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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.1088/Del./2016
Assessment Year: 2011-12

M/s. Xerox India Ltd., 5th Floor, Vatika Business Park, Sector-49, Sohna Road, Gurgaon	**Vs.**	DCIT, Circle-27(2), New Delhi
PAN :AAACM8634R		
(Appellant)		**(Respondent)**

And

ITA No.1053/Del./2016
Assessment Year: 2011-12

ACIT, Circle-27(2), New Delhi	**Vs.**	M/s. Xerox India Ltd., 5th Floor, Vatika Business Park, Sector-49, Sohna Road, Gurgaon
		PAN :AAACM8634R
(Appellant)		**(Respondent)**

Assessee by	Shri Tarandeep Singh, Adv.
Department by	Shri Surendra Pal, CIT(DR)

Date of hearing	07.10.2020
Date of pronouncement	19.10.2020

ORDER

PER O.P. KANT, AM:

These cross appeals by the assessee and the Revenue are directed against final assessment order dated 30.12.2015 passed by the learned Deputy Commissioner of Income Tax, Circle-27(2), New Delhi (in short 'the Assessing Officer') pursuant to the direction of the learned Dispute Resolution Panel (in short 'learned DRP') dated 18.11.2015. The grounds raised by the assessee and the Revenue are reproduced as under:

Grounds of appeal raised by the assessee:

1. *That on facts and in law the orders passed by the Assessing Officer [hereinafter referred as the "AO"] / Dispute Resolution Panel [hereinafter referred as the "DRP"] / Transfer Pricing Officer [hereinafter referred as the "TPO"] are bad in law and void ab-initio.*
2. *That on facts and in law the AO/TPO/DRP erred in making/proposing/upholding Transfer Pricing adjustment of Rs. 3,98,97,000/- on account of Advertisement, Marketing and Promotion (AMP) expenses.*

2.1 *That on facts and in law the TPO/DRP erred in not appreciating that in absence of a "transaction" as envisaged under section 92F of the Act between appellant and its AE for brand promotion or for establishing a marketing intangible the TPO had no jurisdiction to propose an adjustment on account AMP expenses.*

2.2 *That on facts and in law the TPO erred in holding and the DRP inter alia erred in upholding/observing that the:*

(i) Appellant had incurred AMP expenditure of Rs. 288.69 lakhs on development of marketing intangibles for the benefit of AE.
(ii) AMP expenditure of Rs. 288.69 lakhs incurred by the appellant is an "International Transaction" u/s 92B of the Act.
(iii) AE is directly benefited by any expenditure incurred by assesse on AMP
(iv) Alleged transactions of AMP expenditure is to benchmarked in a segregated manner.

2.3 *That on facts and in law, the AO/TPO while giving effect to DRP directions erred in holding that following expenses shall be included within the ambit of AMP for benchmarking purposes:*

(a)	*Marketing and Sales Promotion Expenses*	*Rs 91,87,589*
(b)	*Market Research and Development*	*Rs 10,21,520*
(c)	*Printing and Stationary*	*Rs 16,06,016*
(d)	*Selling Expenses*	*Rs 33,82,252*
(e)	*Partner Training and Meeting*	*Rs 18,19,001*
(f)	*CRS Expense*	*Rs 11,51,784*
(g)	*Membership and Subscription*	*Rs 57,59,079*

3. *That on facts and in law the TPO/ AO/ DRP has erred in rejecting TNMM as the most appropriate method and applying the ratio of AMP/Gross Profit (GP) ratio to determine ALP of the alleged transaction of AMP.*
4. *Without prejudice, that on facts and in law the AO/TPO/DRP erred in not appreciating that the alleged transactions of AMP were "closely linked" with the main activity of distributorship carried on by the appellant and hence it cannot be segregated and benchmarked on a stand-alone basis.*
5. *Without prejudice, that on facts and in law the AO/TPO while giving effect to DRP directions erred in computing / holding:*
   (i) Gross Profit Ratio for the appellant at 19.59%
   (ii) AMP Expense to Sales Ratio for the appellantat 1.93%
   (iii) AMP to GP Ratio for the appellant at 9.85%
   (iv) that AMP to Sales Ratio of the appellant is excessive by 8.52%
6. *Without Prejudice, that on facts and in law the comparable set adopted by the AO/DRP/TPO for the purpose of benchmarking AMP transactions is not proper and akin to the FAR of the appellant.*
7. *Without Prejudice, that on facts and in law the TPO/DRP erred in making/upholding the applicability of a markup of 38.20% on the alleged excessive AMP expenses incurred by the appellant on behalf of the Associated Enterprise.*
8. *That on facts and in law the AO/DRP erred in making/upholding a disallowance of Rs.26,09,863/- being depreciation allowance on capital assets converted into stock in trade.*

8.1 *That on facts and in law the AO/DRP erred in not following the decision of Hon'ble ITAT / High Court in appellant's own case in AY 2007-08 on identical issue*

9. *That on facts and in law while computing the final tax liability the AO erred innot granting credits for TDS Certificates of Rs.8,40,136/- .*

That the appellant prays for leave to add, alter, amend and/or vary the ground(s) of appeal at or before the time of hearing.

Grounds of appeal raised by the Revenue:

1. *"On the facts and in the circumstances of the case, the DRP-2 erred in directing AO to complete the assessment as per observations made by DRP in the order which resulting in reducing the addition to Rs.3,98,97,000/- in place of original recommended ALP of Rs. 14,46,58,620/- for the International transactions undertaken the assessee company with its associate/parent enterprise".*
2. *"Whether the DRP was justified in not appreciating the fact that bright line is a mere step [of the most appropriate method for benchmarking the AMP services] carriedout to estimate and bifurcate expenditure pertaining to the taxpayer for its own routine distribution function and the expenditure incurred on AMP service provided to the AE in a situation where the assessee has not reported the international transaction pertaining to marketing function."*
3. *"Whether under the facts and circumstances of the case and in law the Hon'ble DRP was correct in holding that PLR cannot be the basis for computing markup on AMP expenses without appreciating the Revenue's case wherein the PLR of banks has been used as an uncontrolled comparable to benchmark the opportunity cost of money involved and locked up in AMP expense?"*
4. *"Whether in the facts and circumstance of the case and in law the Hon'ble DRP was justified in stating that routine selling and distribution expenses would not form part of AMP Expenses) disregarding that fact that these expenses contribute to creation of marketing intangible) even while the same is a factor for comparability analysis as different entities account for such expenditure under different heads ?"*
5. *The appellant craves, leave or reserving the right to amend modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."*

2. Briefly stated facts of the case are that the assessee company was incorporated under the law of India and is engaged in the business of trading of Xerographic Equipments, Printers, Scanners, Faxes, Multi-functional Devises, High-end printing equipment etc. The assessee filed return of income on

24.11.2011, declaring total income of Rs.7,36,28,531/-, which was revised on 29.03.2013. However, the revised income remained the same at Rs.7,36,28,531/-. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices were issued and complied with by the assessee. The Assessing Officer noticed various international transactions carried out by the assessee and referred the matter for determination of the Arms' Length Price of the transactions to the Transfer Pricing Officer (in short 'the TPO'). The learned TPO though did not make any adjustment to the amount of the international transactions reported by the assessee, however, proposed an adjustment on account of international transaction, namely, "Creation of Marketing Intangible in favour of the AE" arising out of the advertisement and marketing promotion (AMP). The TPO determined the adjustment of Rs.14,46,58,620/- in his order dated 29.01.2015. Consequently, the Assessing Officer in the Draft Assessment order issued to the assessee included transfer pricing adjustment of Rs.14,46,58,620/-. Against the said Draft Assessment order, the assessee filed objection before the learned DRP on 20th April, 2015. The learned DRP vide its order dated 18.11.2015, directed the TPO to re-compute the margin of transfer pricing adjustment. In compliance to the direction of the learned DRP, the learned TPO gave effect and computed transfer pricing adjustment on account of AMP transaction to Rs.3,98,97,000/-. The learned Assessing Officer accordingly in the final assessment order made adjustment of Rs. 3,98,97,0000/- on account of alleged AMP transactions.

2.1 Aggrieved with the final assessment order of the Assessing Officer, both the assessee as well as the Department are in appeal raising their respective grounds as reproduced above.

3. Before us, both the parties appeared through Video-conferencing and filed documents/paper-books electronically.

4. The learned counsel for the assessee referred to para 8 of the TPO and various paras of the order of the learned DRP. The learned counsel submitted that no international transaction exist in the case of the assessee and the Tribunal in ITA No. 5528/Del./2012 for AY 2008-09 and ITA No. 2060/Del./2015 for AY 2010-11 has given a finding that no international transaction of AMP exist in the case of the assessee and accordingly adjustment has been deleted in the case of the assessee. He submitted that following the above precedents in the case of the assessee, the transfer pricing adjustment made in the year under consideration also needs to be deleted. With regard to the appeal of the Revenue, he submitted that as existence of the international transaction of the AMP has been rejected, the grounds of the Revenue may be rendered infructuous.

5. On the other hand, the learned DR relied on the orders of the lower authorities and submitted that the issue of existence of the international transaction on AMP is pending before the Hon'ble Supreme Court.

6. We have heard the rival submissions of the parties and perused the relevant material on record. In the year under consideration, the findings of learned TPO regarding AMP adjustment can be summarized as under:

(a) The brand "Xerox" is owned by Associated Enterprises (AEs), but the assessee is incurring AMP expenditure on promotion of brand, which result in brand building to the advantage to AEs. There exists an "international transaction" for brand promotion because of alleged excessive AMP spent, in view of the definition of transaction in terms of Section 92F(v) of the Act, according to which, the transaction includes an arrangement, understanding or action in concert, whether or not such arrangement, understanding or action is formal or in writing and well established principle of substance over form. Decision of Special Bench in case of LG Electronics reported in 150 ITD 94(Del)(SB) has been followed.

(b) Selling expenses like rebate, commission, discount should be included within the ambit of AMP.

(c) Assessee company does not own any trademark or brand and had performed significant functions like brand development, market development, etc. on behalf of AE in lndia and hence, the amount of expenses should be reimbursed

(d) Bright Line Test has been applied as the Method for benchmarking alleged AMP Transaction.

6.1 We find that in the year under consideration the learned DRP has issued following directions relying upon the decision of the Hon'ble Delhi High Court in the Case of *Sony Ericsson Mobile Communications India Pvt. Ltd. v Commissioner of Income Tax [(2015) 374 ITR 118]*:

"(a) The assessee has executed an "international transaction" for incurring AMP expenses on behalf of its AE.

(b) Routine selling and distribution expenses shall be excluded subject to the verification by TPO.

(c) The TPO to follow decision in case of Sony Ericsson Mobile (supra) and held that Segregated approach is to be applied for separating routine selling and distribution expenses from AMP expenses considering comparable companies and TPO to apply cost plus method instead of TNMM.

(d) Use of Bright Line Method has been rejected and directions have been issued to TPO to benchmark alleged transaction alternatively"

6.2 Further, we find that identical issue of existence of International Transaction in the case of assessee came up for consideration before the Tribunal for assessment year 2008-09 in

ITA No. 5528/Del/2012. The relevant finding of the Tribunal is reproduced as:

> *"15. Hon'ble Delhi High Court in subsequent decisions viz. Bausch & Lomb Eye Care (India) Pvt. Ltd. v. Additional CIT (2016) 381ITR 227 (Del.) and Honda Siel Power Products Ltd. v. Dy. CIT (2016) 237 Taxman 304 held that it is for the Revenue to firstly discharge the onus to prove the existence of an international transaction between the taxpayer and its AE and only thereafter ALP of international transactions involving AMP can be computed.*
>
> *16. Ld. AR for the taxpayer vehemently contended that AMP expenditure is not an international transaction nor any objective findings have been returned by the ld. TPO. When we peruse the findings of ld. TPO in paras 3.5 & 3.6, the TPO in order to find out whether AMP is an international transaction relied upon section 92F(v) which defines transaction as under:-*
>
> > *"(v) "transaction" includesan arrangement, understanding or action in concert,-*
> > *(A) whether or not such arrangement, understanding or action is formal or in writing; or*
> > *(B) whether or not such arrangement, understanding or action is intended to beenforceable by legal proceeding. "*
>
> *17. Ld. TPO by relying upon section 92F (v) of the Act returned the findings declaring AMP expenditure as an international transaction as under :-*
>
> > *"The issue of AMP expenditure falls squarely within the definition of 'transaction ' as per sec. 92F(v). Hence, there is no infirmity with the action of this office."*
>
> *18. The ld. AR for the taxpayer further contended that continuous growing sales pattern of the taxpayer substantiates the fact that the benefit of AMP activities accrues to the taxpayer only and not to any other entity. However, the ld. TPO dismissed this argument of taxpayer by observing that growth in sales is actually incidental benefit and it is only the enhancement of brand value i.e. actual objective of this exercise.*
>
> *19. Ld. TPO also observed that AMP expenditure of the taxpayer are more than the normal range of expenditure incurred by the routine distributor and such high level of AMP expenses is not incurred only for increasing its sales but to promote the brand which is evident from the fact that AMP/ sales ratio of taxpayer is 6.93% vis-a-vis 1.18% the AMP/sales ratio of routine distributors. We are of the considered view that all these findings are general in nature and are*

not factual objective findings based upon any evidence. Merely because of the fact that AMP expenses of the taxpayer are on higher side, the same cannot be treated to promote the brand and create intangibles for its AE.

20. Ld. AR for the taxpayer further contended that no direct benefit accrues to any other Xerox enterprise or holding company (Xerox US) as a result of marketing activities undertaken by it. However, dismissing the contentions raised by the taxpayer, ld. TPO made out the case that, "by incurring these expenses, the taxpayer has enhanced the value of intangibles owned by the parent company".

21. Ld. AR for the taxpayer further contended that to improve its business market, it is the sole responsibility of the taxpayer and as such, the AMP expenditure has direct nexus with its earning of the income. The taxpayer also relied upon para 7.13 of the OECD Guidelines which state inter alia that, "an AE should not be considered to receive an intra-group service when it obtains incidental benefits attributable solely to its being part of a larger concern and not to a specific activity being performed".

22. Ld. AR for the taxpayer further contended that use of any logo across the globe is not considered equivalent to enhancing a brand. However, ld. TPO proceeded to observe on the basis of general observation that the mandatory use of brand name or logo of the overseas parent company will lead to the creation of a marketing intangibles in favour of the taxpayer. However, when we examine the facts of this case in entirety, no doubt taxpayer uses "Xerox" logo but all the information in relation to contract address, brand ambassador, product, market and other similar details in the advertisement is confined to India only. So, it cannot be said to promote the Xerox brand world-wide. Moreover, when it is undisputed fact that the taxpayer has not paid any royalty for use of Xerox brand name, incidental benefits, if any, to overseas entity does not call for any compensation for the taxpayer.

23. In case of Valvoline Cummins (P.) Ltd. vs. DCIT (2017) 84 taxmann.com 191 (Delhi), Hon'ble Delhi High Court held that mere use of brand name or logo owned by the AEs by the taxpayer will not automatically lead to influence that any expenses that the taxpayer incurred towards AMP was only to enhance the brand by returning following findings:-

> *"17. Once the BLT has been declared by this Court in Sony Ericsson India Pvt. Ltd. (supra) to no longer be a valid basis for determining the existence of or the ALP of an international transaction involving AMP expenses, the order of the TPO was unsustainable in law. The mere fact that the Assessee was*

permitted to use the brand name 'Valvoline' will not automatically lead to an inference that any expense that the Assessee incurred towards AMP was only to enhance the brand 'Valvoline'. The onus was on the Revenue to show the existence of any arrangement or agreement on the basis of which it could be inferred that the AMP expense incurred by the Assessee was not for its own benefit but for the benefit of its AE. That factual foundation has been unable to be laid by the Revenue in the present case. On the basis of the existing record, the TPO has found no basis other than by applying the BLT, to discern the existence of international transaction. Therefore, no purpose will be served if the matter is remanded to the TPO, or even the IT AT, for this purpose. "

24. When all these objections were raised by the taxpayer before the ld. DRP, same has been dismissed by using same ratio applied by the TPO firstly to declare the AMP expenditure as an international transaction and then to treat the AMP expenditure incurred by the taxpayer in excess of routine expenditure to promote the brand and creating intangibles for its AE by using the BLT, as is evident form para 5.3 of the ld. DRP order. In para 5.8, ld. DRP again applied the BLT to benchmark the international transaction qua AMP expenditure by returning following findings:-

"5.8 We have also considered the assessee's objection about rejection of certain comparables by the TPO. Two of them, namely, Mis Ricoh India Ltd. and Mis Spice Mobile Ltd. are engaged in the distribution of branded goods. We have already mentioned that the TPO has considered the distributors of only the similar unbranded goods to determine the routine marketing and distribution expenditure by them. The AMP expenditure incurred by the distributors of the branded goods would include certain amount of brand promotion expenses. That is why such distributors have not been considered as comparables because o~ aim is to determine the routine marketing and distribution expenses to fix the 'brightline' and ascertain the expenditure incurred by the assessee which is attributable to brand promotion. Only routine distributors are to be taken who are nor engaged in any brand building exercise. The purpose of bright line is to ascertain as to how much AMP expenses would normally be incurred by a manufacturer distributor for carrying on its routine distribution activity. For this it is necessary to select comparables which are not engaged in creation of brand name. In respect of the third company, M/s. Rathi Graphics Ltd., the TPO has observed in the order that it was carrying out AMP activities on behalf of its subsidiaries also. The assessee has not given any arguments to rebut the contention

of the AO. Therefore, the assessee's objection regarding rejection of all the three comparables is turned down by the Panel. The assessee has also given a list of its own comparables for determining the "brightlineHowever, all the comparables proposed by the assessee are distributors of branded goods and, therefore, for the reasons mentioned above, such comparables cannot be accepted. However, the Panel, on its own, has carefully examined the functional profile as well as the financials of all the comparables used by the TPO. It has been noted that more than 50% of turnover of M/s Dhoot Industrial Finance Ltd. is from sale of shares. The Panel is, therefore, of the view that it should have not been considered as a comparable. "

25. By now, it is settled principle of law that BLT is not a valid method for determining the existence of international transaction or for determination of ALP of such transactions.

22. Hon'ble Delhi High Court in case of CIT vs. Whirlpool of India Ltd. (2016) 381 ITR 154 (Delhi) decided the identical issue by returning following findings:

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

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

.....

37. The provisions under Chapter X do envisage a 'separate entity concept'. In other words, there cannot be a presumption that in the present case since WOIL is a subsidiary of Whirlpool USA, all the activities of WOIL are in fact dictated by Whirlpool USA. Merely because Whirlpool USA has a financial interest, it cannot be presumed that AMP expense incurred by the WOIL are at the instance or on behalf of Whirlpool USA.

There is merit in the contention of the Assessee that the initial onus is on the Revenue to demonstrate through some tangible material that the two parties acted in concert and further that there was an agreement to enter into an international transaction concerning AMP expenses.

……..

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

26. Hon'ble Delhi High Court in case of Maruti Suzuki India Ltd. vs. CIT (2015) 64 taxmann.com 150 (Delhi) also decided as to how the international transaction qua AMP expenditure is to be determined and as to how the price of international transaction qua AMP expenditure is to be determined by returning following findings:-

“68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an exercise. The Court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price '”which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions". Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negative by the Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT.

> *.....*
> *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.*
> *.....*
> *74. The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to Section 92Bof the Act. The problem does not stop here. Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue)or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for?"*

27. In case of Honda Siel Power Products Ltd. vs. DCIT (2015) 64 taxmann.com 328 (Delhi), Hon'ble Delhi High Court held that:-

> *"25. If the BLT is kept aside as a valid means of determining the existence of an international transaction concerning AMP expenses, the Revenue would have to make out its case on the basis of the other tangible material which might show the existence of any 'arrangement' or 'understanding' or any conduct of either party to show that they were 'acting in concert' as far as the Assessee having to promote the brand of the foreign AE is concerned.*

28. In case of LE Passage to India Tour & Travels (P.) Ltd. (2017) 391 ITR 207 (Delhi), Hon'ble Delhi High Court again held that all transactions reporting AMP cannot be treated as international transaction and the fact of each case would have to be examined independently by returning following findings:-

> *"4. This Court is of the view that whilst L.G. Electronics India Pvt. Ltd. (supra) indicated that AMPs were or did constitute the basis for an inquiry into the international transaction and indicated a "bright line" test for it, Sony Ericsson Mobile Communications India Pvt. Ltd.(supra) overruled that decision. This per se does not mean that every endeavour will be to conclude that all transactions reporting AMPs are to be treated as international transactions, the facts of each case would have to be examined for some deliberations. Whilst the TPO and the DRP undoubtedly held that the international transactions existed - that understanding apparently was passed upon the pre-existing regime, propounded in L.G. Electronics India Pvt. Ltd.(supra) with greater clarity on account of this Court's decision in Sony Ericsson Mobile Communications India Pvt. Ltd.(supra). The I.T.A.T. in our opinion, should have first decided whether in the circumstances of this case, the nature of the AMP reported, could lead to the conclusion that there was an international transaction. When doing so, it should have remitted the matter back for examination to the A.O. in this case. Accordingly, following the decision of Sony Ericsson Mobile Communications India Pvt. Ltd.(supra) and a subsequent decision in Daikin Airconditioning India Pvt. Limited v. Assistant Commissioner of Income Tax in ITA 269/2016, decided on 27.07.2016, this Court hereby remits the matter for a comprehensive decision by the I.T.A.T. In other words, the I.T.A.T. will decide whether the reporting of the AMP in regard to the outbound business constitutes an international transaction for which ALP determination was necessary and if so, the effect thereof. The parties are directed to appear before the I.T.A.T. on 01.02.2017. The appeal is partly allowed in the above terms. "*

29. Hon'ble Delhi High Court in Valvoline Cummins (P.) Ltd. vs. DCIT (supra) further decided the issue in favour of the taxpayer that merely because of the fact that AMP expenditure incurred by the taxpayer was in excess, existence of international transaction cannot be inferred. Operative part of the findings is extracted as under

> *'15. The decision in Le Passage to India Tour & Travels (P) Ltd.(supra) turned on the fact that there was no determination by the TPO in the first place whether there was an international transaction. In the present case, however, the TPO did apply his mind to the existence of an international transaction involving AMP expense. The only ground on which the conclusion was reached by the TPO was that the AMP expenditure incurred by the Assessee was in excess of that*

incurred by the comparables. His conclusion was not based on any other factor. In other words, it was not as if the conclusion arrived by the TPO was based on two or three grounds, one of which was the BLT.

16. This Court in Sony Ericsson India Pvt. Ltd. (supra) categorically found that the BLT was not an appropriate yardstick for determining the existence of an international transaction or for that matter for calculating the ALP of such transaction. The decision of the Full Bench of the IT AT in L.G. Electronics India Pvt. Ltd. v. AC IT (2013) 22 ITR (Trib.) 1 which sought to make BLT the basis was set aside by this Court. "

30. In the instant case, there is not an iota of material on the file apart from relying upon the fact that by incurring huge AMP expenses to the tune of 6.93%, taxpayer has enhanced brand value and created intangibles in favour of its AE, no cogent material is there to treat the incurring of AMP expenses as international transactions. TPO has also not returned the finding that how the benefit of AMP expenditure incurred by the taxpayer have benefited AE, no calculation has come on record, so in these circumstances when we discarded the BLT the entire case of ld. TPO/DRP fell flat.

31. In view of what has been discussed above and following the decisions rendered by Hon'ble High Court discussed in the preceding paras, we are of the considered view that firstly, there is not an iota of material with ld. TPO to prove the existence of an international transactions involving AMP expenses by the taxpayer. TPO rather proceeded on the premise that the AMP expenditure incurred by the taxpayer were far excess of AMP expenses incurred by the comparables.

32. TPO has also applied the BLT which has been discarded by the Hon'ble High Court in a number of judgments. Even otherwise, in the absence of any agreement, arrangement or understanding between the taxpayer and its AE, expressed or implied, that AMP spent of the taxpayer would also be beneficial to the AE or it would enhance the brand value of the AE in any manner, no international transaction can be inferred.

33. Moreover, on the other hand, the taxpayer has come up with specific pleading that it has analysed a principal to principal relationship with its AE and at no point, it has acted as agent of the AE. If this is so, AMP expenses which the taxpayer has incurred to boost up its sales cannot be treated to enhance the brand value and to create intangibles in favour of the AE. All these facts stand proved from the growing sale pattern of the taxpayer which shows that

benefit of AMP activities accrued in favour of the taxpayer. Moreover when TPO has failed to prove that there is an existence of international transaction between taxpayer and AE, the addition on account of AMP expenses cannot be made on the basis of the fact that AMP expenses of the taxpayer are far excess than the AMP expenses of comparables.

34. Even otherwise, the mere use of logo of AE is per se not international transaction. Consequently, we are of the considered view that AO/DRP/TPO have erred in making addition of Rs.36,41,27,428/- which is not sustainable in the eyes of law, hence ordered to be deleted. Hence, grounds no.3 to 25 are determined in favour of the taxpayer.

35. Before parting with this order, we would like to bring on record the fact that ld. DR for the Revenue, although admitted the legal position enunciated in the preceding paragraphs, but he contended that since all the aforesaid decisions are lying challenged before the Hon'ble Apex Court, the matter may be kept pending till the decision by Hon'ble Apex Court. However, we are of the considered view that since it is a stay granted matter and the proceedings before the second appellate authority have not been stayed by any higher forum, the same cannot be kept pending.

36. After considering the legal position as discussed in the preceding paragraphs, we are of the considered opinion that the ALP of an international transaction involving AMP expenses, the adjustment made by the TPO/DRP/AO is not sustainable in the eyes of law. At the same time, we cannot ignore the submission of the learned DR that the matter is pending before Hon'ble Apex Court and the decision of Hon'ble Apex Court would be binding upon all the authorities. In view of the above, we set aside the orders of authorities below and restore the matter to the file of the Assessing Officer. We hold that as per the facts of the case and the legal position as of now and discussed above in this order, the adjustment made by the TPO/DRP/AO in respect of AMP expenses is not sustainable. However, if the above decisions of Hon'ble Jurisdictional High Court which is under consideration before the Hon'ble Apex Court is modified or reversed by the Hon'ble Apex Court, then the Assessing Officer would pass the order afresh considering the decision of Hon'ble Apex Court. In those circumstances, he will also allow opportunity of being heard to the assessee."

6.3 Further, the Tribunal in the case of the assessee in ITA No. 2060/Del./2015 for AY 2010-11 following the findings of the Tribunal in the assessment year 2008-09 has rejected the BLT approach and deleted the adjustment made on account of AMP expenses.

6.4 Before us, the learned counsel of the assessee submitted that in assessment year 2008-09, the Tribunal restored the matter to the Assessing Officer to pass order afresh after considering the decision of the Hon'ble Supreme Court, which was not yet delivered. He further submitted that in assessment year 2010-11, the Tribunal has modified the order and deleted the adjustment. He, therefore, submitted that in the year under consideration also, the adjustment should be deleted without restoring the matter to the Assessing Officer. We have perused the relevant finding of the Tribunal in assessment years 2008-09 and 2010-11. The finding of the Tribunal in para 7.1 for assessment year 2010-11 is reproduced as under:

> *"Para 7.1. We are of the considered opinion that issues raised by the Learned DR have already been considered in the decision of the Hon'ble High Court's cited in the order of the Tribunal (supra). In view of the binding precedent, following the decision of the Tribunal, we hereby direct to delete adjustment made on account of AMP transactions. The corresponding grounds raised are accordingly allowed."…….*

6.5 As question of existence of international transaction of AMP and adjustment on account of the same in the case of assessee have been deleted in the assessment year 2008-09 and 2010-11, thus, respectfully following the finding of the Tribunal (supra), we hold that no international transaction of AMP exist in the case of assessee. Hence, we delete the adjustment made on account of

the AMP transaction. Corresponding grounds raised by the assessee are accordingly allowed. Accordingly, the appeal of the assessee is allowed.

6.6 As far as the grounds raised by the Revenue are concerned, in absence of any international transaction of AMP, the issues raised by the Revenue become infructuous. Accordingly, the appeal of the Revenue is dismissed.

7. In the result, the appeal of the assessee is allowed, whereas the appeal of the Revenue is dismissed.

Order pronounced in the open court on 19th October, 2020.

Sd/-	***Sd/-***
(AMIT SHUKLA)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 19th October, 2020.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi