AMP expense incurred by the taxpayer can, in any case be made under the provision of law, held as under:

57. The Court next turns to the principal contention of the Revenue that in a particular situation of independent distributors/licensed manufacturers matters relating to promotion of a brand of a foreign AE would necessarily be a matter of negotiation between the parties and not necessarily be reduced to writing as part of an agreement between them.

58. It is necessary at this juncture to discuss the reasons for enactment of Chapter X in the Act with the whole new scheme of provisions concerning transfer pricing in the form of Sections 92B to 92F.

69. There is nothing in the Act which indicates how, in the absence of the BLT, one can discern the existence of an international transaction as far as AMP expenditure is concerned. The Court finds considerable merit in the contention of the Assessee that the only TP adjustment authorised and permitted by Chapter X is the substitution of the ALP for the transaction price or the contract price. It bears repetition that each of the methods specified in S.92C (1) is a price discovery method. S.92C (1) thus is explicit that the only manner of effecting a TP adjustment is to substitute the transaction price with the ALP so determined. The second proviso to Section 92C (2) provides a 'gateway' by stipulating that if the variation between the ALP and the transaction price does not exceed the specified percentage, no TP adjustment can at all be made. Both Section 92CA, which provides for making a reference to the TPO for computation of the ALP and the manner of the determination of the ALP by the TPO, and Section 92CB which provides for the "safe harbour" rules for determination of the ALP, can be applied only if the TP adjustment involves substitution of the transaction price with the ALP. Rules 10B, 10C and the new Rule 10AB only deal with the determination of the ALP. Thus for the purposes of Chapter X of the Act, what is envisaged is not a quantitative adjustment but only a substitution of the transaction price with the ALP.

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

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

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

Accordingly, the entire adjustment on account of AMP expense incurred by the appellant is bad in law and liable to be delete.

Re: Expenditure on AMP incurred wholly and exclusively for business of the appellant : benefit to AE only incidental:

The Revenue is seeking to blow hot and cold by holding that the appellant is engaged in the rendering of service of brand promotion / brand building to the AE while accepting that the expenditure had been incurred wholly and exclusively for the business of the appellant.

The Supreme Court in the case of *Sassoon J. David and Co. (P.) Ltd. vs CIT* : 118 ITR 261 held that expenditure incurred wholly and exclusively for purpose of business of an assessee would be allowable deduction notwithstanding that such expenditure may incidentally benefit third party.

In the present case, the expenses have been incurred by the appellant herein for promotion of its business in India, which is reflected in the form of higher turnover and increased profitability. The expenditure in question enures directly for the benefit of business of appellant in India. The benefit, if any, to the AE is only incidental and it is for this reason that no part of the expenditure have been disallowed by the Revenue in terms of section 37(1) of the Act.

On the issue whether any transfer pricing adjustment on account of AMP expense incurred by the assessee be made, on the basis of incidental benefit accrued to foreign AE from such expenditure, the Hon'ble High Court in the case of Maruti (supra) held:

Incidental benefit to SMC

*84. The Court next deals with the submission of the Revenue that the benefit to SMC as a result of the MSIL selling its products with the co-brand 'Maruti-Suzuki' is not merely incidental. The decision in **Sony Ericsson** acknowledges that an expenditure cannot be disallowed wholly or partly because its incidentally benefits the third party. This was in context on Section 57(1) of the Act. Reference was made to the decision in **Sassoon J David & Co Pvt. Ltd. v. CIT (1979) 118 ITR 26 (SC)**. The Supreme Court in the said decision emphasised that the expression 'wholly and exclusively' used in Section 10 (2) (xv) of the Act did not mean 'necessarily'. It said: "The fact that somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being allowed by way of a deduction under Section 10 (2) (xv) of the Act if it satisfies otherwise the tests laid down by the law."*

*85. The OECD Transfer Pricing Guidelines, para 7.13 emphasises that there should not be any automatic inference about an AE receiving an entity group service only because it gets an incidental benefit for being part of a larger concern and not to any specific activity performed. **Even paras 133 and 134 of the Sony Ericsson judgment makes it clear that AMP adjustment cannot be made in respect of a full-risk manufacturer.***

Accordingly, since the expenditure is incurred by the appellant for its own benefit, no adjustment can be made on account of incidental benefit, if any, enuring to the associated enterprise.

Re: Without prejudice, economic ownership of the brand vests with the appellant:

In the instant case, the appellant has a long term license to use the brand name or trademark of the AE, in India. The economic benefits from the development/promotion of a trade mark would, therefore, arise only to the user of such trade mark, selling goods/products under such brand name/trademark.

This Hon'ble Court in the case of Sony Ericsson (supra) accepted that even if marketing intangible is created as a consequence of non-routine AMP expenses incurred by the Indian entity, the economic ownership of such intangibles vested in the Indian entity, which could exploit the same for furthering its business interests. The relevant observations in paras 151 to 154 of the judgement are reproduced hereunder:

"151. Economic ownership of a trade name or trade mark is accepted in international taxation as one of the components or aspects for determining transfer pricing. Economic ownership would only arise in cases of long-term contracts and where there is no negative stipulation denying economic ownership. Economic ownership when pleaded can be accepted if it is proved by the assessed. The burden is on the assessed. It cannot be assumed. It would affect and have consequences, when there is transfer or termination of economic ownership of the brand or trademark.

152. Determination whether the arrangement is long-term with economic ownership or short-term should be ordinarily based upon the conditions existing at the start of the arrangement and not whether the contract is subsequently renewed. However, it is open to the party, i.e. the assessed, to place evidence including affirmation from the brand owner AE that at the start of the arrangement it was accepted and agreed that the contract would be renewed.

153. Economic ownership of a brand is an intangible asset, just as legal ownership. Undifferentiated, economic ownership brand valuation is not done from moment to moment but would be mandated and required if the assessed is deprived, denied or transfers economic ownership. This can happen upon termination of

the distribution-cum-marketing agreement or when economic ownership gets transferred to a third party. Transfer Pricing valuation, therefore, would be mandated at that time. The international transaction could then be made a subject matter of transfer pricing and subjected to tax.

154. Brand or trademark value is paid for, in case of sale of the brand or otherwise by way of merger or acquisition with third parties.
.....

Re-organisation, sale and transfer of a brand as a result of merger and acquisition or sale is not directly a subject matter of these appeals. As noted above, in a given case where the Indian AE claims economic ownership of the brand and is deprived or transfers the said economic ownership, consequences would flow and it may require transfer pricing assessment."

(emphasis supplied)

The aforesaid observation was also reiterated by the coordinate bench in the case of Maruti (supra).

In that view of the matter, even if it were to be assumed that excessive AMP expenditure incurred by the appellant resulted in creation of marketing intangibles, such intangibles being exploited by the appellant for purpose of its business in India, it cannot be said that the same was transferred to the AE for which the Indian entity needed to be compensated.

That apart, there is nothing on record to show that there was, in fact any transfer of the marketing intangible(s) created as a result of excessive AMP expenses in favour of the foreign AE or that the AE has exploited such intangible(s) for purpose of its business in India.

Re: Higher Operating margins of the appellant vis-à-vis comparable companies

Hon'ble Delhi High Court in the case of Maruti (supra), reiterating the law laid down by the coordinate bench in case of Sony Erickson, held:

86. In **Sony Ericsson** it was held that if an Indian entity has satisfied the TNMM i.e. the operating margins of the Indian enterprise are much higher than the operating margins of the comparable companies, no further separate adjustment for AMP expenditure was

warranted. This is also in consonance with Rule 10B which mandates only arriving at the net profit by comparing the profit and loss account of the tested party with the comparable. As far as MSIL is concerned, its operating profit margin is 11.19% which is higher than that of the comparable companies whose profit margin is 4.04%. Therefore, applying the TNMM method it must be stated that there is no question of TP adjustment on account of AMP expenditure.

In the present case, the operating profit margin of the appellant at 6.96% is higher than that of the comparable companies at 2.77% and TNMM has undisputedly been satisfied and accepted by the TPO. Since the operating margins of the appellant are in excess of the selected comparable companies, no adjustment on account of AMP expenses is warranted in the case of the appellant.

The learned DR relied upon the orders of the authorities below.

22. We have heard the rival contentions in the light of the material produced and precedents relied upon. A Special Bench was constituted in the matter of L.G. Electronics India Pvt. Ltd., to consider the above controversy relating to transfer pricing adjustment in relation to AMP expenses. The Special Bench, vide order dated 23-01-2013 in ITA No. 5140/Del/2011, inter alia, came to the conclusion that where the expenditure on advertisements of the foreign brand incurred by the taxpayer are proportionately higher than those incurred by comparable cases, the same leads to the inference of “transaction” between the taxpayer and the foreign AE for creating marketing intangibles on behalf of the later. The Special bench further held that the bright line test is used only to ascertain the cost / value of service rendered by the taxpayer to foreign AE towards creation and improvement of marketing intangibles.

23. In the meanwhile, the Delhi High Court in a batch of appeals including the case of Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT (374 ITR 118) and others, dealing with the controversy relating to transfer pricing

adjustment in relation to AMP expenses held the decision of the Special Bench in the case of LG Electronics India Pvt. Ltd. relied upon by the TPO in the impugned order, as erroneous and unacceptable.

24. The Hon'ble Delhi High Court considering the dispute on facts of several distributors laid down important transfer pricing principles, viz. (a) 'Bright Line Test' applied by the Revenue has no statutory mandate, and the contention of the Revenue that any excess expenditure beyond the bright line should be regarded as separate international transactions is unwarranted (b) clubbing of closely linked transactions is permissible, (c) benchmarking of a bundle of transactions applying entity wide TNMM is permissible (d) once the Revenue accepts the TNMM as the most appropriate method, then it would be inappropriate for the Revenue to treat a particular expenditure like AMP as a separate international transaction.

25. Again, the Delhi High Court in the case of Maruti Suzuki India Ltd (ITA No 110/2014 & 710/2015) has decided the issue of benchmarking AMP expense in the case of manufacturers and at the outset deleted such adjustment holding that Chapter – X of the Act does not authorize the revenue to make quantitative adjustment such as AMP expense. Further, the High Court also held that existence of an international transaction cannot be presumed on the basis of the Bright Line Test.

26. Following the decision in the case of Maruti (supra), Hon'ble Delhi High Court in the case of Whirlpool of India Ltd (ITA No. 228/2015), Honda Sael Power Products Limited vs. DCIT (ITA 346/2015) and Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. ACIT (ITA 643/2010), held likewise, that “, in the absence of

there being an international transaction involving AMP spent with an ascertainable price, neither the substantive nor the machinery provision of Chapter X are applicable to the transfer pricing adjustment exercise”.

27. With this background, the arguments of the parties are dealt as under:

28. The main contention of the TPO was that at the time of transfer pricing proceedings, the TPO has not embarked upon benchmarking of AMP expense, considering it as a separate class of transaction as was made in the other case of other assessee. The TPO was of the view that assessee has incurred AMP expenditure on year to year basis since decades and only due to the efforts of the assessee, the brand name of ‘Goodyear’ get recognition and popularity in India and therefore, the assessee, instead of paying royalty for use of trade name, ought to have charged similar compensation from the AE. According to him, the case of the assessee is at distance from other cases, wherein, the revenue has applied bright line test to determine the non-routine expenditure incurred for the purpose of building brand owned by the associated enterprise and therefore, the decision of High Court in the case of Maruti Suzuki (supra) does not apply to the case of the assessee.

29. We are unable to gather as to how the conclusion drawn by the revenue in making such transfer pricing adjustment on account of incurring AMP expense, by the assessee, is different from the controversy dealt by the Hon’ble High Court in the case of Maruti (supra). In the present case, the TPO at page 26 of his order dated 27.09.2010 has arrived at the following conclusion for making such adjustment:

'5.8 After going through the discussion in the preceding paras the following conclusions may be arrived at:

(i) the assessee has been mandatorily using the Goodyear trademark/ logo in India since 1922

(ii) Over the years, the assessee has made efforts by way of expenditure and human effort to develop the brand in India. It continues to do so to replenish the brand value.

(iii) The entire marketing efforts in India is admittedly drive, planned and executed by the assessee.

(iv) By these efforts the brand has grown in value and significant economic substance has been added to it by the company making decent profits.

(v) Obviously a marketing intangible has been created by the assessee benefitting the parent company. "

30. In the case of the Maruti Suzuki (supra), the TPO had arrived at a similar conclusion, reproduced as under (quoted from the order of Hon'ble High Court):

Final order of the TPO

17. In the final order, the TPO came to the conclusion that the trade mark 'Suzuki' owned by the SMC had piggybacked on the trade mark 'Maruti', without any compensation being paid by SMC to MSIL. He also came to the conclusion that the trade mark 'Maruti' had acquired the status of a 'super brand' whereas the trade mark 'Suzuki' was a relatively weak brand. He concluded that the promotion of the co-branding of 'Maruti-Suzuki' had resulted in (a) promotion of the trade mark of the AE; (b) the use of the trade mark 'Maruti' of the MSIL; (c) reinforcement of the Suzuki trademark which was a weak brand as compared to Maruti in India and; (d) impairment of the value of the Maruti trademark due to cobranding process.

18. The TPO noted that MSIL had incurred an expenditure of Rs. 204.40 crores on AMP expenses for the promotion of the "Maruti Suzuki" brand name which was benefiting SMC. It was accordingly held that "AMP

expenditure of Rs. 204.40 Crores is an international transaction." The assessee has incurred the cost in connection with a benefit and services provided to the AE under a mutual agreement which was not in writing but such arrangements were "proved from the conduct of the assessee". After undertaking a comparability analysis of the AMP expenses incurred by other comparable entities for the AY in question, the TPO concluded: "The assessee had incurred above expenditure, in excess of bright line limit of Rs 136.76 Crores for brand promotion and market development for the AE, which would lead to creation of marketing intangibles legal ownership of which was with the associated enterprise of the assessee". After applying a 'mark up' the TPO recommended that the AO should enhance the income of the assessee by an amount of Rs. 154.12 Crores on account of compensation to be received from its AE for promoting the brand name of its AE."

31. From conjoint reading of the orders passed by the TPO under both cases, it is noted that in both the cases, the TPO is claiming the foreign brand to be weak, and seeking compensation of the marketing efforts undertaken by the assessee for promoting/ building that foreign brand in India. The only difference in both the cases is that in the case of Maruti Suzuki, the TPO has applied bright line test to determine the compensation, however, in the case of the assessee, the TPO has determined the compensation equivalent to what the assessee was paying for use of such trade name. In our opinion, there may be a difference in the computation mechanism of seeking compensation, however, the important element, i.e. seeking compensation for the alleged brand promotion of the AE is common in both the cases.

32. The Id. Departmental Representative subsequently changed his line of argument and held that there exists an international transaction in the case of the assessee and therefore, the case of the assessee is different from the case of Maruti Suzuki. The Id. DR referred page 15 of the transfer pricing study to state that as per the overview of the functions drawn in the study, it is the function of the associated enterprise to undertake brand development and core marketing

of the products and the assessee undertakes the function of local sales and marketing. With this, the Id. DR contended that the assessee undertakes the marketing in India under the guidance and influence of the associated enterprise.

33. The Id. DR also referred to ARTICLE VI – USE AND ADVERTISING of the Trade Mark License Agreement dated 01st Day of October, 2006, between assessee and Goodyear USA, the AE (enclosed at pages 129-147 of the paper book), which reads as under:

- 1. Licensor's Standards. Licensee will use the Licensed trademarks on the licensed products, in association with its licensed services, and in all advertising and promotional material in accordance with the requirements of licensor. Such usage will include, but not be limited to, all newspaper and magazine advertising, use in catalogs, price sheets, invoices, labels, point-of-sale displays, and radio and television commercials. Upon request, Licensee will furnish to licensor information and sample materials showing in detail the manner in which the license Trademarks are used by Licensee on its Licensed Services, and in its advertising and promotional programs.*
- 2. Licensee's Obligation to Mark Licensed Products and Licenses Services – Licensor will have the right, but not the obligation, to require licensee to place on the licensed products, to which the licensed trademark are affixed, or the packaging therefor, or the advertisements for licensed services, the phrase "trademark used under licensed from the Goodyear Tyre and Rubber Company, USA" or such other similar phrase as licensor may reasonably require. Licensee will not be under any obligation to mark the licensed products or packaging unless licensor notifies licensee of the specific marking it desires the licensee to use."*

34. From the above reading of the clauses of the agreement, the Id. DR contended that there exists an international transaction of brand building of 'Goodyear' brand owned by the AE, in as much as the AE is actively controlling and supervising the AMP expense of the assessee. The Id. DR also contended that the Advertising expenses declared by assessee during this year are raised to double the expenses shown to have been incurred in preceding assessment year.

35. The Id. AR of the assessee, in his rebuttal, first made elaborate arguments as to whether the DR is empowered to improve upon the order passed by the TPO himself. The AR of the assessee further submitted that the chart depicted at page 15 of the transfer pricing report, under the head 'overview of the function' discriminates the functions undertaken by the respective parties to the international transactions undertaken during the year under consideration and it cannot be assumed that since the associated enterprise is undertaking the function of brand development and core marketing, the associated enterprise controls and supervises the local sales and marketing function of the assessee. The assessee undertakes the function of marketing in India for the purpose of selling goods manufactured by it in India and as the chart suggests, the associated enterprise, on its own, undertakes the brand development and core marketing, without influencing the assessee, in any manner, whatsoever.

36. With regard to the Trade Mark License Agreement, the AR of the assessee submitted that from reading of the aforesaid clauses, it cannot be concluded that the AE is controlling and supervising the AMP expense of the assessee. The AE, in order to protect the breach of its trademark/ logo, which is licensed for use to the assessee, is requiring the assessee to furnish the sample materials

showing in detail the matter in which the licensed trademarks are used by the assessee. Such general clauses are found invariably in trademark license agreements.

37. We have considered the arguments of the AR of the assessee and the DR. We agree with the submission of the AR of the assessee that the conclusion drawn by the Id. DR, by referring to the aforesaid clauses of transfer pricing study and trademark license agreement, does not lead to an inference of existence of an international transaction of incurring AMP expense by the assessee. Nevertheless, it is equally important to refer to the following findings of the Delhi High Court in the case of Honda Siel Power Products vs. DCIT (ITA No. 346/2015), wherein, the Court has observed that:

26. The relevant facts are that under a Technical Collaboration Agreement, the Assessee is granted exclusive license to manufacture and sell the products of the foreign AEs against payment of royalty of 4% on sales. Additionally, the Assessee entered into agreement dated 19th March, 2007 for obtaining license to use the trademark HONDA. The consideration for use of such trademark is determined at 1 per cent of the sales of licensed products. The mere existence of such an agreement whereby a license has been granted to the Assessee to use the brand name would not ipso facto imply any further understanding or arrangement between the Assessee and its foreign AE regarding the AMP expense for promoting the brand of the foreign AE.

27. Turning to the TP report, a reference has been made by the Revenue to para 4.8 thereof which shows that market development is the function of the AE as well as the Assessee in India. Para 4.9 of the TP report has been referred for the purposes of pointing out export market related information for the products and the competitors and other assistance in tapping potential export markets is provided by the Honda Group. It is further pointed out that para 4.47 of the TP report records that HSPP is responsible for "brand building and maintaining brand loyalty in domestic market." Reference is made to the statement that "this brand name has been developed and popularised by HSPP in India." According to the Revenue,

therefore, there is no dispute that the Assessee is engaged in “developing and maintenance of brand/trade name in India.”

28. A reference is made by the Revenue to the Export Agreement whereunder the Assessee has been granted rights to export products to certain ‘permitted countries’ for payment of royalty of 8 per cent of the export price, which was subsequently raised to 12.25 per cent from 1st February 2008. Honda, Japan reserved the right to change the permitted countries at any time. According to the Revenue this indicates that the Assessee has not been an independent manufacturer and is only functioning as a contract manufacturer for the AE. It is also pointed out that the list of countries to which export is permitted by Honda, Japan included the countries falling in the same geographical location as India. It is stated that the terms of the agreement with such distributors in other countries “could have worked as a sound comparable” but that the Assessee had not chosen to make any such attempt in its TP documentation.

29. In response, it is pointed out on behalf of the Assessee that the payment of royalty fee for the HONDA trademark are separately benchmarked by the Assessee. That is not the subject matter of the dispute in the present case. It is further pointed out that the agreement whereunder license has been granted to the Assessee, does not contain any stipulation concerning the promotion of the brand name HONDA or for incurring AMP expenses for that purpose. There is, according to the Assessee, no tangible material to show that any arrangement or understanding, even an informal one, exists between the Assessee and its foreign AE in relation to AMP expenses.

38. Accordingly, in view of the aforesaid, we are of the opinion that the adjustment made by the TPO is squarely covered by the decision of Delhi High Court in the case of Maruti (supra) and Honda Siel Power Products (supra) and therefore, in the absence of any international transaction of brand building of ‘Goodyear’ brand, undertaken by the assessee with its AE, there cannot be any adjustment under the transfer pricing provisions. Further, as held by the Hon’ble High Court, Chapter – X of the Act does not authorize the revenue to make quantitative adjustment under the transfer pricing provisions, such as AMP expense. The contention of the Id. DR about abnormal increase in

advertisement expenses in comparison to preceding year, does not render any help to the Revenue, keeping in view the proportionate rise in turnover of assessee. We accordingly direct the assessing officer to delete the adjustment made on this account.

39. In the result, the appeal is allowed on this ground.

Grounds No. 5-5.2 - Transfer pricing issue w.r.t. to export of goods

40. The brief facts relating to these grounds are that the appellant has, inter-alia, entered into international transactions of export of finished goods to its associated enterprises of Rs. 104,896,184. The appellant has purchased finished goods, viz., certain varieties of tyres from Goodyear South Asia Tyres Pvt. Ltd. (GSATL) for export to the associated enterprises (AEs) during the relevant previous year. As per the Global Transfer Pricing Policy ("GTPP"), the appellant is entitled to charge a profit mark-up of 5% on the inventory cost and all applicable other costs. The GTPP also provides further mark-up of 5% towards research and development cost. In terms of the GTPP, in addition to the above, inter-company selling price may include mark-up to cover other directly related expenses, such as, general and administrative expenses.

41. It was submitted before the TPO that for computing the gross profit margin or the mark-up from such international transactions of export of traded goods to the AEs, the export incentive amounting to Rs. 62,92,772/- in respect of such purchases from GSATL in terms of off take agreement dated 01-09-2001 is to be deducted from the cost of goods sold.

42. The TPO, however, did not accepted this contention of the assessee and without deducting export incentive from the cost of goods sold, computed the

margin of the assessee. The TPO, to the extent of shortfall in the margin of the assessee than the margin of 5% agreed between the parties in terms of Global Transfer Pricing Policy, made transfer pricing adjustment with respect to transaction of export of goods. The assessee in this case has submitted the objections to the Dispute Resolution Panel. However, the DRP rejected the assessee's submission and upheld the TPO order.

43. Against the above order the assessee is in appeal before us.

44. We have heard the rival contentions in the light of the material produced and precedent relied upon. The AR of the assessee, in all fairness, submitted that the issue is squarely covered against the assessee, by this coordinate bench of Tribunal, in assessee's own case for the assessment year 2006-07. The co-ordinate bench of Tribunal in the said case, has held as under:

11.5 As regards issue of reduction of export incentive from goods sold is concerned, we find that the reasoning adopted by the TPO has considerable cogency. The export benefits are given to the taxpayers to promote and stimulate the growth of exports of goods and services in India. They are also meant to earn valuable foreign exchange for the country. The export incentive was available to the assessee only after trading exports made by the assessee. Global Transfer Pricing policy of the group company mentions cost in inter company transfer before the goods and services are dispatched from the premises of a company to the other company. In the Global Transfer Pricing Policy the future value of benefits which may be available in a few countries cannot be included as this will disturb the very basis/purpose or providing uniform return to each and every enterprise which is a member of global transfer pricing policy. The very purpose of global transfer pricing is to provide a minimum amount of return to the members of global transfer pricing policy. If India provide tax incentive or other incentive to compensate its taxpayers on the basis of the economic situation, then this benefit is available to Indian taxpayers and the same cannot be transferred or traded to other entity which is not located in India. This kind of shifting of economic and tax incentives offered to local company will disturb the fiscal structure of a country and will result in

shifting of profits from one tax jurisdiction to other tax jurisdiction. The economic and tax incentives offered to Indian entities are not meant to subsidize the entity in foreign jurisdiction. The assessee who is involved in controlled transaction this approach actually results in transferring, benefit from Government granted incentives to AE. Moreover, the entities transfer pricing policy cannot override the basic fundamental of transfer pricing analysis. If assessee's method of calculation of cost of goods sold is followed, it would tantamount to a claim of benefit, which has not yet accrued at the time of sale of goods, being treated as a component of cost of goods sold.

11.6 The TPO's reference to the OECD guidelines is also germane. In this regard, we find that in the said guidelines gross profit are defined as "the gross profits from a business transactions are the amount computed by deducting from the gross receipts of the transactions the allocable purchased or production costs of sales, with due adjustment for increases or decreases in inventory or stock in traded, but without taking account of other expenses."

11.7 From the above it follows that while determining the gross profits from sale of goods such incentives cannot be adjusted to determine the cost of goods sold. TPO has rightly observed that export incentives does not form part of the invoice price of goods sold. In such a case, it cannot be reduced from the cost of goods sold. We agree with the TPO that an expenditure that does not form part of the books of accounts cannot be treated as an expense for the purpose of transfer pricing accounting.

11.8 Assessee's reliance of Accounting Standard (AS)-II- Verification of inventories issued by Institute of Chartered Accountant of India (ICAI), for the purpose of determining the cost of purchase is not cogent as the reference to cost of purchase in this is not in the context of arm's length price in transfer pricing.

11.9 Assessee's reliance on the decision of the ITAT in Sony India (P) Ltd., vs. DCIT (Supra) is not applicable on the facts of the present case. The portion of this decision referred by the assessee's counsel was in the context of manufacturing of export to utilize idle facilities to enable the company to improve recovery of its fixed assembly cost. Moreover, in the present case, we are concerned with computation of cost plus markup which was not the case in the Sony India decision. ITA NO. 4360/Del/2010 27

11.10 In the background of the aforesaid discussion, we are of the opinion that TPO has rightly held that export incentive amounting to ` 7,872,603/- cannot be deducted from cost of goods sold.

12. As regards issue of deduction of rebate /discount received amounting to ` 33,21,586/-, the TPO observed that the assessee in this regard has made the claim for the first time. Assessing Officer further observed as under:- (i) This item of rebate does not find a place in the financials accompanying the TP report. (ii) In the details forwarded by the Addl. C.I.T. (Transfer Pricing) Pune there is no reference to any rebate being allowed by M/s GSATL. (iii) The rebate claimed does not seem to appear anywhere in the audited financials of the assessee. (iv) The only conclusion that can be arrived at is that the issue / claim of rebate has been raised to offset the freight cost which has entered the cost base at this stage. For these reasons the claim of rebate shall not be allowed.

12.1 In this regard, we find that as per the agreement assessee is entitled for rebate of 3% on cost of goods purchased for exports to AE as well as to unrelated parties. We find that the above reasoning adopted by the Assessing Officer in disallowing the deduction is not cogent. That the assessee has not made any such claim initially cannot act as estoppel against the proper and valid claim. We agree with the Id. Counsel of the assessee company that the rebate received is inextricably linked with the cost of purchase. We further note that in subsequent assessment years for Assessment Year 2007-08 and 2008-09 the TPO has accepted the contention of the assessee that the rebate received upon purchase of goods is deductible from the value of cost of goods sold. Hence, in our considered opinion, assessee is entitled for deduction of rebate received upon purchase of goods from the value of goods sold.

12.2 We further find that the rebate amount was netted off and net amount of purchase cost shown in the profit and loss account. In this regard, TPO has contended that the said amount was not reflected in the books and accounts of the assessee. In our considered opinion, this factual aspect needs verification. Hence, we remit this issue regarding verification of netting off of rebate from cost of purchase to the file of Assessing Officer. Needless to add that the assessee should be given adequate opportunity of being heard.

45. Respectfully following the decision of the co-ordinate bench of Tribunal in the assessee's own case for the assessment year 2006-07, we uphold the order of the TPO to the extent of netting off of export incentive from the cost of goods sold and set aside the issue of netting off of rebate/discount from the cost of goods sold, to the file of assessing officer/TPO, for verification of the claim in light of our decision for the assessment year 2006-07. Needless to add that the assessee should be given reasonable opportunity of being heard.

46. In the result, the appeal is partly allowed as above on this account.

Grounds No. 6-6.2- Disallowance of machinery repair expenses:

47. The facts with respect to these grounds are that the appellant had incurred expenditure on routine repair and maintenance of plant and machinery aggregating to Rs.3,98,26,598 which included expenditure on account of consumables, stores and spares, etc., issued from stores. The balance expenses were also incurred on annual maintenance services, purchase of consumables and spares, job works, etc., for the purpose of repair and maintenance of the existing plant. The assessing officer made disallowance of Rs. 79,65,320 being 20% of the total expenditure on the repairs holding the same to be capital expenditure.

48. It was submitted by the Id. AR of the assessee that the assessing officer did not give effect to the following findings of the DRP allowing necessary relief in this regard:

"After considering the facts, the DRP sustains the objection of the assessee. The company has submitted audited accounts before the AO and the latter has not been able to point out specific instances where items of capital nature have been debited to repair expenses.

Ad hoc disallowance in audited cases cannot be made. In the past also where such disallowance have been made, the appellate authorities have deleted the same."

49. The Id. AR of the assessee also submitted that this co-ordinate bench of Tribunal, vide order dated 28-08-2006, in the appellant's own case for the assessment year 1997-98, deleted similar disallowance. Further, it was also submitted that in the appellant's case for the assessment year 2003-04 and 2004-05, this co-ordinate bench has upheld the order passed by the CIT(A) deleting similar adhoc disallowance of expenditure out of repair and maintenance expenses for plant and machinery and the revenue did not file appeal to the High Court against order passed by the Tribunal for assessment year 2003-04.

50. Following the aforesaid, this co-ordinate bench in the appellant's own case for the assessment year 2006-07, has deleted such disallowance holding as under:

"In this regard, we also note that such adhoc disallowance were also made by the Assessing Officer in the preceding years in the case of the assessee. But the Delhi Tribunal in assessee's own case for assessment year 2003-04 and 2004-05 upheld the order of the Ld. Commissioner of Income Tax (A) deleting the similar disallowance of expenditure out of repair and maintenance expenses for plant and machinery. We also note that Revenue has not filed any appeal before the High Court of Delhi against the aforesaid order passed by the Tribunal. Hence, in the background of the aforesaid discussions and precedents, we set aside the order of the Assessing Officer and decide the issue in favour of the assessee."

51. Ld. AR of the assessee also brought our attention to the order of the DRP, wherein, following the order of the Hon'ble Tribunal, DRP in the appellant's own case for the assessment year 2008-09, deleted the similar ad-hoc

disallowance of 20% of expenditure incurred on machinery repair and maintenance expenses, proposed by the assessing officer.

52. The Ld. DR relied upon the order of the AO and DRP.

53. We have heard the rival contentions and in light of the material produced and precedent relied upon, respectfully following the decision of the Hon'ble coordinate bench of tribunal in the assessee's own case (*supra*) for the assessment year 2006-07 and earlier assessment years, we set aside the order of the assessing officer and decide the issue in favour of the assessee.

54. In the result, the appeal of the assessee is allowed on this issue.

Re: Ground No. 7 - Disallowance of provision for warranty

55. The assessing officer disallowed the entire expenditure on provision for warranty of Rs.17,72,000 holding that the said liability towards warranty is not ascertained and is a contingent liability and therefore not allowed deduction. The assessee submitted its objection before the DRP. The DRP affirmed the action of the assessing officer in this regard.

56. We have heard the rival contentions in the light of the material produced and precedent relied upon. Ld. Counsel of the assessee submitted as under:

“During the financial year ended on 31st March 2007 the appellant, had incurred /made provision for warranty claims to the extent of Rs.17,72,000 on the basis of past trend and experience of actual warranty claims. The provision for warranty is made on a scientific and actual basis and not an adhoc provision.

It will be appreciated, that the provision for warranty is not a future or a contingent liability. The liability towards warranty expenses is incurred as soon as the sale is made by the appellant and, therefore, it

is a liability in presenti and has definitely arisen in the accounting year. Deduction therefore should be allowed in the year of sales, to which the liability is attached, although the exact liability may be quantified at a future date.

Reliance is placed in this regard on the recent decision of Supreme Court in the case of Rotork Controls India Ltd. vs. CIT: 223 CTR 425, wherein, the Supreme Court laid down three conditions for allowability of provision for warranty - (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation; and (c) a reliable estimate can be made of the amount of the obligation.

Relying on the above decision in the case of Rotork Controls (*supra*), the Hon'ble Delhi High Court in the case of CIT vs. Whirlpool of India [242 CTR 245], too, dismissed the grounds of the revenue for disallowing provision for warranty.

Our attention is also invited to the order passed by the Delhi Bench of the Tribunal in the appellant's own case for the assessment year 2006-07, wherein, similar ad-hoc disallowance of warranty were deleted, as under:

"We agree with the assessee's contention that provision for estimated expenditure to be incurred for warranty obligation in respect of sales made in the relevant previous years is to be accounted as expenditure in the year of sale, in order to match the cost with revenue. The provision for warranty is necessarily required to be made by the companies which are required to follow mercantile system of accounting. In this regard, we further find that Courts have consistently held the view that liability for provision for warranty for replacement on account of manufacturing defects arises at the time of sale and is to be allowed as deduction in that year on the basis of rational /scientific estimate, notwithstanding that the exact amount of liability is ascertained at a later date. We further find that action of the assessee in creating provision for warranty is also in consonance with the decision of the Hon'ble Apex Court in the case of Rotork Controls India Ltd. vs. C.I.T. 314 ITR 62. Similarly, we find that relying on the above decision in the case of Rotork Controls the Hon'ble High court in the case of C.I.T. vs. Whirlpool of India 242 CTR 245 too, dismissed the grounds of the revenue for disallowing

provision for warranty. Reliance by the assessee's counsel in other case laws in this regard as mentioned above are also germane and support the case of the assessee. In the background of the aforesaid discussions and precedents, we hold that provision for warranty made by the assessee is allowable."

57. The Ld. DR relied upon the order of the AO and DRP.

58. On this issue, we note that during the financial year ended on 31st March 2007 the appellant, had incurred /made provision for warranty claims to the extent of Rs.17,72,000 on the basis of past trend and experience of actual warranty claims. The provision for warranty is made on a scientific and actual basis and not an adhoc provision. The assessee has duly submitted and demonstrated the computation of its claim for warranty along with past data. In fact, the basis of computation of warranty was found to same as computed in the preceding year, i.e. AY 2006-07, in which this co-ordinate Bench of Tribunal in the assessee's own case has allowed the appeal and directed the assessing officer to delete such disallowance.

59. Accordingly, respectfully following the decision of the co-ordinate bench of Tribunal in the assessee's own case for the assessment year 2006-07, we hold that provision for warranty made by the assessee is allowable. Hence, we set aside the order Assessing Officer on this issue.

60. In the result, the appeal filed by the Assessee is partly allowed.

Ground No. 8-8.1 - Ad-hoc disallowance of advertisement expenditure under section 37(1) of the Act

61. The ld. AR of the assessee submitted before us that against the total increase in advertisement and sales promotion expense of Rs. 4,87,14,000, the

assessing officer accepted only Rs. 4,20,43,000 and disallowed 50% of the difference of Rs.33,08,500 i.e. (Rs.4,87,14,000-4,20,43,000) on the basis of his conjecture and surmises.

62. The Id. AR of the assessee further made following written submission:

“It was submitted that in a fast growing and very tough competitive business environment, the appellant had to spend a good amount on advertisement and marketing activities to show its presence in the market and sustain in business. Also, for the initiative of Branded Retail Stores, the appellant had spent nearly Rs. 2,27,35,000 during the year and an amount of Rs.1,93,08,000 was spent towards launching and introducing the new product range called “Excellence” for passenger cars. This two expenses alone totaled to Rs. 4,20,43,000 out of total increase in expenditure of Rs. 4,87,14,000.

Further, it was submitted that with the increase in advertisement and sales promotion expense, the company has demonstrated sales growth of nearly 28% as compared to financial year 2005-06. The gross sale in year 2005-06 was Rs. 751.74 crores, which has grown to Rs. 958.11 crores in 2006-07. It would be appreciated that despite having low spending on advertisement and marketing expenditure, the appellant has maintained substantial growth in terms of sales and sustained in this competitive business.

In terms of section 37(1) of the Act, deduction is admissible for expenditure incurred wholly and exclusively for purposes of business. Expenditure justified by business considerations and incurred out of commercial expediency is allowable deduction.

It was also submitted that since the aforesaid expenditure of advertisement and brand promotion has undergone a benchmarking analysis under the Transfer Pricing regulations and an arm's length price thereof has been determined, there could not be any further disallowance of the said payment under section 37(1) of the Act, holding the same to be not an expenditure incurred wholly and exclusively for the purpose of the business of the appellant. Reliance is placed on the decision of the Hon'ble Delhi Bench of the Tribunal in the case of Whirlpool of India Ltd. vs. DCIT (ITA No. 426/D/13), wherein, it is held as under:

“16.....Once the total amount of AMP expenses is processed through the provisions of Chapter X of the Act with the aim of making TP adjustment towards AMP expenses incurred for the foreign AE, or in other words such expenses as are not incurred for the assessee's business, there can be no scope for again reverting to section 37(1) qua such amount to make addition by considering the same expenditure as having not been incurred 'wholly and exclusively' for the purposes of assessee's business. If the amount of AMP expenses is disallowed by processing under both the sections, that is 37 and 92, it will result in double addition to the extent of the original amount incurred for the promotion of the brand of the foreign AE de hors the mark-up. In view of the foregoing discussion, we are of the considered view that the AO was not justified in observing alternatively that a sum of Rs.180 crore and odd is not allowable as per section 37(1) of the Act. We, therefore, vacate the alternative finding given by the AO for disallowance.”

63. Ld. CIT-DR placed reliance on the order of the assessing officer and DRP.

64. We have heard the rival contentions in the light of the material produced and precedent relied upon. We have already held that the advertisement expenditure incurred by the assessee is incurred wholly for the purpose of its business and profession and ought to be allowed deduction in entirety. Further, the assessing officer has clearly made an ad-hoc disallowance of advertisement expenditure incurred by the assessee, which is not permissible under the law. We are of the considered view that AO was not justified in making such ad-hoc disallowances and therefore, direct the assessing officer to delete the adjustment on this account.

65. In the result, the appeal of the assessee is allowed on this issue.

Ground No. 9-10 pertaining to levy of interest u/s. 234B & 234C and initiation of penalty proceedings are consequential and Premature.

ITA No. 6240/Del/2012 – Assessment Year 2008-09

This appeal by the assessee is directed against the order of the Assessing Officer u/s. 143(3) read with section 144C of the I.T Act for the assessment year 2008-09 on the following grounds :

1. *That the assessing officer / the Transfer Pricing Officer (TPO) erred on facts and in law in making adjustment of Rs. 11,60,71,871 to the arm's length price of the international transaction entered into by the appellant with its associated enterprise.*
2. *That the assessing officer/the TPO erred on facts and in law in disregarding the payment of trademark fee of Rs. 5,64,08,000 to the Associated Enterprise ("AE"), The Goodyear Tire & Rubber Company, Akron, USA (hereinafter referred as "Goodyear USA" or "Goodyear Group") without providing any cogent reasons and basis.*
3. *That the assessing officer/the TPO erred on facts and in law in holding that arm's length price of the international transactions regarding payment of trademark fees to be nil allegedly concluding that no recognizable benefit has been passed on to the appellant and therefore there is no rationale for paying this trademark fees to the AE.*
 - 3.1 *That the assessing officer/the TPO erred on facts and in law in not appreciating that the payment of trademark fees was validly benchmarked applying Transactional Net Margin Method ("TNMM") as the most appropriate method and that no adverse inference could be drawn on this account.*
 - 3.2 *That the assessing officer/the TPO erred on facts and in law in computing adjustment on account of international transaction of payment of trademark fee without applying any of the prescribed methods, thereby, violating the basic principles of TP regulations.*
 - 3.3 *That the assessing officer/the TPO erred on facts and in law in holding that the entire arrangement of the payment of trademark fee is designed to shift profits outside India.*

- 3.4 *That the assessing officer/the TPO erred on facts and in law by not appreciating that the AE has not charged trademark fee from the appellant in earlier years considering the adverse financial condition.*
- 3.5 *That the assessing officer/the TPO erred on facts and in law in not appreciating that the trademark fees paid by the appellant to the AE (1% of the net domestic sales and 2% of the net export sales) is within the limits prescribed by the RBI.*
- 3.6 *That the assessing officer/the TPO erred on facts and in law in comparing the other subsidiary (Goodyear South Asia Tyres Private Limited, Aurangabad, Maharashtra, hereinafter referred as "Goodyear Aurangabad") of Goodyear USA with the appellant with reference to trademark fees even when business dynamics and commercial realities (end customer profile, need to be associated with a valuable brand, etc.) in both the companies were entirely different.*
4. *That the assessing officer/TPO erred on facts and in law in making transfer pricing adjustment amounting to Rs. 5,64,08,000 in relation to the advertisement, marketing and sales promotion expenses (hereinafter referred to as 'the AMP expenses') incurred by the appellant holding that such expenses resulted in promotion of brand owned by the associated enterprise, thereby creating marketing intangibles whose ultimate benefit inured to the associated enterprise.*
- 4.1 *That the assessing officer/TPO erred on facts and in law in making adjustment to the income of the appellant of Rs. 5,64,08,000 on account of the arm's length price of the alleged international transaction AMP expenses, holding that instead of payment of the trademark fee to the AE of Rs. 5,64,08,000 the appellant should receive the equivalent amount as compensation for creating and developing marketing intangibles in India.*
- 4.2 *That the assessing officer/TPO erred on facts and in law in not appreciating that AMP expenditure unilaterally incurred by the appellant, could not be regarded as a 'transaction' in absence of any understanding / arrangement between the appellant and the associated enterprise.*
- 4.3 *That the assessing officer/TPO erred on facts and in law in not appreciating that the AMP expenses, incurred by the appellant in India cannot be*

characterized as an 'international transaction' in terms of section 92B, so as to invoke the provisions of section 92 of the Act.

- 4.4 That the Dispute Resolution Panel (DRP) erred on facts and in law in upholding the transfer pricing adjustment allegedly on account of AMP expenditure even while observing that, "we are of the opinion that economic realities cannot yield to agreement or arrangements whether formal or informal. Having said that we are of the firm view that arrangements whether laid down or not cannot militate against a resultant reality arising out of a transaction. There is no gain saying that AMP expenses are an integral part of running a business".*
- 4.5 That DRP erred on facts and in law in holding that "the retrospective amendment to section 92B clearly show that AMP expenditure being incurred by the appellant in relation to creation of marketing intangible in favour of AE is an international transactions".*
- 4.6 That the assessing officer/TPO erred on facts and in law in holding that the appellant has developed marketing intangible for the associated enterprise in India by performing all functions and by bearing all economic costs and risks.*
- 4.7 That the assessing officer/TPO erred on facts and in law in not appreciating that advertisement and marketing expenses incurred by the appellant is not on behalf of or for the benefit of the AE, any benefit to the AE being only incidental.*
- 4.8 That the assessing officer/TPO erred on facts and in law in not appreciating that the AMP expenses incurred by the assessee, did not result in creation of any marketing intangibles; much less on account of the AE.*
- 4.9 That the assessing officer/TPO erred on facts and in law in not appreciating that in absence of any understanding / arrangement between the appellant and the associated enterprise, the associated enterprise was under no obligation to reimburse the AMP expenses incurred by the appellant for sale of its products.*
- 4.10 That the assessing officer/TPO erred on facts and in law in not appreciating that the power of the TPO is restricted to the determination of arm's length price of international transactions by applying any of the prescribed*

method and not to make disallowance of business expenses incurred by the appellant.

- 4.11 That the assessing officer/TPO erred on facts and in law in not appreciating that "bright line limit" is not a prescribed method under the purview of section 92C of the Act.*
- 4.12 Without prejudice, even applying BLT, the assessing officer/TPO erred on facts and in law in not considering any comparables for determining arms length AMP expenditure.*
- 4.13 That DRP erred on facts and in law in holding that bright line test is not a method but merely an economic tool for analysis of quantum of expenditure and the method used is CUP*
- 4.14 Without prejudice that the assessing officer/TPO erred on facts and in law in not appreciating that even applying Bright Line Test ("BLT") no adjustment on account of AMP expenditure could be made in as much as AMP expenditure incurred by the appellant was lower than AMP expenditure incurred by comparable companies.*
- 4.15 That the assessing officer/TPO erred on facts and in law in relying upon the decision of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. vs. Addl. CIT, TPO, New Delhi. [in W.P.(C) 6876/2008 [WP(C) 6876/2008], which has been set aside by the Supreme Court in a Special Leave Petition filed against the decision of the Hon'ble High Court.*
- 4.16 Without prejudice that the assessing officer/TPO erred on facts and in law, in not appreciating that the AMP expenses incurred by the appellant was appropriately established to be at arm's length applying Transactional Net Margin Method (TNMM) on entity-wide basis.*
- 5. That the assessing officer / TPO erred on facts and in law in making adjustment of Rs.32,55,871 in the arm's length price of the international transaction of export of finished goods entered into by the appellant with its associated enterprise.*
 - 5.1 That the assessing officer /TPO erred on facts and in law in not appreciating export incentive, being a compensation for the cost incurred*

for sale of goods, is required to be reduced from the cost of goods sold for computing gross profit margin for determining the arm's length price.

- 5.2 That the assessing officer / TPO erred on facts and in law in holding that incentive received in respect of export of finished goods, should not be taken into account for determining the profit/cost in respect of the international transaction of export.*
- 5.3 That the assessing officer / TPO has erred on facts and in law in holding that "if the assessee's method of calculation of 'cost of goods sold' is followed, it would tantamount to a claim that benefit, which has not yet accrued at the time of sale of goods, being treated as a component of cost of goods sold."*
- 5.4 That the assessing officer / TPO erred on facts and in law in holding that the approach of the appellant in considering export incentive for computing cost of goods sold was in violation of its Global Transfer Pricing Policy.*
- 5.5 'That the assessing officer / TPO erred on facts and in law in ignoring that the Global Transfer Pricing Policy of the group company provides for reducing the cost of merchandise by the export incentives available to the exporting entity.*
- 5.6 That the assessing officer / TPO erred on facts and in law in holding that the export incentive does not form part of invoice price of goods sold and hence the same cannot be reduced from the cost of goods sold.*
- 6. That the assessing offer erred on facts and in law in disallowing the sum of Rs. 43,08,000 being the provision for warranty holding the same to be contingent liability.*
 - 6.1 That the assessing officer erred on facts and in law in not appreciating that the provision for warranty is an ascertained liability incurred at the time of sales and is not a contingent liability.*
- 7. That the assessing officer erred on facts and in law in disallowing a sum of Rs.5,12,04,000, out of the total expenditure of Rs.17,06,32,000 on advertisement and publicity incurred by the assessee holding that the expenditure was incurred for brand building for the entities owning the brand.*

- 7.1 *That the assessing officer erred on facts and in law in not appreciating that the advertisement and publicity expenses were incurred by the appellant in the course of carrying on of its business and were allowable deduction as business expenditure.*
- 7.2 *That the assessing officer erred on facts and in law in disallowing expense incurred on advertisement of Rs. 15,11,304 holding that the details of these expense were not furnished by the appellant, grossly ignoring the complete details of advertisement expense of Rs. 17,06,32,000 submitted by the assessee.*
- 7.3 *Without Prejudice, the assessing officer erred on facts and in law in making disallowance of advertisement expense of Rs. 5,12,04,000 without appreciating the fact that similar disallowance has already been made by the TPO for Rs. 5,64,08,000, thereby making total disallowance of Rs. 10,76,12,000 on the same account.*
8. *That the assessing officer erred on facts and in law in levying interest under section 234B of the Act at Rs.2,98,47,544 instead of correct interest computed under that section at Rs.2,79,96,013.*
9. *That the assessing officer erred on facts and in law in wrongly computing the tax liability at Rs.26,97,85,022 as against Rs.26,57,22,293.*

66. Ground No. 1 is general

67. **Ground No. 2 to 3.6 - Transfer pricing issue w.r.t. to payment of trademark fee**

The aforesaid grounds and issue are identical to the grounds raised by the assessee in ground No. 3 to 3.8 for the appeal for the assessment year 2007-08 in ITA No. 5650/Del/2011. Respectfully following our decision in the appeal for the assessment year 2007-08, these grounds of the assessee are allowed.

Grounds No. 4-4.16 Transfer pricing issue w.r.t. to Advertising, Marketing and Promotion ('AMP') Expenses

The aforesaid grounds and issue are identical to the grounds raised by the assessee in ground No. 4 to 4.15 for the appeal for the assessment year 2007-08 in ITA No. 5650/Del/2011. Respectfully following our decision in the appeal for the assessment year 2007-08, these grounds of the assessee is allowed.

Grounds No. 5-5.6 - Transfer pricing issue w.r.t. to export of goods

68. The aforesaid grounds and issue are identical to the grounds raised by the assessee in ground No. 5-5.2 for the appeal for the assessment year 2007-08 in ITA No. 5650/Del/2011. Respectfully following our decision in the appeal for the assessment year 2007-08, Respectfully following the decision of the co-ordinate bench of Tribunal in the assessee's own case for the assessment year 2006-07, we uphold the order of the TPO to the extent of netting off of export incentive from the cost of goods sold and set aside the issue of netting off of rebate/discount from the cost of goods sold, to the file of assessing officer/TPO, for verification of the claim in light of our decision for the assessment year 2006-07. Needless to add that the assessee should be given reasonable opportunity of being heard.

Grounds No. 6-6.1 - Disallowance of provision for warranty:

69. The aforesaid grounds and issue are identical to the grounds raised by the assessee in ground No. 7 for the appeal for the assessment year 2007-08 in ITA No. 5650/Del/2011. Respectfully following our decision in the appeal for the assessment year 2007-08, these grounds of the assessee is allowed.

Grounds No. 7-7.3 - Disallowance of advertisement expenditure under section 37(1) of the Act:

70. On the aforesaid ground, the appellant submitted that during the relevant previous year, in order to promote the sales of products produced/ traded and

marketed in India, the appellant incurred expenses amounting to Rs. 17,06,32,000 on advertisement and sale promotion expenses respectively.

71. The assessing officer held that (i) the assessee has incurred a large amount on advertisement and publicity which is resulting in benefit to the associated enterprises who own the brand, (ii) the assessee was not able to demonstrate as to how it is wholly benefited from such brand building and that whole arrangement was concocted to lower its profit and to save expenditure of the associated enterprises.

72. The assessing officer accordingly made disallowance of Rs. 5,12,04,000 out of the total expenditure of Rs. 17,06,32,000 incurred on advertisement and publicity, allegedly relatable to the promotion of brand in India.

73. In this regard, the appellant has submitted the following before us:

“The aforesaid advertisement and sales promotion expenses are generally required to be incurred to beat competition in the trade for promoting their products and had direct nexus with the sales of the products in India. The above mentioned expenses were incurred for sales promotion and advertisement in India only and that too in respect of products in which the appellant was dealing in India. Similar advertisement and sales promotion expenses are incurred by the competing companies for promoting sales of their products as well.

Further, the appellant is engaged in the business of manufacture and sale of ‘Goodyear’ tyres. The appellant vide agreement 18-01-1996 with Goodyear Inc. acquired license to manufacture and sale of such products in India. The appellant, it is submitted, is the exclusive user of brand name of such products in India and entire expenditure on advertisements and sales promotion was incurred for promoting the sales of these products by the appellant in India and benefit of which was derived entirely by the appellant. Such expenses incurred in India, do not have any reach outside

India so as to result in any benefit to the other group company which are the owner of the said brand.

The Supreme Court in the case of Sassoon J. David and Co.; (P) Ltd. Vs. CIT : 118 ITR 261 held that expenditure incurred wholly and exclusively for purpose of business of an assessee would be allowable deduction notwithstanding that such expenditure may incidentally b

Hon'ble Delhi High Court in the case of CIT vs. Adidas India Marketing (P) Ltd. : 195 Taxman 256, held that".....No doubt, brand name of 'Adidas' is already a well-known brand which belongs to the parent company of the assessee. However, to popularize the said product in India and to promote its sale in the Indian territories, it became essential for the assessee to incur expenditure on advertising to propagate the aforesaid brand name. The benefit thereof had to necessarily accrue to the assessee as well as the main purpose of the advertisement is to augment the sales. The contention of the assessee that it was a commercial practice and commercial expediency has right been accepted by the Tribunal".

Reliance is placed on the recent decision of the Hon'ble Delhi High Court in the case of CIT vs. Agra Beverages Corporation (P) Ltd. (ITA Nos. 966 of 2009 & 836 of 2010), wherein it is held that advertisement expenses were incurred by the assessee, a franchisee of Pepsi, for its own benefit and if in the process 'Pepsi' or its trademark, also benefitted, the same would not militate against the assessee for claiming deduction under section 37 of the Act.

The Hon'ble Delhi Bench of the Tribunal in the case of DCIT vs. Maruti Countrywide Auto Financial Services Pvt. Ltd. (ITA Nos. 2181 to 2183/Del/2010), similarly upheld the order passed by the Commissioner of Income-tax (Appeals), deleting the disallowance of advertisement and promotion expenses, made on the ground that such expenses incidentally resulted in promotion of the brand owned by Maruti Udyog Limited.

It is further respectfully submitted that since the aforesaid expenditure of advertisement and brand promotion has undergone a benchmarking analysis under the Transfer Pricing regulations and an arm's length price thereof has been determined, there could not be any further disallowance of the said payment under section 37(1) of the Act, holding the same to be not

an expenditure incurred wholly and exclusively for the purpose of the business of the appellant. Reliance is placed on the decision of the Hon'ble Delhi Bench of the Tribunal in the case of Whirlpool of India Ltd. vs. DCIT (ITA No. 426/D/13), wherein, it is held as under:

"16.....Once the total amount of AMP expenses is processed through the provisions of Chapter X of the Act with the aim of making TP adjustment towards AMP expenses incurred for the foreign AE, or in other words such expenses as are not incurred for the assessee's business, there can be no scope for again reverting to section 37(1) qua such amount to make addition by considering the same expenditure as having not been incurred 'wholly and exclusively' for the purposes of assessee's business. If the amount of AMP expenses is disallowed by processing under both the sections, that is 37 and 92, it will result in double addition to the extent of the original amount incurred for the promotion of the brand of the foreign AE de hors the mark-up. In view of the foregoing discussion, we are of the considered view that the AO was not justified in observing alternatively that a sum of Rs.180 crore and odd is not allowable as per section 37(1) of the Act. We, therefore, vacate the alternative finding given by the AO for disallowance."

In view of the aforesaid, adhoc disallowance of Rs. 5,12,04,000 incurred on advertisement and publicity is unlawful and is liable to be deleted.

Further, regarding disallowance of expense of Rs. 15,11,304 incurred by the assessee on advertisement expense, it is respectfully submitted that complete details of advertisement expense of Rs. 17.06 crores has been duly submitted by the assessee during the course of assessment, which are verifiable from the records. Accordingly, no addition can be proposed on account of non submission of details of expense.

74. The Id. CIT-DR relied on the order of the assessing officer and the DRP.
75. We have heard the rival contentions in the light of the material produced and precedent relied upon. We have already held that the advertisement expenditure incurred by the assessee is incurred wholly for the purpose of its business and profession and ought to be allowed deduction in entirety. During

the course of hearing, the Id. AR of the assessee has also placed reliance on the decision of Hon'ble Delhi High Court in the case of Whirlpool of India Ltd (ITA No. 228/2015), to hold that advertisement expenditure cannot be disallowed deduction merely because it gives incidental benefit to owner of the brand, as under:

*"46. As already mentioned, merely because there is an incidental benefit to Whirlpool USA, it cannot be said that the AMP expenses incurred by WOIL was for promoting the brand of Whirlpool USA. As mentioned in **Sassoon J David** (supra) "the fact that somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being allowed by way of a deduction under Section 10 (2) (xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law".*

76. Respectfully following the decision of the Hon'ble Delhi High Court in the case of Whirlpool and several other decisions submitted by the assessee, we are of the considered view that AO was not justified in making such disallowance and therefore, direct the assessing officer to delete the adjustment on this account.

77. In the result, the appeal of the assessee is allowed on this issue.

Grounds No. 8-9 are consequential in nature and thus, need no specific adjudication.

ITA No. 961/Del/2014 – Assessment Year 2009-10

This appeal by the assessee is directed against the order of the Assessing Officer u/s. 143(3) read with section 144C of the I.T Act for the assessment year 2009-10 on the following grounds :

1. *That the assessing officer erred on facts and in law in completing assessment under section 144C/143(3) of the Income-tax Act, 1961 ('the Act') at an income of Rs. 67,38,74,300 as against the income of Rs. 50,17,92,004 returned by the appellant.*
2. *That the assessing officer / the Transfer Pricing Officer (TPO) erred on facts and in law in making adjustment of Rs. 13,68,57,865 to the arm's length price of the international transaction entered into by the appellant with its associated enterprise.*
3. *That the assessing officer/the TPO erred on facts and in law in holding the arm's length price of the international transaction of payment of trademark fee of Rs. 6,69,11,000 to the Associated Enterprise ("AE"), the Goodyear Tire & Rubber Company, USA as NIL without applying any of the prescribed methods.*
 - 3.1 *That the assessing officer/the TPO erred on facts and in law in holding that arms length price of the international transaction of payment of trademark fees to be nil allegedly holding that no recognizable benefit has been passed on to the appellant and therefore there is no rationale for paying this trademark fees to the AE.*
 - 3.2 *That the assessing officer/the TPO erred on facts and in law in not appreciating that the international transaction of payment of trademark fees was appropriately benchmarked applying Transactional Net Margin Method ("TNMM") as the most appropriate method and was accordingly established to be at arm's length.*
 - 3.3 *That the DRP / TPO erred on facts and in law in holding that the entire arrangement of the payment of trademark fee is designed to shift profits outside India.*
 - 3.4 *That the DRP erred on facts and in law in holding that "..... except for 3 years from 2000 to 2002 the taxpayer have always been making profit which shows that payment for "trademark fee" has no connection with the profitability of the taxpayer....."*
 - 3.5 *That the DRP erred on facts and in law in upholding the action of the TPO in considering the arm's length price of payment of trademark fee at NIL, allegedly applying the benefit test.*

- 3.6 *That the assessing officer/the TPO erred on facts and in law in not appreciating that the trademark fees paid by the appellant to the AE 1% of the net domestic sales and 2% of the net export sales is within the limits prescribed by the RBL and was pursuant to a bonafide transaction.*
- 3.7 *That the assessing officer/the TPO erred on facts and in law in comparing the other subsidiary (Goodyear South Asia Tyres Private Limited, Aurangabad, Maharashtra, hereinafter referred as "Goodyear Aurangabad") of Goodyear USA with the appellant with reference to trademark fees even when business dynamics and commercial realities (end customer profile, need to be associated with a valuable brand, etc.) in both the companies were entirely different.*
4. *That the assessing officer/TPO erred on facts and in law in making transfer pricing adjustment amounting to 6,69,11,000 in relation to the advertisement, marketing and sales promotion expenses (hereinafter referred to as 'the AMP expenses') incurred by the appellant.*
- 4.1 *That the assessing officer/TPO erred on facts and in law in making an addition of Rs.6,69,11,000 on account of the arm's length price of the alleged international transaction AMP expenses, holding that the appellant was promoting the brand of the associated enterprise and instead of payment of the trademark fee to the AE of 6,69,11,000 the appellant should receive the equivalent amount as compensation for creating and developing marketing intangibles in India.*
- 4.2 *That on the facts and in the circumstances of the case, the DRP erred in law in upholding, in principle, transfer pricing adjustment made by the assessing officer / TPO in respect of expenditure incurred on advertising, marketing and publicity ("AMP expenses").*
- 4.3 *The DRP/TPO erred on facts and in law in not appreciating that the AMP expenses, etc., unilaterally incurred by the appellant in India could not be characterized as an international transaction as per section 92B, in the absence of any proved understanding / arrangement between the appellant and the associated enterprise, so as to invoke the provisions of section 92 of the Act.*
- 4.4 *That the TPO / DRP erred on facts and in law in not appreciating that unilaterally incurring of AMP expenses by the appellant does not result in*

an international transaction in terms of section 92B of the Act, even after its amendment by the Finance Act, 2012.

- 4.5 That the DRP erred on facts and in law in holding that “.....by using the trademark / logo on advertisement and sales promotion the taxpayer is creating / strengthening the marketing intangible or its AE and that too without any fee or any reimbursement from the AE.....”*
- 4.6 That the DRP erred on facts and in law in holding that, “there is an international transaction between the assessee and the foreign AE under which the assessee incurred AMP expenses towards promotion of brand which is legally owned by the foreign AE”.*
- 4.7 That DRP / TPO erred in allegedly benchmarking the reimbursement received as support from AE as AMP transaction.*
- 4.8 The DRP erred on facts and in law in not holding that merely because the Indian company had incurred expenditure on product advertisements including the foreign brand and the AMP expenses incurred by the taxpayer, were proportionately higher than those incurred by comparable cases taken by the TPO, did not lead to the inference of “transaction” between the taxpayer and the foreign AE for creating marketing intangibles on behalf of the later.*
- 4.9 The Dispute Resolution Panel (DRP)/TPO erred on facts and in law in not appreciating that the only Transfer Pricing adjustment permitted by Chapter X of the Act was in respect of the difference between the arm’s length price (ALP) and the contract or declared price, but the said provision could not be invoked to determine the ‘quantum’ / extent of business expenditure.*
- 4.10 The DRP erred on facts and in law in not appreciating that the Transfer Pricing adjustment sought to be made by the TPO in the present case was a mere quantitative adjustment, on the footing that the appellant had incurred excessive amount of AMP expenditure and consequently that such Transfer Pricing adjustment was not at all permitted or authorized by Chapter X of the Act.*
- 4.11 The DRP/TPO erred on facts and in law in holding that expenditure incurred by the appellant which incidentally resulted in brand building for*

the foreign AE, was a transaction of creating and improving marketing intangibles for and on behalf of its foreign AE and further that such a transaction was in the nature of provision of a service by the appellant to the AE.

- 4.12 That the DRP/TPO erred on facts and in law in holding that AMP expenses incurred by the appellant resulted in promotion of brand owned by the associated enterprise, thereby creating marketing intangibles whose ultimate benefit inured to the associated enterprise*
- 4.13 That TPO / DRP erred on facts and in law by questioning the commercial expediency of AMP expenditure incurred by the appellant and assuming that benefit has accrued to AE on account of AMP expenses incurred by the appellant in India.*
- 4.14 The DRP/TPO erred on facts and in law in not appreciating that the advertisement and marketing expenses were incurred by the appellant wholly and exclusively for purposes of its business and not on behalf of or for the benefit of the AE; any benefit to the AE being only incidental.*
- 4.15 That the DRP/TPO erred on facts and in law in not appreciating that the characterization of the appellant being that of a full fledged manufacturer and / or distributor performing all functions and bearing all risks, is the sole beneficiary of the AMP expenditure incurred by it, justified the conduct of the appellant in incurring and bearing the cost of AMP expenditure.*
- 4.16 Without prejudice, TPO/DRP erred on facts and in law in not appreciating that even if marketing intangible has been created then the appellant is the economic owner of the benefit of such intangible.*
- 4.17 The DRP/TPO erred on facts and in law in applying Bright Line Test not appreciating that in absence of specific provision in the Transfer Pricing statutory provisions in India., adjustment on account of the arm's length price of the advertisement and brand promotion expenses could not be made.*
- 4.18 The DRP/TPO erred on facts and in law in not appreciating that such a Transfer Pricing adjustment cannot at all be made in law without determining the Arm's Length Price ("ALP") by applying one of the methods specified in section 92C of the Act.*

- 4.19 *Without prejudice, that even if contention of TPO is accepted then AMP adjustment should be applied only on distribution segment of the appellant and not on manufacturing segment.*
- 4.20 *Without prejudice that the assessing officer erred on facts and in law in ignoring the fact that, since the appellant earns return commensurate with other brand owners, the appellant is adequately compensated for its functions and AMP expenses.*
- 4.21 *Without prejudice that the DRP/TPO erred on facts and in law, in not appreciating that the AMP expenses incurred by the appellant was appropriately established to be at arm's length applying TNMM.*
- 4.22 *Without prejudice, the DRP / TPO erred on facts and in law in not placing on record any comparables for determining arms length AMP expenditure.*
- 4.23 *Without prejudice that the assessing officer/TPO erred on facts and in law in not appreciating that even applying Bright Line Test ("BLT") no adjustment on account of AMP expenditure could be made in as much as AMP expenditure incurred by the appellant was lower than AMP expenditure incurred by comparable companies.*
- 4.24 *Without prejudice that the assessing officer/TPO erred on facts and in law, in not appreciating that the AMP expenses incurred by the appellant was appropriately established to be at arm's length applying Transactional Net Margin Method (TNMM).*
5. *That the assessing officer / TPO erred on facts and in law in making adjustment of Rs. 30,35,865 in the arm's length price of the international transaction of export of finished goods entered into by the appellant with its associated enterprise.*
- 5.1 *That the assessing officer /TPO erred on facts and in law in not appreciating export incentive, being a compensation for the cost incurred for sale of goods, is required to be reduced from the cost of goods sold for computing gross profit margin for determining the arm's length price.*
- 5.2 *That the assessing officer / TPO erred on facts and in law in holding that incentive received in respect of export of finished goods, should not be taken*

into account for determining the profit/cost in respect of the international transaction of export.

- 5.3 That the assessing officer / TPO has erred on facts and in law in holding that "if the appellant's method of calculation of 'cost of goods sold' is followed, it would tantamount to a claim that benefit, which has not yet accrued at the time of sale of goods, being treated as a component of cost of goods sold."*
- 5.4 That the assessing officer / TPO erred on facts and in law in holding that the approach of the appellant in considering export incentive for computing cost of goods sold was in violation of its Global Transfer Pricing Policy.*
- 5.5 'That the assessing officer / TPO erred on facts and in law in ignoring that the Global Transfer Pricing Policy of the group company provides for reducing the cost of merchandise by the export incentives available to the exporting entity.*
- 5.6 That the assessing officer / TPO erred on facts and in law in holding that the export incentive does not form part of invoice price of goods sold and hence the same cannot be reduced from the cost of goods sold.*
- 6. That the assessing offer erred on facts and in law in disallowing provision for obsolete spares and parts amounting to Rs. 20,36,000 allegedly holding it to be in the nature of provision for replacement loss (warranty) and on the premise that the said expenditure is based on estimate and without any scientific basis.*
- 6.1 That the assessing officer erred on facts and in law in disallowing the said expenditure not appreciating that the details and explanation wrt provision of obsolete spare and parts submitted during the course of assessment proceedings.*
- 7. That the assessing officer erred on facts and in law in making an adhoc disallowance of Rs. 3,20,71,500 being 30% of the total expenditure of Rs.10,69,05,000 on advertisement and publicity incurred by the appellant holding that the expenditure was incurred for brand building for the entities owning the brand.*

- 7.1 *That the assessing officer erred on facts and in law in not appreciating that the advertisement and publicity expenses were incurred by the appellant in the course of carrying on of its business and were allowable deduction as business expenditure.*
- 7.2 *That the assessing officer erred on facts and in law in making the adhoc disallowance of expense incurred on advertisement of Rs. 3,20,71,500 holding that certain information / break-up of the amount of expense incurred towards brand building and advertisement were not furnished by the appellant, not appreciating that the complete details of such expenses was placed on record.*
- 7.3 *That the assessing officer erred on facts and in law in not appreciating that when the said expenditure of advertisement has been subjected to benchmarking analysis by the TPO under section 92 of the Act and appropriate arm's length price in this regard has been determined, there cannot be any further disallowance for the said expenditure under section 37 of the Act on the basis that a part of such expenditure was incurred for the benefit of the overseas associated enterprise.*
- 7.4 *Without Prejudice, the assessing officer erred on facts and in law in making disallowance of advertisement expense of Rs. 3,20,71,500 without appreciating the fact that similar disallowance has already been made by the TPO for Rs. 6,69,11,000, thereby making a double disallowance to that extent.*
8. *That the assessing officer erred on facts and in law in disallowing expenditure amounting to Rs. 11,16,932 allegedly holding that the appellant has failed to provide complete details of expenditure incurred by the appellant and that the expenditure were not incurred wholly and exclusively for the purpose of business.*
9. *That the assessing officer erred on facts and in law in levying interest under Section 234B and Section 234C of the Act.*
78. Ground No. 1 an 2 are general.
79. **Ground No. 3 to 3.7 - Transfer pricing issue w.r.t. to payment of trademark fee**

The aforesaid grounds and issue are identical to the grounds raised by the assessee in ground No. 3 to 3.8 for the appeal for the assessment year 2007-08 in ITA No. 5650/Del/2011. Respectfully following our decision in the appeal for the assessment year 2007-08, these grounds of the assessee is allowed.

Grounds No. 4-4.24 Transfer pricing issue w.r.t. to Advertising, Marketing and Promotion ('AMP') Expenses

The aforesaid grounds and issue are identical to the grounds raised by the assessee in ground No. 4 to 4.15 for the appeal for the assessment year 2007-08 in ITA No. 5650/Del/2011. Respectfully following our decision in the appeal for the assessment year 2007-08, these grounds of the assessee is allowed.

Grounds No. 5-5.6 - Transfer pricing issue w.r.t. to export of goods

80. The aforesaid grounds and issue are identical to the grounds raised by the assessee in ground No. 5-5.2 for the appeal for the assessment year 2007-08 in ITA No. 5650/Del/2011. Respectfully following our decision in the appeal for the assessment year 2007-08, Respectfully following the decision of the co-ordinate bench of Tribunal in the assessee's own case for the assessment year 2006-07, we uphold the order of the TPO to the extent of netting off of export incentive from the cost of goods sold and set aside the issue of netting off of rebate/discount from the cost of goods sold, to the file of assessing officer/TPO, for verification of the claim in light of our decision for the assessment year 2006-07. Needless to add that the assessee should be given reasonable opportunity of being heard.

Grounds No. 6-6.1 - Disallowance of provision for obsolete spares and parts:

The aforesaid grounds and issue are identical to the grounds raised by the assessee in ground No. 7 for the appeal for the assessment year 2007-08 in ITA No. 5650/Del/2011. Respectfully following our decision in the appeal for the assessment year 2007-08, these grounds of the assessee is allowed.

Grounds No. 7-7.4 - Disallowance of advertisement expenditure under section 37 of the Act:

The aforesaid grounds and issue are identical to the grounds raised by the assessee in ground No. 7-7.1 for the appeal for the assessment year 2008-09 in ITA No. 6240/Del/2012. Respectfully following our decision in the appeal for the assessment year 2008-09, these grounds of the assessee is allowed.

Grounds No. 8 - Disallowance of miscellaneous expenditure of Rs. 11,16,932

81. The Id. AR of the assessee submitted that the assessing officer has made disallowance for want of details of such expenses. The details of expenditure incurred by the appellant were furnished before the DRP on 14.11.2013. However, without properly appreciating the facts of the case, has sustained the disallowance. Therefore, the assessing officer may kindly be directed to decide the issue after examine the details.

82. The CIT-DR made no objection in sending the issue back to the file of assessing officer for verification of details submitted by the assessee before the DRP vide letter dated 14.11.2013.

83. In view of the above, we set aside the issue to the file of the assessing officer to verify the details of expenditure submitted by the appellant to the

DRP vide reply dated 14.11.2013. Needless to add that the assessee should be given reasonable opportunity of being heard.

Re: **Grounds No. 9** is consequential in nature and thus, needs no specific adjudication.

84. In view of the above the three appeals filed by the assessee for assessment year 2007-08 (ITA No. 6560/Del/2011), 2008-09 (ITA No. 6240/Del/2012) and 2009-10 (ITA No. 961/Del/2014) are partly allowed.

Order pronounced in open court on 29.04.2016.

---Sd-----
(I. C. SUDHIR)
JUDICIAL MEMBER

---Sd---
(L. P. SAHU)
ACCOUNTANT MEMBER

Dated : 29.04.2016

*aks/-

Copy of order forwarded to:

(1) *The appellant*
(3) *Commissioner*
(5) *Departmental Representative*

(2) *The respondent*
(4) *CIT(A)*
(6) *Guard File*

By order

Assistant. Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi