आयकर अपीलीय अधिकरण, दिल्ली विशेष न्यायपीठ नई दिल्ली ।

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI SPECIAL BENCH, NEW DELHI

सर्वश्री जी.डी. अग्रवाल, उपाध्यक्ष, आर.एस. स्याल, लेखा सदस्य
एवं हरि ओम मराठा, न्यायिक सदस्य, के समक्ष ।

Before Shri G.D.Agarwal, VP, Shri R.S.Syal, AM and Shri Hari Om Maratha, JM

आयकर अपील सं./ITA No.5140/Del/2011
(**निर्धारण वर्ष** / Assessment Year : 2007-2008)

M/s.L.G.Electronics India Private Limited Plot No.51, Udyog Vihar Surajpur Kasna Road, Greater Noida Gautam Budh Nagar (U.P.) **PAN :**	**बनाम**/ Vs.	The Asstt.Commissioner of Income-tax Circle - 3 Noida.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/**Appellant by : Shri Ajay Vohra, Advocate,**
Shri Neeraj Jain, CA,
Shri Ramit Katyal, CA &
Shri Abhishek Aggarwal, CA
प्रत्यर्थी की ओर से/**Respondent by : Shri K.G.C.Srivastava, Special Counsel,**
Shri Peeyush Jain, CIT-DR &
Ms.Preeti Bhardwaj

सुनवाई की तारीख / **Date of Hearing : 08.11.2012**		घोषणा की तारीख / **Date of Pronouncement : .01.2013**

INTERVENERS

Sl. No.	ITA no. & Asstt. Yr.	Name of the party	Represented by
1.	5638/D/2011 – 2007-08	M/s Haier Telecom Pvt. Ltd.	Sh. Ashwani Taneja Adv.
2.	4022/D/2010 – 2003-04	M/s LVMH Watch & Jewellery India P. L	Sh. Vikas Srivastava Adv.
3 to 6.	3571/D/2010- 2005-06 4680/D/2010-2006-07 5235/D/2011 – 2007-08 4404/D/2012 – 2008-09	M/s Haier Applianeds India P. Ltd.	Sh. Ajay Vohra Adv. With Sh. Neeraj Jain Sh. Ramit Katyal & Sh. AbhishekAggarwal CAs.
7.	5650/D/2011- 2007-08	M/s Goodyear India P. Ltd.	-do-
8.	1148/Chd/2011-2007-08	M/s Glaxo Smithkline Consumer H. Ltd.	-do-
9.	5237/D/2011-2005-06	M/s Maruti Suzuki India Ltd.	Sh. S. Ganesh Sr. Adv. with Sh. Neeraj Jain CA

10.	4978/D/2011-2007-08	M/s Sony India P. Ltd.	Sh. N. Venkatraman Sr. Adv. with Sh. Manonnet Dalal
11 & 12	3861/D/2011-2006-07 4924/D/2011-2007-08	M/s Bausch & Lomb Eyecare P. Ltd.	Sh.Mukesh Butani Adv. with Sh. Rahul Yadav & Sh. Vishal Kalra
13.	5826/D/2011-2007-08	M/s Fujifilm Corporation	-do-
14	5593/D/2011-2007-08	M/s Cannon India P. Ltd.	-do-
15 &16	5090/D/2010-2006-07 5685/D/2011-2007-08	M/s Daikin Airconditioning India. P. Ltd.	-do-
17.	4602/D/2010-2006-07	M/s Cannon India P. Ltd.	Sh. M.S. Syali Sr. Adv. with Sh. Tarandeep Singh
18.	4584/D/2011-2007-08	M/s Amadeus India P. Ltd.	-do-
19 to 21	1370/Mum/09-2004-05 6030/Mum/09-2005-06 4675/Mum/09-2006-07	M/s Star India Pvt. Ltd.	Sh. S. Ganesh Sr. Adv. with Sh. Sunil Agrawal Adv.
22.	1334/Ch/2010-2006-07	Pepsi Foods Pvt. Ltd.	Sh. M.S. Syali Sr. Adv. with Sh. Tarandeep Singh

आदेश / O R D E R

Per R.S.Syal (AM) :

The Hon'ble President has constituted this Special Bench to adjudicate the following two questions:

> *"1. Whether, on the facts and in circumstances of the case, the Assessing Officer was justified in making transfer pricing adjustment in relation to advertisement, marketing and sales promotion expenses incurred by the assessee?*
>
> *2. Whether the Assessing Officer was justified in holding that the assessee should have earned a mark up from the Associated Enterprise in respect of AMP expenses alleged to have been incurred for and on behalf of the AE?"*

2. The factual matrix of the case is that L.G. Electronics Inc. (hereinafter called as "LGK"), is a Korean based company, engaged in the business of manufacture, sale and distribution of electronic products and electrical appliances such as television, audio/video equipments, washing machines, refrigerators and air-conditioners etc. Pursuant to the approval of the Govt. of India, conveyed vide letter dated 29-1-1997, LGK was permitted to establish a wholly owned subsidiary in India. L.G. Electronics India Pvt. Ltd. (hereinafter called as "LGI"), that is the assessee in question, was incorporated in 1997 as a wholly owned subsidiary of LGK. An agreement was entered between LGK and LGI on 10th March 1997, as per which both entered into a mutual foreign collaboration agreement. Thereafter a Technical assistance and royalty agreement was entered into between these two entities on 1-7-2001 by which LGI, in the capacity of a licensee, obtained a right to use the technical information, designs, drawings and industrial property rights for the manufacture, marketing, sale and services of the agreed products from the LGK i.e. the licensor. As per the agreement, the assessee agreed to pay royalty to LGK at the rate of 1% as a consideration for the use of industrial property rights, designs and technical knowhow, for the manufacture and sale of the greed products. The licensor allowed the licensee to use its brand name and trade marks to products manufactured in India during the validity period of the agreement, which in the instant case is "without any restriction". Article 7 of this agreement with caption `Use of `LG' Brand name & trade marks' provides that : `The Licensor hereby allows the Licensee

for the use of its Brand Name and Trade Marks for the licensed products manufactured in India during the validity period of the Agreement'. Second para of this article further states that : "In case at any stage in future the Licensor demands any royalty payment on this account, the Licensee will take steps to get the Government of India's approval for payment of such royalty payment". It is not the case of the Revenue that the licensor demanded any royalty payment for use of LG brand name and trade marks during the year in question. The Assessing Officer (hereinafter also called `the AO') referred the international transactions reported by the assessee to the Transfer Pricing Officer (hereinafter called `the TPO'). One of such transactions included in the assessee's audit report was "Contribution towards Global Cricket Sponsorship". The TPO observed that the assessee had received contribution from its Associated Enterprise (hereinafter called the `AE') for the expenditure incurred on sponsorship of Global Cricket events. The quantum of contribution received was considered as a part contribution for the brand promotion carried out by the assessee on behalf of its foreign AE. The TPO observed that the assessee's expenses on advertisement, marketing and promotion including trade discount and volume rebate, described by him as Advertising, Marketing and Promotion (hereinafter called `the AMP expenses') were 3.85% of its sales at ₹6553.36 crore. He computed similar percentage in the case of Videocon Appliances Ltd. (0.12%) and Whirlpool of India Ltd (2.66%) with their arithmetic mean at 1.39%. It was opined that the assessee was promoting LG brand owned by its foreign AE and hence should have been adequately compensated by the foreign AE. Applying the Bright Line Test, the TPO held that the expenses up to 1.39% of the sales should be considered as having been incurred for the assessee's own business and the remaining part which is in excess of such percentage, at 2.46% (3.85% - 1.39%) on brand promotion of the foreign AE. Such excess at ₹161,21,99,499/- was proposed as a transfer pricing adjustment on account of AMP expenses for brand building.

3. Before the Dispute Resolution Panel (hereinafter called `the DRP'), it was contended on behalf of the assessee that the total AMP expenses so incurred helped in increasing its sales activity and hence no part of the same could be considered as unrelated to its business, being in the nature of brand building for the foreign AE. It was also put forth that the LG brand was in existence globally even before the assessee started its operations in India. Thus it was pleaded that the assessee did not have any occasion to create this brand in India. The assessee also claimed that brand name was available to it without paying any brand royalty, which was an important factor to be kept in mind. Even if such expenses resulted in creation of a brand in India, the assessee contended that no further amount was attributable to such brand creation on account of its higher profitability and non-payment of brand royalty.

4. The DRP found that the assessee incurred extraordinary AMP expenses for the promotion and development of LG brand in India. The assessee's contention that the incurring of such expenses did not

lead to the promotion of brand in India, was found to be not tenable. The DRP concurred with the view taken by the AO in the draft order prepared by the AO u/s 144C in making adjustment of ₹161.21 crore. It was further observed by the DRP that TPO had not charged mark-up on such AMP expenses. The same was found warranted as the assessee's activity required not only the deployment of its funds but also entrepreneur's efforts including the use of its infrastructure. Opportunity cost was finalized at 10.50%, being the interest rate charged by the banks; and compensation for the assessee's entrepreneurial efforts was taken at 2.5% . Thus, the DRP came to hold that the mark-up of 13% should have been applied on the amount proposed for adjustment. At the same time, the DRP agreed with the assessee's contention that no opportunity cost of 10.5% should be charged on the expenses for which reimbursement was received immediately after the same were incurred. Pursuant to directions given by the DRP, the ld. AO passed order u/s 143(3) read with sec. 144C on 31.10.2011 making additions, *inter alia*, of ₹182.71 crore (inclusive of mark-up @ 13%) towards AMP expenses on brand building incurred for and on behalf of its AE. The assessee is aggrieved against such addition of ₹182.71 crore made by the AO.

5. We have heard Shri Ajay Vohra, Shri Ramit Katyal & Shri Abhishek Aggarwal, the learned counsel representing the assessee (hereinafter called the ld. counsel for the assessee /appellant) and Shri G.C. Srivastava, Shri Peeyush Jain, the CIT-DR & Ms. Preeti Bhardwaj (hereinafter called the ld. counsel for the Revenue/Department). We have also heard several learned counsel

for the interveners, namely, Shri M.S.Syali & Shri Tarandeep Singh for M/s. Cannon India P. Ltd., M/s. Amadeus India P. Ltd. and M/s. Pepsi Foods P. Ltd., Shri S.Ganesh & Shri Neeraj Jain for M/s. Maruti Suzuki India Limited, Shri S.Ganesh & Shri Sunil Agrawal for M/s. Star India P. Ltd., Shri N.Venkataraman & Shri Manoneet Dalal for M/s. Sony India P. Ltd., Shri Ajay Vohra, Shri Neeraj Jain, Shri Ramit Katyal & Shri Abhishek Aggrawal for M/s. Haier Appliances India P. Ltd., M/s. Goodyear India P. Ltd. and M/s. Glaxo Smithkline Consumer H. Ltd., Shri Mukesh Butani, Shri Rahul Yadav & Shri Vishal Kalra for M/s. Bausch & Lomb Eyecare P. Ltd., M/s. Fujifilm Corporation, M/s. Canan I.P. Ltd. and M/s. Daikin Airconditioner I. P. Ltd., Shri Ashwani Taneja, for M/s.Haier Telecom Private Limited and Shri Vikas Srivastava, for M/s. LVMH Watch and Jewellery I. P. Ltd. (all collectively referred to as the ld. counsel for the interveners).

6. Though both the questions referred to this special bench are inter-linked, still we are taking up question no. 1 first. The ld. counsel for the assessee has assailed the impugned order on various legal and factual issues. In so far as the first question is concerned, we have divided such submissions into seven broader parts for the sake of convenience, which will be dealt with one by one.

I. JURISDICTION OF TPO
II. RULE 29
III. TRANSACTION
IV. INTERNATIONAL TRANSACTION

V. COST/VALUE OF TRANSACTION
VI. METHODS FOR DETERMINATION OF ALP OF INTERNATIONAL TRANSACTION
VII. MARUTI SUZUKI'S CASE

I. JURISDICTION OF TPO

7.1. Without prejudice to the main argument that there is no transaction much less an international transaction of brand building for the foreign Associated enterprise in the facts and circumstances of the present case, the ld. counsel for the appellant strongly contended that the TPO was not justified in assuming jurisdiction to process the such international transaction in the absence of any reference made to him by the AO. It was stated that the jurisdiction over a subject matter can be acquired only after the concerned authority first discharges the onus of proof about the satisfaction of all the pre-requisite conditions for the assumption of such jurisdiction. Coming to the present context, the learned counsel for the assessee contended that the AO did not refer the international transaction of marketing intangibles to the TPO and as such the latter was precluded from determining the arm's length price (hereinafter also called `the ALP') in respect of such transaction. Our attention was invited towards the judgment in the case of *CIT Vs. Amadeus (India) (P) Ltd. [(2012) 246 CTR (Del.) 338]* in which it has been held that it is not within the domain of the TPO to determine whether a particular transaction is or is not an international transaction and then to determine the ALP thereof, which was not referred to him but comes to his notice during the course of proceedings.

7.2. The ld. counsel submitted that section 92CA of the Income-tax Act, 1961 (hereinafter also called `the Act') has undergone certain changes. He referred to sub-section (2A) of section 92CA, inserted by the Finance Act 2011 w.e.f. 1-6-2011, as per which, where any other international transaction, apart from those referred to under sub-sec. (1), comes to the notice of the TPO during the course of proceedings before him, the provisions of this Chapter shall apply as if such international transaction is an international transaction referred to him under sub-sec. (1). The ld. AR submitted that the newly inserted provision is applicable only w.e.f. 1-6-2011. As the TPO passed order on 29-10-2010, the deficiency in jurisdiction which was missing under sub-section (2), remained lacking even with the help of sub-section (2A). Referring to sub-sec. (2B) of sec. 92CA, the ld. AR contended that this provision has been inserted by the Finance Act 2012 with retrospective effective from 1-6-2002. Such provision with retrospective effect cannot come to the rescue of the Revenue to cure the defect in the jurisdiction of the TPO in determining ALP of the international transaction because it was not there at the time of his passing the order. In support of this contention, he referred to the judgment of the Hon'ble Supreme Court in the case of *CIT Vs. Max India Ltd. [(2007) 295 ITR 282 (SC)]*. In that judgment it has been held that the position of law is to be considered as it stands on the date when the order is passed. He also referred to the judgment of the Hon'ble Supreme Court in the case of

Sagir Ahamad Vs. State of U.P. & others 1954 AIR 728. The ld. AR contended that it has been held in this later case that the subsequent amendment of Constitution of India cannot validate a prior unconstitutional Act. He also invited our attention towards the judgment of the Hon'ble Gujarat High Court in the case of *Avani Export & others Vs. CIT & Others* dated 2nd July, 2012, to shore up his submission for reading down the retrospective operation of sub-section (2B) of sec. 92CA. The ld. counsel emphasized on giving prospective operation to sub-section (2B) of sec. 92CA by contending that if sub-sec. (2B) is held to be retrospective from 1-6-2002, then all other sub-sections of sec. 92CA will become otiose.

7.3. This point was also underscored by another ld. counsel appearing for some of the interveners. It was contended that sub-sec. (2A) of section 92CA considers all the circumstances under which an international transaction, other than that referred to by the AO, comes to notice of the TPO during the course of proceedings before him. He submitted that this sub-section unconditionally empowers the TPO to consider any transaction which comes to his notice during the course of proceedings before him. On the contrary sub-section (2B) has been made applicable only in respect of an international transaction for which the assessee failed to furnish the report u/s 92E, which is a restricted provision. It was claimed that the mandate of sub-sec. (2B) can apply only in respect of a transaction which is an international transaction as per assessee's understanding but has not been reported. But where a transaction is not an international transaction as per the assessee's version, the same cannot be brought within the ambit of sub-sec. (2B). It was submitted that if we analyze the position after 1-6-2011, being the date from which sub-sec. (2A) has been inserted, in a way that an international transaction for which the assessee did not furnish audit report u/s 92E as covered under sub-section (2B), then the mandate of sub-sec. (2A) to that extent shall fail. Both the sub-sections (2A) and (2B) of section 92CA should be interpreted as different in content from each other. He relied on the judgment of Hon'ble Supreme Court in the case of *Sultana Begum Vs. Prem Chand Jain (1997) 1 SCC 373* to contend that the statute has to be read as a whole to find out the real intention of the legislature. He argued that if the interpretation is given to sub-sec. (2B) as encompassing all international transactions in respect of which assessee did not furnish report u/s 92E, then sub-sec. (2A) to that extent shall be rendered inoperative because the contents of sub-section (2B) in such a situation would also stand covered in sub-sec. (2A). In his opinion, the only possible way to harmoniously interpret sub-sections (2A) and (2B) of section 92CA is to imprison the scope of sub-sec. (2B) with such transactions which the assessee perceives as international transaction but fails to report.

7.4. The ld. counsel for the appellant invited our attention towards the requirement enshrined in sub-sec. (1) of section 92CA, being the taking of a previous approval of the Commissioner before making reference by the AO. It was submitted that since in the instant case the TPO himself assumed jurisdiction in determining ALP of the international transaction, the requirement of seeking a prior approval of the Commissioner failed. In that view of the matter also, the ld.

AR submitted that the action of the TPO in determining ALP in respect of the transaction be declared as a nullity.

7.5. The ld. DR vehemently opposed the above contention by stating that there is no irregularity or invalidity in assuming jurisdiction by the TPO because of the insertion of sub-section (2B) of section 92CA with retrospective effective, covering the period under consideration.

7.6. We have heard the rival submissions and perused the related material on record. In order to evaluate the rival contentions in this regard, it will be apposite to consider the relevant parts of section 92CA, as under:

> "*92CA. Reference to Transfer Pricing Officer.—(1) Where any person, being the assessee, has entered into an #international transaction or specified domestic transaction in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said #international transaction or specified domestic transaction under section 92C to the Transfer Pricing Officer.
>
> (2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the #international transaction or specified domestic transaction referred to in sub-section (1).

***(2A) Where any other #international transaction or specified domestic transaction other than an #international transaction or specified domestic transaction referred under sub-section (1), comes to the notice of the Transfer Pricing Officer during the course of the proceedings before him, the provisions of this Chapter shall apply as if such other #international transaction or specified domestic transaction is an #international transaction or specified domestic transaction referred to him under sub-section (1).

##(2B) Where in respect of an international transaction, the assessee has not furnished the report under section 92E and such transaction comes to the notice of the Transfer Pricing Officer during the course of the proceeding before him, the provisions of this Chapter shall apply as if such transaction is an international transaction referred to him under sub-section (1).

###(2C) Nothing contained in sub-section (2B) shall empower the Assessing Officer either to assess or reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year, proceedings for which have been completed before the 1st day of July, 2012.

*Inserted by the Finance Act, 2002, w.e.f. 1-6-2002.
*** Inserted by the Finance Act 2011, w.e.f. 1-6-2011.
# Substituted by the Finance Act 2012, w.e.f. 1-4-2013.
Inserted by the Finance Act 2012, w.r.e.f. 1-6-2002.
Inserted by the Finance Act 2012, w.e.f. 1-7-2012.

7.7. Sub-section (1) of section 92CA provides that where the assessee has entered into an international transaction and the AO considers it necessary so to do, he may, with the previous approval of the Commissioner, refer the computation of the ALP in relation to the said transaction to the TPO. Thus, there is an intrinsic requirement of seeking the approval of the Commissioner before making a reference to the TPO u/s 92CA. As per sub-sec. (2), the TPO shall determine the arm's length price of the transaction which has been referred to him by the AO as per sub-sec. (1). A conjoint reading of sub-secs. (1) & (2) of section 92CA makes it manifest that the TPO can determine ALP of an international transaction only when a valid reference is made to him by the AO and not otherwise. The judgment of the Hon'ble jurisdictional High Court in *Amadeus (India) (P) Ltd. (supra)*, has laid down that in the absence of a valid reference by the AO, the TPO cannot determine ALP of an international transaction. This judgment has been rendered on consideration the provisions of sub-section (2) of section 92CA.

7.8. It is interesting to note that the Finance Act 2011 inserted sub-sec. (2A) of sec. 92CA w.e.f. 1-6-2011. As per this provision the TPO shall determine ALP of any international transaction, other than that referred to him by the AO under sub-section (1), which comes to his notice during the course of proceedings before him. This provision has thus enlarged the jurisdiction of the TPO by empowering him to compute ALP in respect of any transaction, other than those referred to him by the AO, which comes to his notice during the course of determining ALP of the referred transactions. Consequently, the sub-section (2A) has changed the legal position as settled by the Hon'ble jurisdictional High Court in the case of *Amadeus (India) (P) Ltd. (supra)*. It is worthwhile to mention here that the Hon'ble jurisdictional High Court in *Amadeus (India) (P)*

Ltd. (supra), has decided the controversy in the light of sub-sec. (2) of sec. 92CA. Their Lordships made it unequivocal at least at two places in the judgment that their view is on the basis of provision of sec. 92CA as applicable to the assessment year 2006-07, that is, prior to introduction of sub-section (2A) of sec. 92CA. It thus becomes apparent that with the insertion of sub-sec. (2A), the TPO can compute ALP in respect of any transaction other than those referred to him by the AO. However, it is pertinent to note that sub-sec. (2A) has been inserted w.e.f. 1-6-2011. Thus, the mandate of sub-sec. (2A) cannot apply to a period anterior to this cut-off date. As the TPO passed the order in the instant case on 29-10-2010 which is obviously prior to 1-6-2011, sub-section (2A) can not be of any help to save his action.

7.9. Then comes the insertion of sub-sec. (2B) of section 92CA by the Finance Act 2012 with retrospective effect from 1-6-2002. It is significant to note that the date giving retrospective effect to this provision coincides with the insertion of sec. 92CA itself in the statute. As per sub-sec. (2B), where an assessee has not furnished report u/s 92E in respect of an international transaction and such transaction comes to the notice of the TPO during the course of proceedings before him, it shall be considered as an international transaction referred to the TPO under sub-sec. (1). Admittedly, the assessee did not report the international transaction under consideration in its report u/s 92E. Going by the prescription of sub-sec. (2B), it becomes visible that such transaction is to be considered as an international transaction referred by the AO to the TPO under sub-sec. (1) of sec. 92CA because it came to his notice during the course of proceedings, after 1.6.2002.

7.10. The ld. counsel for the appellant has seriously objected to giving retrospective effect to sub-sec. (2B). His submission has been recorded above as per which it was tried to make out that the subsequent amendment by way of insertion of sub-section (2B) cannot cure the defect in the otherwise invalid jurisdiction at the time of its original exercise. The ld. AR submitted that jurisdiction has to be tested on the basis of the law existing at the time of assuming jurisdiction. In this regard he heavily relied on the judgment in the case of *Max India Ltd. (supra)*. Let us examine the factual matrix and the legal proposition emerging out of that case and then its applicability to the facts of the present case. It can be noticed that the question before the Hon'ble Supreme Court was to examine the validity of action of the Commissioner u/s 263. The Hon'ble Apex Court has held that if an issue is debatable, that goes outside the purview of sec. 263. In this judgment, the Hon'ble Summit Court observed that sec. 80-HHC came to be amended eleven times and obviously there were two views in respect of the words "losses or profits", which aspect was clarified by the 2005 amendment with retrospective effect. The entire case has proceeded on the existence of two views on the point, thereby debarring the Commissioner from exercising revisional power u/s 263. Further, the Hon'ble Supreme Court observed that subsequent amendment in 2005, even though retrospective, will not attract the provisions of sec. 263 as the position of law standing on the date of the passing of the order by the Commissioner is to be considered.

7.11. In our considered opinion, the judgment does not support the contention of the ld. AR. Obviously that case has advanced on the question of two views existing on the point. There are umpteen number of judgments to support the proposition that an action u/s 263 is barred on a debatable issue. An issue is said to be debatable when two possible views exist on it. If the AO followed one of such possible views, the Commissioner cannot intervene to impose the other view by invoking jurisdiction u/s 263. It is of further significance to note that Hon'ble Supreme Court in that case started with the remarks –"*we express no opinion on the scope of the said amendment of 2005*". It is patent from these observations that the Hon'ble Apex Court did not go into the interpretation of the word "profit" as encompassing the word "loss" as well, which was the subject matter of the 2005 amendment under consideration. It simply decided the point in assessee's favour by holding that since there were two views existing on the point, the CIT could not have embarked upon section 263.

7.12. Presently we are concerned with the framing of assessment and determining the question of ALP by the TPO. There is a phenomenal distinction between the requirements for taking action u/s 263 and framing an assessment u/s 143(3) or the other related proceedings. Unlike sec. 263, there is no requirement that the AO/ TPO cannot decide a debatable issue. There is not and cannot be any law, prohibiting the AO from deciding a debatable issue in favour of the Revenue until the dispute is finally set to rest by some legislative amendment or by some judgment of the Hon'ble Supreme Court or that of the Hon'ble jurisdictional High Court. The observations made in the case of *Max India (supra)* need to be viewed in the surroundings of the facts of that case and the legal position governing the issue. Whereas section 80HHC was subjected to eleven amendments and its interpretation was not free from doubt and even the Hon'ble Summit Court dealt with the question of validity of action u/s 263 without expressing any opinion on the scope of the said amendment of 2005, sub-sec. (2B) of sec. 92CA is a provision having no shred of doubt on its construction. Its ambit is not eclipsed by any uncertainty. There is no question of keeping its interpretation in the arena of any debate. Even a layman will read this provision as extending the power of TPO to such international transactions in respect of which the assessee did not furnish audit report. In view of the above discussion, it becomes apparent that the *ratio decidendi* in the case of *Max India (supra)* can have no application to the facts of the instant case.

7.13. We now consider the judgment of the Hon'ble Gujarat High Court in the case of *Avani Exports (supra)*. Here also the controversy rotates around the interpretation of third and fourth provisos to sec. 80HHC(3). Various writ petitions were filed before the Hon'ble Supreme Court on the constitutional validity of insertion of the third and fourth provisos to sec. 80HHC(3) of the Act by amendment of the Tax Laws (Amendment) Act, 2005 with retrospective effect. The

Hon'ble Supreme Court transferred these matters pending before various High Courts to the Hon'ble Gujarat High Court for considering whether the severable parts of the third and fourth provisos to sec. 80HHC(3) of the I.T. Act, 1961, were *ultra virus* to Articles 14 & 19(1)(g) of the Constitution of India. After considering elaborate arguments from both the sides, the Hon'ble Gujarat High Court has held the amendment to be prospective, thereby holding its retrospective operation to be infringing the Constitution. From the above judgment, it is clear that the Hon'ble Gujarat High Court has read down the retrospective effect to the amendment of sec. 80-HHC by deciding that it shall operate prospectively.

7.14. At this juncture, it is relevant to note difference between powers of the Hon'ble Supreme Court and the Hon'ble High Courts on one hand and the Tribunal on the other on the question of deciding the constitutional validity of a provision. It hardly needs to be emphasized that the Tribunal is a creature of the Act and hence has no power to declare any provision of the Act as unconstitutional, either fully or partly. Every single provision of the Act has to be presumed by the tribunal as a constitutionally valid piece of legislation. The power to declare any provision as unconstitutional lies in the exclusive domain of the Hon'ble Supreme Court and the Hon'ble High Courts. Not only a provision *per se* but even the retrospective effect given by the legislature to a particular provision can also be tested by these Hon'ble higher Courts on the touchstone of the provisions of the Constitution of India. The tribunal can examine the nature of amendment along with other relevant circumstances for ascertaining whether it is intended to be prospective or retrospective, only where no retrospective effect has been given by the Parliament to any provision. But where the legislature has specifically given retrospective effect to a provision, the tribunal has no power to declare the retrospective effect of such amendment as unconstitutional, without there being any such direct enunciation by the higher courts.

7.15. From the above judgment, it can be seen that Hon'ble Gujarat High Court has held the retrospective operation of the amendment to be null and void being in contravention of Articles 14 & 19 of the Constitution of India. It is not a case that by upholding the constitutional validity of the retrospective amendment, the Hon'ble High Court has held that it can't apply to the cases before it. There is a marked difference in a situation where an amendment itself is held to be in violation of the Constitution of India and hence declared as void and a situation in which the amendment is valid but is interpreted as not applicable to a particular case. Whereas the Hon'ble Supreme Court and Hon'ble High Courts can declare an amendment to be unconstitutional and hence invalid, the Tribunal cannot do so. In view of the above discussion, we are of the considered opinion that the judgment in the case of *Avani Exports (supra)* cannot be applied to the facts of the instant case to declare the retrospective operation of sub-section (2B) of section 92CA as unconstitutional and hence inoperative.

7.16. Now we take up the judgment in the case of *Sagir Ahamad (supra)*, relied on by the ld. AR for bolstering his submission that the subsequent insertion of sub-section (2B) of section 92CA cannot validate the jurisdiction of the TPO which was earlier lacking. In this case the U.P. Road Transport Act, 1951 was enacted, which was violative of Article 19(1)(g) of the Constitution of India. Thereafter, an amendment was carried out to Article 19(1) of the Constitution which validated the position stated in the U.P. Transport Act. The question arose as to whether the amendment of the Constitution, which came later, can validate an earlier legislation which was unconstitutional when it was passed. The Hon'ble Supreme Court held that the subsequent amendment of the Constitution cannot validate or remove the unconstitutionality of an Act. It is beyond our comprehension as to how this judgment supports the contention of the ld. AR. We are dealing with a situation in which there is insertion of sub-sec. (2B) of sec. 92CA with retrospective effect from 1-6-2002. The effect of insertion with retrospective effect is that the amendment is construed as existing from the date from which the retrospective effect is given. It is not as if the amendment is to be considered as effective from the date of its insertion only. If the force of a provision is considered from the date of its insertion, then obviously the retrospective effect given to such provision would become meaningless. In *Sagir Ahamad's* case the amendment to the Constitution was done prospectively. That is the reason for which the Hon'ble Supreme Court held that the unconstitutional Act passed anterior to such amendment cannot be validated by a subsequent amendment.

7.17. At this stage it is appropriate to note that sub-sec. (2B) has been inserted by the Finance Act, 2012, whereas sub-sec. (2A) by the Finance Act, 2011. We have noticed above that by means of insertion of sub-sec. (2A), the TPO gets power to determine ALP in respect of transaction not referred to him by the AO but coming to his notice during the course of proceedings before him. Due to insertion of this provision w.e.f. 1-6-2011, the earlier action taken by the TPO in several cases in determining ALP of the transactions not referred to him by the AO, remained to be saved. Thus the position of the judgment in the case of *Sagir Ahamad (supra)* is akin to prevalence of sub-sec. (2A) of sec. 92CA alone. In that case also U.P. Road Transport Act 1951 was held to be unconstitutional despite amendment to Article 19, which if present at the time of enactment of U.P. Transport Act, would have made the Act constitutional. Similarly, sub-sec. (2A) of sec. 92CA validates the determination of ALP by TPO in respect of international transactions not referred to him only w.e.f. 1-6-2011 and not prior to that.

7.18. Realizing that sub-sec. (2A) did not serve the purpose in entirety to validate the action of the TPO in determining ALP in respect of transactions not referred to by the AO, the legislature came out with sub-sec. (2B) with retrospective effect from 1-6-2002. As per this sub-section, any international transaction in respect of which the assessee has not furnished report u/s 92E can be considered by the

TPO for determining ALP. Thus, sub-sec. (2B) has the effect of validating the action of the TPO with effect from 1.6.2002, thereby covering even the period prior to 1-6-2011, being the date of insertion of sub-sec. (2A) of sec. 92CA. The contention that sub-sec. (2B) of sec. 92CA cannot be invoked to regularize the otherwise invalid action of the TPO, in our considered opinion, is farfetched. When the legislature in its wisdom has given retrospective effect to sub-sec. (2B) from 1-6-2002, it is impermissible for us to hold that the retrospectivity of this provision should be ignored and only prospective effect be given to it. If the contention raised by the ld. AR is accepted then the very insertion of sub-section (2B) shall become redundant.

7.19. Here it is relevant to note that the Finance Act, 2012 introduced sub-sec. (2C) along with sub-sec. (2B) of section 92CA. Whereas sub-section (2B) has been made retrospectively applicable from 1.6.2002, sub-section (2C) has been given effect from 1-7-2012. The reason is obvious when we see the contents of both the provisions. Under sub-section (2C), the power of the AO to make assessment or reassessment u/s 147 or pass order u/s 154 to enhance the assessment completed before 1-7-2012, has been curtailed to the extent the subject matter is covered by sub-section (2B). It shows that abundant caution has been taken by the legislature in not disturbing the finality of the assessment due to retrospective operation of sub-section (2B) in cases set out in sub-section (2C). The acceptance of the contention of the ld. AR to consider sub-section (2B) as prospective, would not only make sub-section (2B) but sub-section

(2C) also as dormant and non-existent. Obviously an interpretation which makes a valid piece of legislation as redundant, does not merit acceptance. The purpose intended to be achieved in validating the jurisdiction of the TPO on the earlier transactions not referred to him by the AO on one hand and also not disturbing the finality of assessments already completed on the other, has been properly achieved by the respective dates from which sub-sections (2A), (2B) and (2C) have been given effect to.

7.20. The ld. counsel for the appellant also contended that if sub-section (2B) is considered as retrospective in operation, then all other sub-sections of sec. 92CA will loose the worth of their existence. This argument was developed to contend that if the TPO is to be permitted to determine ALP in respect of any transaction, then sub-sec. (1) requiring reference to him by the AO, will be rendered useless. In our considered opinion, this contention misses the wood from the tree. The jurisdiction of the TPO is activate only when the AO makes reference to him under sub-section (1) for determining ALP in respect of certain transactions. Sub-secs. (2A) and (2B) come into play only when sub-sec. (1) has already been set into motion. Thus, it is only when the AO makes a reference to the TPO in terms of sub-sec. (1) for determination of ALP in respect of the referred international transactions, that the TPO gets power under sub-sections (2A) and (2B) to determine ALP in respect of non-referred international transactions as well. In the absence of any such reference under sub-section (1), the TPO cannot *suo motu* undertake the determination of ALP in respect of other international transactions not referred to him. It is a different matter that the reference by the AO may be for one international transaction and the TPO while determining ALP in respect of that one international transaction, also comes across certain other international transactions requiring determination of ALP. Thus, reference by the AO to the TPO for at least one international transaction is a necessary stipulation to assume power for determining ALP in respect of other transactions.

7.21. Another point urged by the ld. counsel for the appellant was that sub-sec. (1) requires making a reference by the AO with the previous approval of the Commissioner. It was contended that insofar as *suo motu* exercise of power by the TPO on other international transactions is concerned, the requirement of seeking approval from the CIT will be lacking, rendering the assumption of jurisdiction by the TPO over such other international transactions as invalid. Here again we find ourselves in respectful disagreement with the submission. What sub-sec. (1) requires is that the AO should seek previous approval of the Commissioner in respect of the transactions for which he is making reference to the TPO. There is no requirement of previous approval of the Commissioner in respect of the international transactions which come to the notice of the TPO during the course of proceedings before him. The prerequisite of seeking approval of the Commissioner is incorporated in sub-sec. (1) alone and the same cannot be read into sub-secs. (2A) and (2B) by the doctrine of incorporation. Our view is fortified by the judgment of the Hon'ble Supreme Court in the case of *CIT Vs. Pawan Kumar Laddha [(2010) 324 ITR 324 (SC)]*.

7.22. Now we take up the contention raised by the ld. counsel for some of the interveners on harmoniously interpreting sub-section (2B) by limiting its scope only to such transactions which the assessee perceives as international transactions but fails to report. We are not convinced with such interpretation. A line of distinction sought to be drawn by the ld. counsel between two types of international transactions for which the assessee has not furnished audit report, viz., which is an international transaction as per assessee's version and which is not so, has no statutory sanction. There is no such cue, even remotely, in the language of sub-sec. (2B). The reference to international transaction in sub-sec. (2B), for which the assessee has not furnished report u/s 92E, is unqualified. If we interpret sub-sec. (2B) in the way suggested by the ld. AR, it would amount to doing violence to the unambiguous language of the provision by importing certain words in it, which is obviously impermissible. The primary rule is that of strict or literal interpretation, as per which a provision should be read as it is unless manifestly absurd results follow from such interpretation.

7.23. We are equally conscious of the rule of harmonious construction as reiterated in *Sultana Begum (supra)*. Principle 3 in para 15 of the judgment is that "it is to be borne in mind by all the courts all the times that when there are two conflicting provisions in an Act which cannot be reconciled with each other, it should be interpreted as if possible, effect should be given to both". In our considered opinion, the rule of harmonious construction can be applied instantly by excluding the cases in which the assessee has not furnished report in respect of international transactions, whether or not it is an international transaction as per the assessee's view point, from the ambit of sub-sec. (2A) and including them in sub-section (2B) of section 92CA. It is relevant to note that sub-sec. (2A) is a general provision on the issue of the TPO *suo motu* taking up an international transaction not referred by the AO, whereas sub-sec. (2B) is a special provision limited in its scope only to such international transactions in respect of which the assessee did not furnish report u/s 92E. We have thoroughly discussed elsewhere in this order that when there is special provision governing a particular types of cases, then such cases stand excluded from the general provision governing all the cases. As such we are of the considered opinion that the scope of sub-sec. (2B) covers all types of international transactions in respect of which the assessee has not furnished report, whether or not these are international transactions as per the assessee's version. The contention of the ld. counsel in this regard is thus sans merits and is hereby rejected. We want to clarify that the above discussion has been made only to deal with the contention raised on behalf of some of the interveners. But for that, it is only academic in so far as we are concerned with the present appeal involving the A.Y. 2007-08, which is a period anterior to A.Y. 2012-13. The extant case is fully and directly covered under sub-section (2B) of section 92CA. In that view of the matter, it becomes evident that no fault can be found with the jurisdiction of the TPO to process the transaction under reference.

II. RULE 29

8.1. Before we take up various legal and factual issues raised on behalf of the assessee, it is appropriate to mention that the ld. DR filed two separate applications at different stages of the proceedings before this Special bench seeking leave of the tribunal for admission of additional evidence under rule 29 of the ITAT Rules, 1963. First application was filed before the commencement of his arguments as respondent, that is, after the completion of arguments by the ld. AR; and the second was filed, at the fag end of the proceedings of the case, that is, after the completion of rejoinder by the ld. AR.

8.2. We will deal with both the applications one by one. Through such first application, the ld. DR sought permission to file copies of the order passed by TPO in assessee's own case for A.Y. 2008-09 along with written submissions filed by the assessee before the TPO for the said assessment year and also statements dated 10-3-2011 of Shri Laxmi Kant Gupta, Chief Marketing Officer and Shri Arim M. Kooliyl AGM Products Planning, both employees of the assessee. It was contended that these documents have bearing on the issue under consideration as they go to the root of the matter. It was also stated that there was indeed nothing new in these documents as these were already in the knowledge of the assessee.

8.3. The ld. counsel for the assessee seriously objected to the filing of such additional evidence before the Tribunal. It was submitted that Rule 29 does not confer any right on the parties before the tribunal to file additional evidence in the circumstances which are presently prevailing. The ld. AR relied on *CIT Vs. Rao Raja Hanut Singh [(2001) 252 ITR 528 (Raj.)]; A.K. Babu Khan Vs. CWT [(1976) 102 ITR 757(AP)]; and CIT Vs. Babu Lal Nim [(1963) 47 ITR 864 (MP)]* to oppose the admission of additional evidence. He contended that the Revenue should have filed such application before commencement of the arguments by the assessee appellant, so that he could get opportunity of replying to such documents. It was also submitted that the Department seeks to file some new material through such application, which material is germane to the proceedings for the A.Y. 2008-09 and hence the same cannot be considered as significant for the year under consideration.

8.4. We have heard the rival submissions in this regard. In order to put this controversy to rest, it would be apposite to note down the prescription of Rule 29 of the ITAT Rules, 1963 which is as under :-

> *"29. The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any documents to be produced or any witness to be examined or any affidavit to be filed* to enable it to pass orders or for any other substantial cause*, or, if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such*

> *document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced."*

8.5. A bare perusal of the Rule reveals that the parties are not entitled to produce additional evidence before the Tribunal. The same can be filed *inter alia*, if the Tribunal requires "to enable it to pass orders" or "for any other substantial cause". We are not concerned with the other part of the Rule 29. The contention raised by the ld. AR that the Department has no right to file additional evidence under Rule 29 is partly correct in the sense that no right vests with any party to press for the admission of additional evidence before the Tribunal. It is the prerogative of the Tribunal to entertain additional evidence for enabling it to pass order or for any other substantial cause.

8.6. We find that the Revenue has invoked Rule 29 for filing certain material which is already in the knowledge of the assessee. Technically speaking, it is not additional evidence as it comprises of the order passed by the TPO in assessee's own case for A.Y. 2008-09; submissions made by the assessee itself and statements of the employees of the assessee recorded by the Revenue. As will be seen *infra* that the so called additional evidence is nothing but corroboration of the material existing otherwise on which the ld. DR has relied to bolster his submissions.

8.7. Be that as it may, it is pertinent to note that presently we are dealing with the issue of determination of ALP in relation to international transaction of brand building by the assessee for its foreign AE in this Special Bench. More than twenty parties, who sought permission to intervene, have been permitted. Arguments have been advanced on behalf of all of them through various ld. counsel. The decision presently given by the Special Bench will have binding effect over other Division Benches of the Tribunal across the country. Through this Special Bench order certain broader principles are going to be laid down, which will have impact over several other cases. Since there are going to be much larger ramifications of this order over several other cases, in our considered opinion the ends of justice greatly demand the consideration of such additional evidence having a direct bearing on the issue. The above enumerated factors are sufficient to highlight the importance of the issue under consideration and to bring it within the ambit of the expressions "for any other substantial cause" and "to enable it to pass orders" as employed in rule 29.

8.8. The Hon'ble Delhi High Court in *CIT VS. Text Hundred India P.Ltd. [(2011)239 CTR (Del.) 263]* has held that the `discretion lies with the tribunal to admit additional evidence in the interest of justice once the tribunal affirms the opinion that doing so would be necessary for proper adjudication of the matter. This can be done even when application is filed by one of the parties to the appeal and it need not to be a *suo motto* action of the Tribunal.' It further observed that the true test in this behalf is whether the Appellate Court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced. The legitimate occasion, therefore, for exercise of discretion under this rule is not before the Appellate Court hears and examines the case before it, but arises when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent to the Appellate court coming in its way to pronounce judgment. From the above judgment it is vivid that the additional evidence can not only be admitted on an application by the parties, but also at the *suo motu* discretion of the tribunal, if it considers necessary to entertain the additional evidence for enabling it to pass orders or for any other substantial cause.

8.9. Insofar as the judgment in the case of *Rao Raja Hanut Singh (supra)* is concerned, it is seen that the Hon'ble Rajasthan High Court has laid down that the admission of additional evidence at the appellate stage is absolutely within the discretion of the Tribunal and cannot be claimed as a matter of right. It has further been held that the parties cannot set up an altogether new case through the additional evidence. It will be seen on the appreciation of such material at a later stage in this order that the additional evidence sought to be relied by the ld. DR is not to set up a new case, but is only in support of the reply to be given by the ld. DR on the propositions argued by the ld. counsel for the assessee as well as the interveners. The judgment in the case of *A.K. Babu Khan (supra)* again talks of the discretion of the Tribunal in allowing or refusing to admit the additional evidence. The case of *Babulal Nim (supra),* is based on its own facts in which the assessee filed certain additional evidence before the Tribunal at the Tribunal's behest. Such additional evidence was towards setting up of an overall new case. It was in such circumstances that the Hon'ble High Court directed to exclude the additional evidence. In so far as the facts of the present case are concerned, the additional evidence is not towards setting up of an altogether new case.

8.10. Under the present circumstances, we are of the considered opinion that the additional evidence sought to be field by the Revenue through the first application has significant bearing on the issue raised in this case. As there is overwhelming importance of this order, we hereby admit such evidence for the reasons discussed hereinabove. An announcement to this effect was made during the course of hearing, so that both the parties may proceed accordingly.

8.11. As regards the contention of the ld. AR that the Department should have filed such additional evidence before the commencement of the arguments on behalf of the appellant-assessee, we note that logic behind this contention is the adherence to the principles of natural justice. It is axiomatic that no affected party can be denied the opportunity to put forth his stand on the adverse material filed by the opposite party. We indeed gave ample opportunity to the ld. AR to controvert the additional evidence. He took one day in his rejoinder, both the forenoon and afternoon sessions, *inter alia* making submissions on such evidence, which have been duly recorded and considered in this order at the appropriate place.

8.12. Now we take up the second application which, unlike the first application, came to be filed by the ld. DR on the conclusion of the hearing of the assessee's case. Relying on *Text Hundred India P.Ltd.(supra),* the ld. DR contended that since the power of the tribunal extends to accepting additional evidence even after the conclusion of hearing, there can be no embargo on his filing additional evidence at this stage.

8.13. We are not inclined to entertain this application for admission of the additional evidence. A line of distinction needs to be drawn between the additional evidence proposed to be filed by the either party and that *suo motu* required by the tribunal. In so far as the additional evidence proposed to be filed by the either party is concerned, that can be possibly requested for admission at any stage of proceedings provided there is a scope for the other side to rebut it. Any stage can never embrace the conclusion of hearing, that is when the appellant as well as respondent have made submissions and further the appellant has also concluded his rejoinder. No party can be allowed to come up with a request for filing additional evidence at that juncture. If such a request is acceded to, it would create an anomalous situation in which the other party will never get chance to refute it. It is an elementary principle of law that no one can be condemned unheard.

8.14. In contradistinction to the right of the parties to apply for the admission of additional evidence at the appropriate stage of proceedings, the power of the tribunal in *suo motu* requiring additional evidence cannot be curtailed even after the conclusion of hearing. If in the given facts and circumstances of the case it is felt by the tribunal that consideration of some fresh evidence is essential for the proper and effective disposal of the appeal, it can very well require the production of additional evidence. But in that case also it will be essential for the tribunal to refix the matter for seeking additional evidence and getting comments of both the sides on such evidence.

8.15. As presently we are confronted with a situation in which the hearing of the assessee's case is effectively over not only by the reply of the Revenue to the assessee's contentions but also by the completion of rejoinder on behalf of the assessee to the Revenue's reply, in our considered opinion the ld. DR cannot be allowed to file additional evidence through its second application at this belated stage. We fail to see any reason for the ld. DR in not filing such additional evidence along with his first application which was filed at the outset of the commencement of his arguments. We, therefore, refuse to entertain the second application.

8.16. To sum up, out of the two applications filed by the ld. DR under rule 29, first is allowed and the second is rejected.

III. <u>TRANSACTION</u>

9.1. The ld. counsel for the assessee contended that there is no such alleged transaction of creating marketing intangible in the nature of brand building by the assessee for its foreign AE, much less an international transaction. It was stated that the assessee did not arrive at any understanding, oral or written, with its AE for promoting their brand. All the AMP expenses were incurred in India for advertising its products and there was no interference of the foreign AE in any manner in this regard. He argued that it was the assessee who was taking final decision on the question of when, where, and how the advertisement was to be done. All the payments towards such expenses incurred were made to the third parties and the foreign AE was no where involved in this entire exercise. The ld. AR opposed the view point of the Revenue in bifurcating the total advertisement expenses into two parts, viz., first part towards the business carried on by the assessee deductible in full in the hands of the assessee by equating it with the proportionate amount of such expenses incurred by the independent comparable parties; and the second part towards the brand building for the foreign AE as not deductible. Whole of the AMP expenses were incurred by the assessee for its own business purpose and there was no question of spending anything exclusively towards brand building for its foreign AE. There can be no brand without product, which shows that all the advertisement expenses, even though exhibiting the foreign brand, were liable to be attributed only to the advertisement of products. He contended that when the assessee incurred AMP expenses for its business purpose, which were recorded as such, the Revenue was not entitled to recharacterize this transaction by splitting it into two parts – first towards advertisement expenses for the assessee's business and second towards the brand building for the foreign AE. In support of this contention he relied on the judgment of the Hon'ble jurisdictional High Court in *CIT Vs. EKL Appliances Ltd. [(2012) 345 ITR 241 (Del)]*.

9.2. It was stated that in order to reach any conclusion about the assessee incurring AMP expenses towards brand building for the foreign AE, there should be some agreement between the two for incurring of such expenses. In the absence of any such agreement, the existence of such an agreement cannot be inferred. He referred to sec. 92F(v) which defines the term `transaction' to elucidate that it talks of agreement, understanding or action in concert. As there was no such agreement etc. between the assessee and the foreign AE, the ld. AR contended that it was wrong to infer it without any basis. He relied on the judgment of the Hon'ble Supreme Court in the case of *Daiichi Sankyo Co. Ltd. Vs. Jayaram Chigurupati & others [(2010) 157 Company Cases 380 (SC)]* to contend that there can be no presumption about the acting of two parties in concert. Even if both the parties are related to each other, the action in concert needs to be specifically proved. In the radiance of this judgment, it was contended that the Revenue was wrong in drawing an inference as to any transaction of brand building between the assessee and the foreign AE.

9.3. The ld. counsel further argued that primarily there was no incurring of expenses for the brand building and even if it was presumed that some part of the assessee's advertisement expenses incidentally led to the brand building for the foreign AE, then also it cannot be considered as a `transaction' because there is no evidence of any prior understanding between the assessee and the foreign AE in this regard. It was, therefore, stated that the vital ingredient of `transaction', being the agreement or understanding or action in concert between the parties, was miserably lacking in this case.

9.4. The ld. DR countered the submissions advanced on behalf of the assessee by stating that the existence of oral agreement in the facts and circumstances of the present case is absolutely visible. He argued that the incurring of AMP expenses of a magnitude which have been incurred by the assessee but which no businessman in a commercially rational manner incurs, goes to show that there was a tacit understanding between the assessee and the foreign AE for creating/improving the marketing intangible of the foreign AE in India by incurring such excess AMP expenses, which is a transaction. In view of the above arguments it was stated that the transaction of brand building for the foreign AE can be very well inferred from the facts and circumstances of the present case because the assessee is a hundred percent subsidiary of its foreign AE working at the command of its parent company.

9.5. The ld. DR invited our attention towards certain ads given by the assessee in newspapers showing that the brand name and the slogan of the foreign AE were demonstrated absolutely promptly, which proved that the assessee was acting on the instructions of its principal company for the creation/enhancement of the brand value also. He also opposed the argument of the ld. AR that there can be no advertisement of brand independent of product. In this regard some ad films of LG were shown in the open court to reveal that there can be advertisement only for brand *de hors* products. One such video was shown, by which only LG brand is advertised and there is no reference to any LG products in that video. By placing on record an extract from www. persuasive.com on page 173 of the paper book, the ld. DR also quoted example of brand Tommy Hilfiger, which does not manufacture anything at its own but sells the goods under its brand. The ld. DR submitted that there can be advertisement only for brand and not for product or it can also be for a product coupled with brand or only for product and not for brand. It was, therefore, submitted that the assessee entered into agreement with its foreign AE for advertising the brand of the later, which is nothing but an implied transaction.

9.6. He argued that the United Nations Transfer Pricing Manual provides for the allocation of such cost of market penetration, marketing expansion and market maintenance strategies between a MNE and its subsidiaries under the Transfer Pricing Regulations. The ld. DR referred to page 74 of the paper book, being extracts from United Nations Transfer Pricing Manuals. Para 5.3.2.5 provides that "the allocation of the cost of these strategies between a MNE and its subsidiaries is an important issue in transfer pricing and will depend on the facts and circumstances of each case. It is important to examine various factors in order to address this issue of cost allocation between parties to the transactions." He invited our attention towards certain relevant factors relevant in this regard mentioned in such Manual including – whether unusual intense advertising marketing and sales promotion efforts have taken place. In the light of the above Transfer Pricing Manual of United nations, the ld. DR contended that the incurring of unusual AMP expense requires allocation of AMP cost between the MNE and its subsidiaries. In so far as such allocation to the MNE is concerned, the same is nothing but a transaction.

9.7. After considering the rival submissions and the perusing the relevant material on record, an elementary question which falls for our consideration is to decide as to whether there is any `transaction' between the assessee and the foreign AE for the brand building in India, the legal ownership of which vests with the principal abroad. It would be apposite to consider the definition of `transaction' given in clause (v) of sec. 92F, which reads as under : -

> *"(v) "transaction" includes an 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 be enforceable by legal proceeding".*

9.8. From the above definition it is apparent that a transaction is an arrangement, understanding or action in concert, whether formal or in writing or whether enforceable or not by legal proceedings. The case of the Revenue is that brand building by the assessee for its foreign AE via incurring AMP expenses to the extent of more than what other independent entities proportionately incur for advertisement of their products in a similar situation, has resulted into a transaction. On the other hand, it has been argued by the ld. AR that there is a lack of agreement or unison between the assessee and its foreign AE on the question of incurring AMP expenses for brand building on behalf of the foreign entity. The contention has been made by the ld. AR that in the absence of any mutual agreement between the assessee and its foreign AE, it cannot result into a transaction.

9.9. We do not find any force in this contention made on behalf of the assessee. If the unison or mutual agreement between two parties was to be deduced only from the terms of some formal agreement, then there was no need for the legislature to define "transaction" u/s 92F *inter alia* to mean an arrangement or understanding - "(A) whether or not such arrangement, understanding or action is formal or in writing". The incorporation of the words "whether or not" before the words "such arrangement, understanding or action is formal or in writing", is a clear pointer to the fact that the agreement between the two AEs can be formal or in writing on one hand or informal or oral on the other. When there is a formal or written agreement between two AEs, the answer to the question as to the existence of transaction becomes patent. If, however, there is an informal or an oral understanding, the existence of such agreement cannot be specifically found out because of it being not express. However, such an informal or oral agreement, which is latent, can be inferred from the attending facts and circumstances to make it patent. Such inference can be drawn from the conduct of the parties. It follows that a `transaction' can be both express as well as oral. So long as there exists some sort of understanding between two AEs on a particular point, the same shall have to be considered as a transaction, whether or not it has been reduced to writing. The ld. AR relied on the judgment of the Hon'ble Supreme Court in the case of *Daiichi Sankyo Co. Ltd. Vs. Jayaram Chigurupati & others [(2010) 157 Company Cases 380 (SC)]* to bring home the point that that there can be no presumption about the acting of two parties in concert. Nobody can deny that there can be no such presumption. Action in concert can only be by the meeting of minds between two or more persons leading to the shared objective. The Hon'ble Supreme Court observed in this case that : "it is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal". In the case of an informal or oral concert, there has necessarily to be something to indicate the concert indirectly. The Hon'ble Summit Court has observed in this very judgment that : "it is the conduct of the parties that determines their identity". Thus it cannot be said that in the absence of any express agreement between the assessee and its foreign AE for incurring AMP expenses for the brand promotion, whose legal ownership vests with the foreign entity, there can be no transaction. The natural upshot is that if there is no express agreement between the assessee and its foreign AE and still the facts and circumstances indicate that the Indian entity incurred some AMP expenses towards brand promotion of the foreign entity, the same shall be considered as an implied or oral transaction.

9.10. We do not find any force in the contention of the ld. DR that the mere fact of the assessee having spent proportionately higher amount on advertisement in comparison with similarly placed independent entities be considered as conclusive to infer that some part of the advertisement expenses were incurred towards brand promotion for the foreign AE. Every businessman knows his interest best. It is for the assessee to decide that how much is to be incurred to carry on his business smoothly. There can be no impediment on the power of the assessee to spend as much as he likes on advertisement. The fact that the assessee has spent proportionately more on advertisement can, at best be a cause of doubt for the AO to trigger examination and satisfy himself that no benefit etc. in the shape of brand building has been provided to the foreign AE. There can be no scope for inferring any brand building without there being any advertisement for the brand or logo of the foreign AE, either separately or with the products and name of the assessee. The AO/TPO can satisfy himself by verifying if the advertisement expenses are confined to advertising the products to be sold in India along with the assessee's own name. If it is so, the matter ends. The AO will have to allow deduction for the entire AMP expenses whether or not these are proportionately higher. But if it is found that apart from advertising the products and the assessee's name, it has also simultaneously or independently advertised the brand or logo of the foreign AE, then the initial doubt gets converted into a direct inference about some tacit understanding between the assessee and the foreign AE on this score. As in the case of an express agreement, the incurring of AMP expenses for brand building draws strength from such express agreement; in the like manner, the incurring of proportionately more AMP expenses coupled with the advertisement of brand or logo of the foreign AE, gives strength to the inference of some informal or implied agreement in this regard.

9.11. Adverting to the facts of the instant case, it is noticed that the ld. DR has amply shown that the assessee not only promoted its name and products through advertisements, but also the foreign brand simultaneously, which has remained uncontroverted on behalf of the assessee. This factor together with the fact that the assessee's AMP expenses are proportionately much higher than those incurred by other comparable cases, lends due credence to the inference of the transaction between the assessee and the foreign AE for creating marketing intangible on behalf of the latter.

9.12. The ld. AR has vehemently argued that when the assessee incurred AMP expenses for its business purpose and recorded them as such, the Revenue went wrong in recharacterizing this transaction by splitting it into two parts, viz., one towards advertisement expenses for the assessee's business and second towards the brand building for the foreign AE. He fortified this contention by relying on the judgment of *EKL Appliances Ltd. (supra).* There is absolutely no doubt that para 17 of the judgment unambiguously lays down that the tax administration should not disregard the actual transaction and substitute other transactions for it. However, it is imperative to note that the proposition laid down in para 17 is not infallible or is not an unexceptionable rule. Caveat has been included in the immediately next para no. 18. Two exceptions have been carved out of the general rule against recharacterization of any transaction as set out in para 17, viz. "(i) where the economic substance of a transaction differs from its form; and (ii) where the form and substance of the transaction are the same but the arrangements made in relation to the transaction, viewed in their totality differ from those which would have been adopted by the individual enterprise behaving in a commercially rational manner." In our considered opinion, the second exception governs the extant situation, as per which, where the form and substance of the transaction are the same, but arrangements made in relation to transaction viewed in totality differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner. The assessee incurred AMP expenses and explicitly showed them as such. Thus the form of showing the AMP expenses coincides with the substance of the AMP expenses. But the arrangement made in such transaction, viewed in totality, differs from that which would have been adopted by independent enterprises behaving in a commercially rational manner. Though the AMP expenses were shown as such but the overt act of showing such expenses as its own is different from what is incurred by independent enterprises behaving in a commercially rational manner, which unearths the covert act of treating the AMP expenses incurred for the brand building for and on behalf of the foreign AE, as also its own. What is relevant to consider is as to whether an independent enterprise behaving in a commercially rational manner would incur the expenses to the extent the assessee has incurred. If the answer to this question is in affirmative, then the transaction cannot be re-characterized. If, however, the answer is in negative, then the transaction needs to be probed further for determining as to whether its recharacterization is required. Such recharacterization can be done with the help of the *ratio decidendi* of this judgment itself, being, making a comparison with what *`independent enterprises behaving in a commercially rational manner*' would do, tied with the fact of the assessee also simultaneously advertising the brand of its foreign AE. Reverting to the context of AMP expenses, one needs to find out as to how much AMP expenses would independent enterprises behaving in a commercially rational manner, incur. Once by making such a comparison, the result follows that the Indian AE, prominently displaying brand of its Foreign AE in its advertisements, has incurred expenses proportionately more than that incurred by independent enterprises behaving in a commercial rational manner, then it becomes eminent to recharacterize the transaction of total AMP expenses with a view to separate the transaction of brand building for the foreign AE. Even the United Nations Transfer Pricing Manual, which has only a persuasive value, provides for the allocation of such cost between the MNE and its subsidiaries. We, therefore, hold that in the facts and circumstances of the present case, there is a 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 entity.

Economic vis-à-vis legal ownership of brand

10.1. The ld. counsel for some of the interveners contended that there are two types of ownerships of a brand, viz., legal ownership and economic ownership. In their opinion, part of the AMP expenses incurred in India can be construed as leading only to the building of the economic ownership of a foreign brand, which vests solely with the Indian assessee, thus making full AMP expenses eligible for deduction in its hands. They submitted that the total AMP expenses should be segregated into routine and non-routine. Whereas routine advertisement expenses are deductible in full u/s 37(1), non-routine expenses on advertisement should be attributed to the economic ownership of the brand. As it is the Indian entity which acquires the economic ownership of brand and then exploits it for making more and more sales in India, those should also be allowed in its hands. It was claimed that no part of AMP expenses can be allocated to the legal ownership of brand vesting with the foreign AE, so as to call for any disallowance in the hands of the assessee.

10.2. We do not find any weight in the contention put forth about the economic ownership and legal ownership of a brand. It is not denied that there can be no economic ownership of a brand, but that exists only in a commercial sense. When it comes in the context of the Act, it is only the legal ownership of the brand that is recognized. If we accept the contention of the ld. AR that it be held as an economic owner of the brand or logo of its foreign AE for the purposes of the Act and hence expenses incurred for brand building, which is legally owned by the foreign AE, should be allowed as deduction in its hands, then incongruous results will follow. It is patent that a manufacturer does not ordinarily sells its goods directly to the ultimate customers. There is normally a chain of middlemen ending with retailer. Going by that logic and descending in the line, the distributors or wholesalers to whom the assessee sells its goods, also become economic owners of the brand on the parity of reasoning that they also exploit the brand for the purpose of selling the goods to retailers. Similarly the retailers also become the economic owners of the brand on the premise that on the basis of such brand they are selling the goods to the ultimate customers. All these middlemen and the assessee can be considered as economic owners of the brand only in a commercial sense for the limited purpose of exploiting it for the business purpose, which is otherwise legally owned by the foreign AE. Such economic ownership is nothing more than that. Suppose the foreign company, who is legal owner of the brand, sells its brand to a third party for a particular consideration, can it be said that the Indian assessee or for that purpose the wholesalers or retailers should also get share in the total consideration towards the sale of brand because they were also economic owners of such brand to some extent? The answer is obviously in negative. It is only the foreign enterprise who will recover the entire sale consideration for the sale of brand and will be subjected to tax as per the relevant taxing provisions. There can be no tax liability in the hands of the Indian AE or the wholesalers or the retailers for parting with the economic ownership of such brand under the Act. In that view of the matter we are of the considered opinion that the concept of economic ownership of a brand, *albeit* relevant in commercial sense, is not recognized for the purposes of the Act. The above discussion leads us to irresistible conclusion that the advertisement done by the assessee also carrying the brand/logo of its foreign AE coupled with the fact that it spent proportionately higher amount on AMP expenses, gives clear inference of a `transaction' between the assessee and its AE of building and promoting the foreign brand.

Repercussions of parent AE's influence

11.1. The ld. DR contended that the inference of transaction of brand building can also be drawn from the fact that the assessee and its parent company are associated enterprises. The foreign AE exercises complete control and influence over the economic behavior of the assessee because of it being hundred percent subsidiary. If the foreign entity chooses to direct the assessee to incur expenses on its brand promotion without explicitly recording this fact in its account books, the later cannot afford to say no. He argued that all the arguments advanced by the ld. AR to the effect that it is solely for the assessee to decide on the question of incurring of AMP expenses, are based on the presumption of separate entity concept of the assessee *vis-a-vis* the foreign AE, which is really not applicable in the present case because of the relation between the two. Even though the assessee and foreign AE are separate legal entities in two different tax jurisdictions, the ld. DR contended that the assessee cannot be regarded as distinct from its foreign AE. He invited our attention towards the Foreign collaboration agreement dated 10-3-1997 which provides through clause 5 that the "L.G. Electronics shall at all times have the right to nominate all or majority of the directors on the board of LGEIL". Clause 6 provides that "L.G. Electronics shall have the right to nominate the Chairman and the Managing Director of LGEIL at all times". These clauses read in conjunction with other relevant clauses amply prove that it is L.G. Korea which exercises complete control over the assessee not only in nominating the Chairman and Managing Director but also all the directors of the assessee company. He also took us through Article 4 dealing with royalty payment under the Technical assistance and royalty agreement dated 1-7-2001, whose Clause 1(b) stipulates that the `licensor will advise the licensee the rate of royalty and payment thereof on Agreed Products other than TVs as and when the concerned division of licensor demands the royalty payment. The licensee then will take necessary steps to take Govt. of India's approval if it so required.' It was argued that a perusal of the above clauses indicates that it is only LGK which decides the rate of royalty to be paid by the assessee over the period. On such decision taken by LGK, the assessee is supposed to take necessary steps for obtaining the Govt. of India's approval, if any, required for payment of royalty. This clause was claimed to be proving that there is only one way traffic and there is no question of any mutual negotiations taking place to finalise any business decisions as happens between two independent entities. Under this arrangement, it is only LGK which takes the final call and that has binding effect on the assessee. He also referred to the Article 7 of this agreement, which allows the use of "LG" brand name and trademark. This clause provides in second para that in case at any stage in future the licensor demands any royalty payment on this account, the licensee will take steps to get the Govt. of India's approval for payment of such royalty payment. It was stated that from this Article it was evident that the amount of royalty to be paid by LGI to LGK for use of its brand name falls in the exclusive domain of LGK. The assessee has no role at all to play in such decision, except following the dictate of LGK. The sum and substance of his contention was that since LGK exercises complete control over the economic decisions of LGI, the separate legal character of the assessee should be overlooked notwithstanding the fact that LGI is a legally separate entity.

11.2. Per contra, the learned Counsel for the assessee submitted in rejoinder that the contention of the learned Departmental Representative about disregarding the separate legal character of the assessee due to the influence of the foreign AE on its economic policies, was utterly erroneous. He relied on the judgment of the Hon'ble Supreme Court in the case of *Vodafone International Holdings B.V. Vs. Union of India & Anr.s [(2012) 341 ITR 1 (SC)]* in which it has been held that if there are two separate but related legal entities, their separate legal character cannot be ordinarily disregarded. It was submitted that the legal character can be ignored only where the Revenue positively proves the factum of the existence of influence of the foreign AE over the affairs of the Indian AE in general or in respect of specific transactions. He argued that such burden has not been discharged in the present case by the Revenue in proving that there was any influence of the foreign AE in the decision taken by the Indian AE towards incurring of the AMP expenses in India.

11.3. We are convinced with the submissions advanced on behalf of the assessee in this regard but only to the extent of not ignoring the legal character of the Indian AE simply because of the close relationship between the two enterprises. If we proceed with the presumption that since the foreign enterprise has influence over the economic behavior of the assessee and hence the separate legal character of the Indian enterprise should be overlooked, then it would mean that the such separate legal character of the assessee will be lost not for one transaction but for all practical purposes. In that case only the foreign entity will survive as a taxable unit even under the Act. Probably it is not the case of the Revenue also as it is the Indian entity which has been subjected to the present assessment.

11.4. However, we are not agreeable with the remaining part of the contention of the ld. AR that the legal character of one enterprise can be altered only where the Revenue positively proves the factum of the existence of influence of the foreign AE over the affairs of the Indian AE in general or in respect of specific transactions. In fact, it is due to this close relation between AEs of MNC that Chapter-X has been enshrined in the Act as an anti-tax avoidance measure. No doubt AEs in India and abroad are two separate legal entities subject to tax in different tax jurisdictions, but the fact that the economic behaviour of one depends on the wish of the other, can never be totally lost sight of. Due to this factor, it becomes significant to verify as to whether the decisions taken by the Indian AE are influenced by its foreign AE. If any decision taken by the Indian AE is found to be uninfluenced, then the transaction is accepted as such by the Revenue at its face value. If however it turns out that the behavior of the Indian AE has been influenced by the foreign AE, then there arises a need for adjustment to that extent by removing the effect of such influence. In fact, the transfer pricing provisions (hereinafter also called `the TP provisions') are aimed at discovering, in the first instance, if there is any influence of the foreign AE over transactions between it and its Indian counterpart ; and if the answer is in affirmative, then by unloading the effect of such influence on the transaction. This entire exercise is executed by firstly visualizing the value of an international transaction between the two AEs; then ascertaining the ALP of such transaction; and then eventually computing the total income of the Indian AE having regard to the ALP of the international transaction. Initial burden is always on the assessee to prove that the international transaction with the foreign AE is at arm's length price.

11.5. In our considered opinion the rival parties have occupied the position akin to north pole and south pole on this score. In the context of the TP provisions, the correct position lies somewhere between these two extreme ends. Whereas the separate legal character of both the entities remains intact under Chapter-X, at the same time there is a simultaneous mandate for removing the effect of influence of one entity over the economic dealings with the other on a transactional level by computing the income having regard to the ALP of each international transaction.

Whether any express agreement in this case ?

12.1. The ld. DR submitted that it is a case in which, apart from drawing an inference as to the transaction, there was an express agreement between the assessee and the foreign AE for incurring of AMP expenses for branding building. He referred to certain material indicating the Blue Ocean Strategy ("BOS" in short) adopted by L.G. group. He explained the concept of BOS as not to out-perform the competition in the existing industry, but to create new market space or a blue ocean, thereby making the competition irrelevant. It was stated that this creation of new markets is obviously achieved *inter alia* through the vigorous campaign for the awareness of brand and products. Our attention was drawn towards pages 102 and 106 of the paper book containing details of BOS of the LG Electronics, which provides that "In January 2006, the company launched `Blue Ocean Management' campaign to be one among the top three EIT firms in the world by 2010". From this material, it was shown that the BOS was implemented in January 2006, to be carried on for four five years with a view to bring L.G. Electronics within the three top firms of the world by 2010. It was explained that the period relevant to the assessment year under consideration is covered under the currency of the BOS as adopted by the LGK on a global level including India through the assessee. A reference was made to page 132 of the paper book as per which the assessee, that is, LGI announced to follow the footsteps of LGK in adopting the BOS. Then he referred to interview of Mr. M.B. Shin, the Managing Director of the assessee company, a copy of which is available on page 133 of the paper book. In response to question as to what is the rationale behind LGI adopting the BOS in India, Mr. Shin replied that the concept of BOS as adopted by LG Electronics world wide, is for strengthening business capabilities and streamlining business structure thus being able to achieve the global top three by 2010. Mr. Gabor George Burt, in response to same question said that "LG is adopting the Blue Ocean Strategy (BOS) in India as part of its global strategy." The ld. DR also took us through some other material to indicate that the task of finalizing the scheme of advertisement under BOS and its implementation on global level was assigned by LG Korea to LG Singapore and it was only in the domain of LG Singapore to chalk out the advertisement strategy for all the AEs of LGK uniformly on a global level. The ld. DR referred to additional evidence admitted under rule 29 through his first application to exhibit that the brand building for the foreign AE was an important part of BOS, which the assessee admitted to have done in India. The ld. DR energetically referred to Article 20 of Addendum no. 1 dated 1-1-2002 to agreement dated 1-7-2001 between LGK and LGI, a copy of which has been placed on page 58 of the paper book, to show that it was the obligation of the Indian entity to incur all the advertisement expenses in India.

12.2. The learned AR contended that the reliance of the learned Departmental Representative on the BOS for making out a case that the assessee incurred AMP expenses at the dictate of the foreign AE, was wrong. It was stated that the BOS is not a new strategy devised by LG Korea, but was an already existing one. He reiterated his earlier arguments that the entire advertisement in India was planned and executed by the assessee alone. With the help of some papers, it was shown by him that the foreign AE simply prescribed the size and manner of placement of the brand and logo LG in the advertisements to be done by the assessee in India.

12.3. After considering the rival arguments in this regard and going through the relevant records it is clear that the LGK adopted BOS on a global level with an aim to create new markets, which primarily includes marketing strategy for the awareness of brand and products. It is further evident from the interview of Mr. M.B. Shin, the Managing Director of the assessee company that it adopted the BOS in India as part of its global strategy. The details as referred to by the ld. DR reveal that the entire marketing strategy of LG group through advertising and promotion was decided globally. The assessee and other AEs of LGK in other countries were supposed to follow the overall strategy made by LGK. When the assessee subscribed to BOS of its foreign AE, it cannot be contended that all the decisions about the timing, areas and quantum of advertisement were taken by the assessee, as was contended by the ld. AR. In fact all such decisions are derivatives of the overall BOS formulated by LGK. Though the ld. AR repeatedly asserted empty handedly that advertisement in India was planned and executed by the assessee alone, but he not only failed to support his contention but also could not place on record any contrary evidence to indicate that either the BOS was not a strategy *inter alia* for advertising and marketing on a global level or the assessee did not adopt it.

12.4. At this stage we need to consider the additional evidence filed by the ld. DR through the first application. The assessee in response to notice u/s 92CA for the A.Y. 2008-09 submitted before the TPO that LG Electronics Singapore Pte. Ltd.'s (LGESL) Marketing division is responsible for developing a range of marketing and sale strategy. Marketing functions are provided by LGESL to LGEA for establishing consistent and effective marketing and promotion strategies in the respective countries. The assessee also submitted that the corporate marketing functions included corporate brand management relating to LGK on a regional level. The assessee further stated before TPO, through the above referred written submissions, that LGESL's corporate Marketing division performs the specific functions which include, "Brand management including Brand Health Index enhancement, customer insight enhancement, new brand image deployment and brand campaign initiatives and review". It is further relevant to consider the statement of Shri Laxmi Kant Gupta, the Chief Marketing Officer of the assessee company recorded on 10-3-2011. In answer to question about the building of brand "LG" in India and how LGK controls this brand in India, he replied that "They give us set of guidelines on how to depict the brand in various places like advertising, shops etc". In response to the next question about the names of the expatriates employed in the marketing department and their role and responsibilities, he gave the name of Mr. Gilbert Ahn, Vice President Marketing, by stating his role to coordinate marketing inputs between India and Korea for smooth implementation. He also named four persons with the names Mr. D.S. Shin (Appliances) ; Mr. Joy Seo (TV); Mr. M.J. Jeon (AC.); Mr. G.B. Kim (DAV); and Mr. Jaesung Choi (GSM mobiles) as assisting in the strategy and coordination of marketing development with Korea. From the statement of Shri L.K. Gupta, it is apparent that his assertion was on the advertising policy of the LG as a whole and not specific to the particular year of the recording of such statement. It cannot be said that Shri L.K. Gupta, the Chief Marketing Officer of the assessee was oblivious of the global BOS adopted by LGK in vogue. Not only the assessee was directly helping in brand building for the foreign AE, but also some of its executives were actively engaged in coordinating with LGK in the marketing development. It can be easily noticed that the entire additional evidence sought to be relied by the ld. DR is nothing but corroboration of the material already existing about the BOS implemented by the assessee in India during the period relevant to the assessment year under consideration. In view of the above discussion, it becomes manifest that all the arguments advanced by ld. AR about the assessee taking *suo motu* decision about the advertisement have become unsustainable. The position which emerges is that the advertisement expenses were incurred by the assessee in furtherance of BOS adopted by its principal on a global level. Nothing turns out of the contention of the ld. AR that the BOS is not a strategy devised by the assessee. Even if it is not a strategy devised by LG Korea but still the fact remains that

LG Korea adopted this strategy, acting under which it decided the incurring of AMP expenses under a global scheme *inter alia* for promotion of the brand and logo LG in India through the assessee. When we consider these facts in totality about the assessee adopting the BOS framed by LGK on global level, which also *inter alia*, aims at "Brand management including …..new brand image deployment and brand campaign initiatives and review", the inference as to an informal arrangement or understanding between the assessee and its AE for the brand building gets reinforced. Such inference is otherwise lucidly deducible from the fact that the assessee incurred AMP expenses more than a commercially rational person incurs for his business coupled with the fact that it also simultaneously or separately advertised brand/logo of its AE.

12.5. The ld. DR has placed a lot of emphasis on Addendum no. 1 dated 1-1-2002 to agreement dated 1-7-2001 between LGK and LGI, a copy of which has been placed on page 58 of the paper book, to contend that there was express agreement between the assessee and the foreign AE in this regard. Article 20 of this addendum is reproduced as under:

> "<u>Article 20 – Advertising, Marketing and Sales Promotion</u>.
> The licensee agrees to provide and make arrangements for advertising, marketing and sales promotion in the licensed territory for LG Products manufactured by the Licensor and those by the Licensee at their cost."

12.6. From the above Article it can be seen that it is the assessee who agreed to make arrangements for advertising, marketing and sale promotion in India for the LG products manufactured by it as well as LGK. The cost of such advertising, marketing and sale promotion in India was also agreed to be exclusively borne by the assessee. It is not only the products manufactured by LGI for which the assessee has undertaken to incur AMP expenses but even for the products manufactured by LGK as well. When we view this Article, it is found that although there are sufficient hints but it falls short of decisively saying that there exists an express agreement for incurring of the AMP expenses in India by the assessee for creating marketing intangibles for and on behalf of the foreign AE.

13. *Ex consequenti* we hold that there is a `transaction' between the assessee and the foreign AE for the promotion of brand LG in India, which is legally owned by the latter.

IV. <u>INTERNATIONAL TRANSACTION</u>

14.1. Having seen that there was a transaction between the assessee and the foreign AE, now let us examine as to whether such transaction can be called as international transaction. It was submitted by the ld. counsel for the assessee and some of the interveners that even if it is treated as a transaction, but still it does not falls within the definition of `international transaction' as per section 92B of the Act. It was argued that sec. 92B refers to a transaction between two or more associated enterprises "in the nature of" purchase, sale or lease of tangible or intangible property etc. It was submitted that the expression "in the nature of" has been clarified by way of insertion of Explanation to section 92B by the Finance Act, 2012 with retrospective effect from 1-4-2002, but the case under consideration does not fall in any of the sub-clauses of clause (i) of the Explanation to section 92B so as to be called as an international transaction.

14.2. Coming a step ahead of actual international transaction as per section 92B(1), the ld. counsel submitted that the legislature also deems certain transactions as international transactions as per sub-sec. (2) of sec. 92B. Elaborating sub-sec. (2) of sec. 92B, it was put forth that a transaction with a third party is deemed as an international transaction if there is a prior agreement in relation to the relevant transaction between the third person and the associated enterprise or the terms of relevant transaction are determined in substance between such third person and the associated enterprise. It was stated that the case of the assessee cannot be brought even within the purview of sub-sec. (2) because there is no allegation by the Revenue that the third parties who were paid by the assessee for defraying advertisement expenses had any understanding with the foreign AE so as to determine the terms of their agreements for advertisement with the assessee. Once a transaction is not covered under sub-sec. (1) of section 92B, the ld. AR stated that the same can be deemed as an international transaction only when it falls under sub-sec. (2) of sec. 92B. If a transaction does not satisfy the pre-requisites for inclusion either in sub-sec. (1) or sub-section (2) of section 92B, it cannot be reckoned as an international transaction so as to be eligible for processing under Chapter X of the Act.

14.3. The ld. AR argued that there is always some consideration for doing any thing, without which there can be no valid agreement. It was pointed out that no consideration moved between the assessee and the foreign AE on account of the alleged brand building. The assessee incurred advertisement expenses for which the payments were made to third parties unrelated to it. Such transactions got concluded on the incurring of advertisement expenses without any direct or indirect involvement of the assessee's foreign AE. It was stated that a transaction with a third party or a part of such transaction cannot be called as transaction with the AE. As the entire advertisement expenses were incurred in India *vis a vis* third parties, the requirement of sec. 92B was claimed to be lacking. The ld. AR argued that there should be a first degree nexus between the incurring of advertisement expenses and the brand promotion for the foreign AE so as to regard it as an international transaction. Any incidental benefit resulting to the foreign AE, out of the expenses incurred by the assessee in India, cannot be termed as international transaction. As there was no transaction between the assessee and its foreign AE insofar as incurring of AMP expenses is concerned, the ld AR argued that the same ceased to be an international transaction. It was argued that the present so-called transaction of brand building for the foreign AE by the assessee is neither covered under sub-section (1) nor (2) of section 92B and hence the same cannot be recognized as an international transaction.

14.4. The ld. DR contended that a careful look at sub-section (1) of section 92B would indicate that the term `international transaction' has been defined in widest possible manner. Normally a provision is either exhaustive or inclusive. Section 92B was claimed as a classic example of a combination of both. It was explained that the provision can be seen into three parts. First part is exhaustive as opening with : `"international transaction" *means* a transaction ….in the nature of purchase, sale or lease of tangible or intangible property, or provision of services…..'. Second part further advances the scope of the exhaustive character by roping in `any other transaction having a bearing on the profits, income, losses or assets of such enterprises'. Third part is inclusive which provides that it `shall *include* a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of…any cost or expense …in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.'

14.5. The ld. DR argued that the instant transaction can be viewed as "international transaction" not on one but on three different counts. The first being, the earlier part of sub-section (1), which is in the nature of the exhaustive part of the definition referring to `...in the nature of ….provision of services'. It was stated that the authorities below have primarily viewed this transaction as in the nature of provision of a service of creating, improving or maintaining marketing intangible for the foreign AE, in lieu of which the foreign AE ought to have reimbursed the assessee.

14.6. The ld. DR contended that it can also be considered as an international transaction having a `bearing on the profits, income, losses or assets' of the assessee. Bearing on the profits of an enterprise was explained as a transaction having been recorded in such a way that the profits of the enterprise get needlessly deflated. In the present context, there can be deflation of profits of an enterprise, when the expenses pertaining to the foreign AE are also claimed as deduction by the Indian enterprise. If it amply turns out that the Indian entity has booked certain amount incurred for its AE as its own expense, this would have the effect of reducing the profit without reason, thereby depriving Indian exchequer from its rightful share of taxes. It was stated on behalf of the Revenue that the assessee incurred AMP expenses with a tacit understanding of creating the marketing intangible for its foreign AE. The assessee not only claimed deduction for the AMP expenses incurred for its own business purpose but also for the expenses towards creating or improving the marketing intangibles of the foreign entity. This excess claim of deduction was stated to have a direct bearing on the profits of the assessee, thereby bringing it within the ambit of an international transaction.

14.7. The third way of looking at this as an international transaction was its inclusion under the relevant part of section 92B(1), which runs as under : `*and shall include a mutual agreement* *or arrangement* (there is an oral understanding) between two or more associated enterprises (between the assessee and foreign AE) *for the allocation or apportionment of..... any cost or expense incurred or to be incurred* (brand promotion expenses) *in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises* (benefit, service or facility of which shall be available to the foreign AE). It was stated that there is an agreement between the assessee and its foreign AE under which only the assessee was to incur all AMP expenses in India in connection with a benefit, service or facility to be provided to itself as well as its foreign AE. He argued that the excess of the AMP expenses incurred by the Indian entity over what other comparable independent entities incur in similarly placed situation, means the exclusive benefit, service or facility to the foreign AE so as to constitute the value of international transaction of brand building for it. That is how he contended that the present transaction is an international transaction from three different angles.

14.8. The ld. DR argued that the payment to third parties for advertising is not an international transaction. It has never been the case of the Revenue that the payment made to the third parties towards advertisement expenses be treated as an international transaction. He stated that rather the international transaction is restricted to the activity done by the Indian AE in relation to foreign AE for adding value to a brand (being an intangible property of the foreign AE), the payment for which made by the Indian assessee is included in the overall AMP expenses claimed as deduction by the assessee.

14.9. Replying to the ld. DR's contention that section 92B has been worded very widely to include each and every transaction between the two AEs within the pale of international transaction, the ld. counsel for some of the interveners relied on the judgment in *Addtl. CIT Vs. Income Tax Appellate Tribunal & Anr. [(1975) 100 ITR 483 (AP)]* to contend that simultaneous use of the words `means' and `includes' in a definition make it exhaustive and not inclusive. It was highlighted that only the transactions set out in section 92B can be considered as international transactions and nothing beyond that. As the instant transaction is not covered by section 92B, it was claimed that the same cannot be considered as an international transaction.

14.10. After considering the rival submissions in this regard, we have no doubt in our mind that only international transactions can be considered within the purview of the Chapter X of the Act. Unless a transaction is an international transaction within the meaning of sec. 92B, the same cannot be subjected to the TP provisions. The expression `international transaction' has been defined under section 92B, which has two sub-sections. The first sub-section talks of actual international transaction and the second sub-section refers to a deemed international transaction.

14.11. The case of the revenue is that it is an international transaction in terms of sub-sec. (1) of sec. 92B. Let us see the prescription of this provision, which is as under :-

> *"92B. Meaning of international transaction.—(1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a 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 services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises."*

14.12. After sub-section (1), there is sub-section (2) followed by the Explanation with two clauses, inserted by the Finance Act, 2012 w.r.e.f. 1.4.2002 starting with the expression : ` For the removal of doubts'. Clause (i) of the Explanation provides that "the expression `international transaction' shall include - ". Then there are five sub-clauses from (a) to (e). Clause (ii) of the Explanation provides that "the expressions `intangible property' shall include -". Then there are twelve sub-clauses from (a) to (l).

14.13.1. Firstly we shall evaluate the rival contentions about the definition of `international transaction' u/s 92B, being exhaustive or inclusive. It is noticed that such definition as per sub-section (1) uses both the words `means' and `includes' at two different places. A definition is exhaustive when it incorporates the word `means' in its opening part and thereafter lists out certain items, say A and B. In that case it will mean that only A and B form the content of the thing defined. A definition is inclusive when it uses the word `includes' in its opening part and thereafter lists out certain items, say A and B. In that case it will mean that not only A and B but also other items not listed, say C or D, can also form the content of the thing defined, if these are otherwise of the same nature. If however a definition includes both the words `means' and `includes', that is, it says that it means `A' and includes `B', then it will again mean that it is an exhaustive definition to include both A and B and not C or D etc. A definition despite being exhaustive can still be inclusive, if one or more of its components are again defined in an inclusive manner. Suppose in the definition of the third category discussed above, having both A and B by use of the words `means' and `includes', the contents of either A or B are both are further defined in an inclusive manner, this definition will again become inclusive to the extent of the definition of either A or B or both having been defined in an inclusive manner.

14.13.2. Turning to the definition of international transaction as per sub-section (1) of sec. 92B it is noticed that it uses both the words `means' and `includes'. When we examine the Explanation to this section clarifying the meaning of the expression `international transaction' and `intangible property', then it becomes clear that both have again been defined in inclusive manner. Even though sub-clauses (a) to (c) and (e) of clause (i) of the Explanation defining `international transaction' are exhaustive, but sub-clause (d) being the `provision of services' is again inclusive as `including' provision of market research, market development, marketing management,…'. It is of critical importance to observe that the expression `international transaction' itself has been defined in this Explanation only in an inclusive manner. As a result of insertion of the Explanation with retrospective effect, the otherwise exhaustive definition of `international transaction' given in sub-section (1) has been converted into an inclusive one. Clause (ii) of the Explanation also defines the expression `intangible property' in an inclusive manner. Sub-clause (a) of clause (ii) embraces `marketing related intangible assets' in the ambit of intangible property, which is again not exhaustive because of the use of the expression `such as' before `trademarks, trade names, brand names, logos'. From the above examination of section 92B in entirety, it can be easily noticed that the legislature has given very extensive and inclusive meaning to the expressions `international transaction' and `intangible property'.

14.14. When we read sec. 92B(1) it comes to fore that in order to be characterized as an international transaction, the following salient features must be present : -

(1) There should be a `transaction'

(2) Such `transaction' should be between two or more AEs and either or both of whom should be non-residents.

(3) Such transaction should be of the nature as referred to in section 92B.

14.15. In the earlier part of this order, we have held that the brand building by the assessee for its foreign AE constitutes a `transaction'. So far as the second requisite is concerned, there is no dispute on the fact that LG Korea is an associated enterprise of the assessee. Thus, there are two AEs in the present case and one of them, namely, LGK is a non-resident. This condition also stands satisfied.

14.16. The third requisite is that the `transaction' as per the first requisite must be of the nature as referred to in section 92B. All the three requisites must be cumulatively satisfied so as to make a `transaction' an `international transaction'. If there is a transaction between two AEs and one or both of whom are non-residents, it will not become an international transaction so as to fall within the domain of Chapter-X, unless it is of the nature as defined in section 92B.

14.17. It has been vigorously argued by the ld. counsel for the assessee and some of the interveners that clause (i) of Explanation to section 92B gives meaning to the expression `in the nature of international transaction' and since sub-clauses (a) to (e) of clause (i) do not refer to transaction of brand building, it cannot be considered as an international transaction. We are not persuaded by this submission. It is pertinent to note that the expression `international transaction' as per clause (i) of the Explanation has been `clarified' to `*include'* five sub-clauses. Thus the meaning assigned to `international transaction' as per clause (i) of the Explanation is simply *inclusive* and not *exhaustive*. There is hardly any need to burden this order with the *ratio decidendi* emanating from a plethora of judgments that the scope of an inclusive definition always extends beyond the specified inclusions.

14.18.1. Now we will examine as to whether this transaction falls within any of the sub-clauses of clause (i) of Explanation to section 92B. The learned counsel for the assessee contended that the view point of the ld. DR that the transaction of brand building is in the nature of `provision of service', is not tenable. He submitted that Indian entity is engaged in the business of manufacturing and selling of electronic goods etc. and not in rendering services of advertisement and promotion of a brand to its customers. His contention was that in order to bring any transaction within the scope of `provision of services', it is *sine qua non* that the main business activity of the Indian enterprise and the nature of service provided to the foreign AE must be same. As it is not so in the present case, the ld. AR contended that the transaction cannot be held as a `provision of service'.

14.18.2. We do not find any force in this submission advanced on behalf of the assessee for the reason that the language of section 92B simply mandates the 'provision of services' by one AE to another. It is not qualified by any words to restrict its scope only to such services as are provided by the assessee in its regular course of business. What is significant in this regard is the factum of rendition of service, which is an international transaction. Source of service is inconsequential. It can be produced by the AE as primarily engaged in the business of rendering such service or it can be produced by the Indian AE otherwise than by being primarily engaged in such business or it can be outsourced. The fact that the Indian entity is rendering any service to the foreign AE, which is not its main business, would not convert the otherwise international transaction into a non-international transaction.

14.18.3. Ordinarily a service may be professional, public or a business service. Even in common parlance provision of service means the act of performing a task for a person which that person requires it in exchange for some consideration. Cl. (i) of Explanation to section 92B defining `international transaction' includes through sub-clause (d) : `provision of services, including provision of market research, market development, marketing management…..'. Clause (ii) of the Explanation defining `intangible property' includes through sub-clause (a) : `marketing related intangible assets, such as, trademarks, trade names, brand names, logos'. When we consider both these provisions together, it becomes clear that provision of services defined in an inclusive manner encompassing all the market related services including those specifically covered like market development, research and administration and the further fact that brand name and logos have been specifically considered as marketing intangibles, there remains no doubt about the brand building being a provision of service in the present context. In the light of the above discussion we are of the considered opinion that the transaction of brand building by the assessee for the foreign AE is in the nature of `provision of service'. Having held such transaction to be an international transaction in the nature of `provision of service', we do not consider it expedient to deal with the contention of the ld. DR that it is also an international transaction having a `bearing on the profits, income, losses or assets' of the assessee on one hand and/or towards allocation or apportionment of any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, on the other.

14.19. Now we take up the contention of the ld. AR that there was no transaction between the assessee and its foreign AE insofar as incurring of AMP expenses is concerned and further the assessee entered into transactions with the third parties who are advertising agencies and it is not the case of the Revenue that the terms of transactions with such third parties were determined in substance by the foreign AE. Insofar as the part of the contention of the ld. AR about the deemed international transaction u/s 92B is concerned, we find that it is nobody's case that the transaction in question is a deemed international transaction. In order to be covered under sub-sec. (2) of Sec. 92B for making a transaction with a third party as deemed international transaction, it is essential that the AE of the assessee should have influence over the third party in terms of determining the terms and conditions of such transaction. It is only in such a situation that the transaction with such third party is deemed to be an international transaction. Further it is not the case of the Revenue that the transaction of payments of AMP expenses to the third parties is an international transaction. Rather the international transaction has been taken as the value addition made by the assessee to the brand by making payment which are included in the overall AMP expenses paid to the third parties.

14.20. The further contention that there was no consideration by the foreign AE in the present case, is again of no avail. The mere fact that no consideration moved between the AEs for a transaction is not a decisive factor to have influence over its nature. Payment of consideration has not been made as a condition precedent for inclusion of any transaction within the ambit of section 92B. The transfer pricing provisions should be seen in the backdrop of the fact that these are special provisions for avoidance of tax on the transactions structured between two associated enterprises. The simple fact that the foreign AE did not pay any consideration to the Indian AE will not take the transaction out of the purview of the transfer pricing provisions, if it is otherwise an international transaction.

14.21. Thus it is palpable that all the three necessary ingredients as culled out from a bare reading of section 92B are fully satisfied in the present case. There is a transaction of creating and improving marketing intangibles by the assessee for and on behalf of its foreign AE ; the foreign AE is non-resident ; such transaction is in the nature of provision of service. Resultantly, we hold that the Revenue authorities were fully justified in treating the transaction of brand building as an international transaction in the facts and circumstances of the present case.

V. <u>COST/VALUE OF TRANSACTION</u>

15.1. At this stage, we feel it productive to have a macro view of the transfer pricing provisions. Section 92 provides that the income from an international transaction shall be computed having regard to ALP. What is an international transaction and who is an associated enterprise has been defined in sections 92B and 92A respectively. Then arrives section 92C. Sub-section (1) of this section provides that : "The arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction……..". A conjoint reading of sections 92 and 92C divulges that the first step in the computation of income from international transaction is to identify the international transaction and its cost/value. In one case it may be the cost and in other it may be the value of international transaction relevant for the purpose. For example if AE X with cost of goods at₹90 makes sales to AE Y at ₹100, it will be ₹100, being the value of international transaction of sale in the hands of AE X. However it will be ₹100, being the cost of international transaction of purchase in the hands of AE Y. The second step in such computation is to determine the arm's length price in relation to such international transaction as per section 92C. The last step as per section 92 is to compute the total income of an assessee from an international transaction having regard to the arm's length price. It can be explained by way of a simple example. Suppose the value of purchase of goods from AE is ₹100. This amount constitutes the value of international transaction of purchase. Second step is to determine arm's length price of such purchases u/s. 92C. Suppose the arm's length price of such purchase is ₹80. Then is the final step of computing income u/s 92 in relation to the international transaction having regard to the arm's length price. Other things being neutral, the value of international transaction in the present case at ₹100 shall be substituted with the ALP of the international transaction at ₹80, thereby leading to the computation of total income by making upward adjustment of ₹20. The ALP of a transaction can also be computed by finding out the rate of profit margin of a comparable uncontrolled transaction. Again section 92C will require the computation of ALP by considering the margin in a similar uncontrolled transaction and then comparing it with that shown by the assessee from its international transaction. Suppose the assessee has entered into an international transaction of sale to AE at ₹100 thereby giving profit margin at say 5%. Further suppose the profit margin in a comparable uncontrolled transaction u/s 92C by any of the recognized methods comes to 12%. In this case the total income of the assessee shall be computed by considering the profit margin at 12% thereby suitably increasing the ALP from sale transaction of ₹100. From the above discussion it is vivid that before applying the provisions of Chapter X, one needs to have the cost/value of international transaction on one hand and the ALP in relation to such international transaction as determined u/s 92C on the other. Thereafter starts the process of computing total income of the assessee u/s 92 by making adjustment, if required, on comparing the value of the international transaction with its ALP as determined u/s 92C. Thus it is evident that basically two variables are involved in the transfer pricing exercise viz., firstly the cost/value of international transaction and secondly, the ALP of such international transaction.

15.2. The ld. counsel for the assessee contended that the Revenue has invoked the Bright Line Test for making the transfer pricing adjustment by determining ALP in respect of the AMP expenses towards the transaction of creating marketing intangibles. He stated that the Bright Line Test is a part of U.S. legislation. By inviting our attention towards sec. 1.482 -4 of US –IRC, copy placed at page 399 of the paper book, the ld. AR contended that the US regulations incorporate the Bright Line Test within its legislation. In the absence of any such incorporation under the relevant provisions of the Income-tax Act, 1961, the ld. AR contended that taking cognizance of this test for denial of deduction of AMP expenses was unwarranted. It was further submitted that the Revenue authorities have relied on case of *United States Tax Court in DHL Corporation & Subsidiaries Vs. Commissioner of Internal Revenue*, in which the brand promotion expenses have been held to be not fully deductible and part of the same has been held to be attributable to the enterprise holding brand. By inviting our attention towards the judgment of the *United States Court of Appeals in DHL Corporation & Subsidiary Vs. Commissioner of Internal Revenue*, a copy of which has been placed at pages 364 onwards of the paper book, the ld. AR submitted that the decision of the United States Tax Court in DHL Corporation & Subsidiaries has been reversed by the United States Court of Appeals. In that view of the matter it was stated that no reliance can be placed on the decision of lower authority of U.S. which has been set aside by a superior authority of US.

15.3. The ld. DR countered the submissions put forth for the assessee. It was stated that the bright line test is simply a tool to ascertain the cost of the international transaction and it is wrong to contend that the ALP has been determined by applying the bright line test, which is not a part of the Indian tax law.

15.4. We have heard the rival submissions in this regard and gone through the necessary material. There is absolutely no doubt that a provision from the legislation of a foreign country cannot be imported into the Indian legislation. Similar is the position regarding the judgments of the foreign courts. These have only a persuasive value and cannot have a binding effect over the Indian authorities. As such, we are abstaining from examining the case in the light of the US Regulations or the decision of the United States Tax Court or United States Court of Appeals in *DHL Corporation & Subsidiaries Vs. Commissioner of Internal Revenue*.

15.5. Much emphasis has been laid by the learned Counsel for the assessee and those for the interveners that the Revenue authorities invoked the bright line test in order to determine ALP of the international transaction, which is not one of the recognized methods u/s 92C. In our considered opinion there is an inherent fallacy in this contention urged before us.

15.6. There can be an international transaction between the assessee and its AE under which the assessee incurs some expenses on behalf of its AE. There arises no difficulty when despite there being no formal agreement, the Indian AE incurs such expenses and keeps them in a separate account. The difficulty arises only when such expenses are either clubbed with certain other expenses incurred for the foreign AE or combined with certain similar expenses incurred by the Indian AE for its own business purpose. It is in such a later situation that the task of separating the costs incurred for the foreign AE and those for the business of the Indian AE, assumes significance. If such expenses in two classes are identifiable, one can separate them with ease. But, when both the expenses are intermingled and otherwise inseparable, then some mechanism needs to be devised for ascertaining the cost of the international transaction, being the amount of expenses incurred for the foreign AE.

15.7. As in the present case the assessee did not declare any cost/value of the international transaction of brand building, it became imperative for the TPO to find out such cost/value by applying some mechanism. In fact, the bright line test in our case is a way of finding out the cost/value of international transaction, which is the first variable under the TP provisions and not the second variable, being the ALP of the international transaction. Bright line is a line drawn within the overall amount of AMP expense. The amount on one side of the bright line is the amount of AMP expense incurred for normal business of the assessee and the remaining amount on the other side is the cost/value of the international transaction representing the amount of AMP expense incurred for and on behalf of the foreign AE towards creating or maintaining its marketing intangible. Now the pertinent question is where to draw such line. If the assessee fails to give any basis for drawing this line by not supplying the cost/value of the international transaction, and further by not showing any other more cogent way of determining the cost/value of such international transaction, then the onus comes upon the TPO to find out the cost/value of such international transaction in some rational manner.

15.8. In the present case, the assessee did not declare any cost/value of the international transaction in the nature of brand building. As such, it fell upon the TPO to find out such amount out of the total AMP expenses incurred by the assessee. In the absence of any assistance from the assessee in determining such cost/value, logically it could have been by first identifying comparable independent domestic cases ; ascertaining the amount of advertisement, marketing and promotion expenses incurred by them and percentage of such AMP expenses to their respective sales ; noting the total AMP expenses incurred by the assessee ; discovering the amount of AMP expenses incurred by the Indian entity for its business purpose, by applying the above percentage of comparable cases to assessee's sales. The excess of total AMP expenses over such amount as determined as per the immediately preceding step ought to have been and has been rightly taken as a measure to determine the amount of AMP expenses incurred by the assessee for the brand promotion of foreign AE. In other words, the amount coming up as per the last step is the cost/value of such international transaction.

15.9. The figure so deduced, by applying the above approach, representing the cost/value of the international transaction, in the instant case is ₹161.21 crore. The TPO impliedly considered the same figure as both representing the cost/value of international transaction and also its ALP. However, the DRP came to hold that mark-up of 13% should also have been applied. In a way, the DRP adopted the cost/value of international transaction at ₹161.21 crore and computed the ALP of such transaction at ₹182.71 crore. It is this final figure of ₹182.71 crore which was eventually considered by the AO for making adjustment, against which the assessee has come up in appeal before the tribunal.

15.10. The fact of the matter is that it is the cost/value of the international transaction at ₹161.21 crore which has been determined by applying the bright line test. Position would have been different if the ALP of the international transaction would have been determined by invoking bright line test. What is appropriate is the substance of the matter and not the nomenclature given to a transaction. In our considered opinion the name given to the method of computing the cost/value of international transaction, whether bright line test or otherwise, has no significance. Since in the present case it is the cost/value of the international transaction which has been determined by applying the bright line test, the contention raised by the learned counsel in this regard has been rendered without merit.

15.11. As the adjustment made by the AO on account of this international transaction with cost/value at ₹161.21 crore and ALP at ₹182.71 crore is not in the nature of the assessee's expense, naturally no deduction was permissible to this extent. Proceeding, for the time being, with the presumption as to correctness of both these figures, the assessee was required to either exclude the total AMP expenses by ₹161.21 crore and then show the upward adjustment to the total income by ₹21.50 crore (₹182.71 crore minus ₹161.21 crore) or if the total AMP expenses were not to be reduced, then by showing income of ₹182.71 crore, which would have had the effect of reducing the AMP expenses by ₹161.21 crore coupled with the showing separate income of ₹21.50 crore. The assessee in the present case has not chosen any of these two permissible courses and allowed the AMP expenses to swell by ₹161.21 crore. The case of the Revenue is that the assessee should have been reimbursed by the foreign AE with the ALP of the international transaction at ₹182.71 crore. From the above discussion there is absolutely no doubt in our mind that the figure of ₹161.21 crore, determined by applying the bright line test, is the cost/value of the international transaction of brand building for the foreign AE.

Interplay amongst sections 37(1), 40A(2) & 92

16.1. The ld. AR argued that the AMP expenses incurred by the assessee are fully deductible u/s 37(1) and there is no question of finding any ALP of the international transaction in this regard. The conditions for deductibility of such expenses, being wholly and exclusively incurred for the purpose of business, as set out in sec. 37(1), stand duly satisfied. He submitted that the word "wholly" refers to the quantum of the expenditure and the word "exclusively" refers to the assessee getting sole benefit out of such expenditure. It was claimed that the AMP expenses were incurred by the assessee for the promotion of its business. Even if some other person or for that matter the foreign AE of the assessee got some benefit out of such expenses, there can be no reason to restrict the allowance of such expenses. Reliance was placed on the judgment of Hon'ble Supreme Court in the case of *Sassoon J. David & Co. P. Ltd. Vs. CIT [(1979) 118 ITR 261 (SC)]*, wherein it has been held that the assessee can claim deduction for expenses incurred for its business purpose. The fact that somebody other than the assessee was also benefited by the expenditure, should not come in the way of expenditure being allowed by way of deduction if it satisfies the otherwise test of deductibility. It was submitted that the entire expenditure on AMP was incurred by the assesssee for its business purpose which resulted in substantial upswing in its turnover. Primarily, no benefit was availed by the foreign AE and even if some benefit did percolate to it incidentally, that could not have been considered as a reason to mar the deductibility of whole of such expenses in the hands of the assessee u/s 37(1) of the Act.

16.2. The ld. AR also argued that the advertisement expense are deductible in full as revenue expenditure in the year of incurring itself notwithstanding the fact that the benefit of such expense is obtained beyond the year. Apart from relying on certain decisions in this regard, he also referred to the Accounting Standard 26 of the Institute of Chartered Accountants of India prescribing the accounting treatment to be given to marketing intangibles by writing it off in entirety in the year of incurring. In the light of the above submissions it was claimed that the entire amount of the AMP expenses incurred by the assessee is eligible for deduction in the year itself and the Revenue cannot make a disallowance of a part of such expense. He argued that that the effect of the action by the authorities below has been to reduce the amount of deduction which is otherwise fully allowable u/s 37(1).

16.3. The ld. counsel for the assessee referred to certain decisions governing deductibility of advertisement expenses notwithstanding the foreign enterprise also getting some benefit by way of the so called brand building. Firstly he relied on the decision of the Delhi Bench of the tribunal in the case of *Nestle India Ltd. Vs. DCIT [(2007) 111 TTJ (Del.) 498]*. The assessee in that case incurred certain advertisement expenses. As the assessee was using the license of its foreign collaborator, the AO invoked the provisions of sec. 92 and held that the incurring of the advertisement expenses was for the benefit of the non-resident company also. Disallowance at the rate of 50% of the total expenses incurred on advertisement and sales promotion was made by treating them as not wholly and exclusively for the assessee's business. When the matter came up before the Tribunal, it was held that there could be no disallowance of such advertisement expenses. It was stated by the ld. AR that the Department's appeal against such order was not admitted on the question of deletion of disallowance of advertisement expenses u/s 92 and further the SLP filed before the Hon'ble Supreme Court against the judgment of the Hon'ble jurisdictional High Court in not admitting substantial question of law, also came to be dismissed. The ld. AR placed reliance on certain other cases in which almost similar question was raised and also replied accordingly by holding that if the foreign collaborator got some benefit out of advertisement expenses, that would not mitigate against the deductibility of expenditure u/s 37(1) of the Act. However, on a specific query, the ld. AR was fair enough to concede that the decision in the case of Nestle and such other cases were decided in the context of sec. 92 as it existed before its substitution by sec. 92 to 92F by the Finance Act, 2001, being the transfer pricing provisions under consideration. It was however, maintained that the *ratio decidendi* of these decisions still holds good and is even applicable in the context of the transfer pricing provisions.

16.4. The learned Counsel also placed a great deal of emphasis on the judgment of the Hon'ble jurisdictional High Court in the case of *CIT v. Nestle India Limited [(2011) 337 ITR 103 (Bom.)]*, which considered the interplay between sections 40A(2) and 37 and thereafter came to hold that the payment in the form of royalty/consideration to the related party cannot be treated as excessive or unreasonable. On the strength of this judgment it was contended that same logic should apply when considering the deductibility of an expense under Chapter X of the Act.

16.5. In the oppugnation, the ld. DR argued that it was wrong to say that the amount of deduction has been restricted by making disallowance for some part of the otherwise deductible AMP expenses. It was stated that due to inclusion of brand promotion expenses in the total AMP expenses, which are otherwise not deductible in the hands of the assessee as not incurred for its business, section 92 has come to play for taking away a part of the AMP expenses towards brand building out of the ambit of section 37(1) together with the mark-up.

16.6. We have heard the rival submissions in the light of material placed before us and precedents relied on. A lot of emphasis has been placed by the ld. counsel for the appellant and other interveners on the point that the deductibility of AMP expenses should be viewed in the light of section 37(1) alone. Once the entire amount is found to be deductible under this provision, then, no part of it can be attributed to the brand building for the foreign AE notwithstanding the fact that the foreign AE also got benefitted out of such expense. We do not find such submission as correct under the present legal and factual scenario. There is no doubt about the general proposition as laid down in the decisions pressed into service by the ld. AR that if an expenditure is deductible u/s 37(1), being incurred wholly and exclusively for business purpose, the same has to be allowed in entirety notwithstanding the fact that some third party was also benefitted by such expenditure. However, in case of an international transaction, this general proposition undergoes change because of Chapter X of the Act containing the transfer pricing provisions, with the marginal note: `Special provisions relating to avoidance of tax'. This Chapter requires the computation of income from international transactions having regard to arm's length price. The hitherto section 92 as existing on the statute up to the A.Y. 2001-02 was substituted by the Finance Act, 2001 with sections 92 to 92F. Through such TP provisions it has been mandated that any income arising from an international transaction shall be computed having regard to arm's length price. It has further been provided through section 92 that the cost or expenses allocated or apportioned between two or more associated enterprises shall be at arm's length price. Memorandum explaining the provisions of the Finance Bill has included such provision under the main category of `Measures to Curb Tax Avoidance'. This set of sections has been described as a : `New Legislation to curb tax avoidance by abuse of transfer pricing'. It is significant to note the following excerpt from the Memorandum explaining the provisions of the Finance Bill : "The increasing participation of multinational groups in economic activities in the country has given rise to new and complex issues emerging from transactions entered into between two or more enterprises belonging to the same multinational group. The profits derived by such enterprises carrying on business in India can be controlled by the multinational group, by manipulating the prices charged and paid in such intra-group transactions, thereby, leading to erosion of tax revenues." The Memorandum explaining the provisions of the Finance Bill 2001 further provides as under : -

> *"With a view to provide a statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India, in the case of such multinational enterprises, new provisions are proposed to be introduced in the Income-tax Act.*
>
> *…………..*
>
> *It is proposed to substitute section 92 with a new section to provide that any income arising from an international transaction shall be computed having regard to the arm's length price. It further provides that the costs or expenses allocated or apportioned between two or more associated enterprises shall be at arm's length prices."*

16.7. From the above, it follows that the TP provisions have been inserted in the Act as a measure to `curb tax avoidance'. In that view of the matter these provisions acquire status of special provisions as have been rightly given in the heading of the Chapter itself. We are reminded of the legal maxim `*Generalia specialibus non derogant*' which means that the general things do not derogate from special. It implies that the special provision overrides the general provision. If a special provision is made on a certain subject, such matter is excluded from the general provision. The Hon'ble Supreme Court in the case of *Britania Industries Ltd.Vs. CIT & Anr. [(2005) 278 ITR 546 (SC)]* has held that the expenditure towards rent, repairs, maintenance of guest house used in connection with the business is to be disallowed u/s. 37(4) because this is a special provision overriding the general provision. The Hon'ble Bombay High Court has quoted the above maxim of `*Generalia specialibus non derogant*' with approval in the case of *Forbes Forbes Campbell And Co. Ltd. Vs. CIT [(1994) 206 ITR 495 (Bom.)].* The same has also been applied by the Hon'ble Madras High Court in the case of *CIT Vs. Copes Vulcen Inc. [(1987) 167 ITR 884 (Mad.)].* Turning to the facts of the instant case, we find that the TP provisions have been inserted as special provisions to curb the avoidance of tax. Once there is an international transaction, then the TP provisions shall prevail over the other regular provisions governing the deductibility or taxability of an amount from such transaction.

16.8. Moreover, the decisive test is to consider the deductibility of any expense in the hands of the assessee on its own account and not otherwise. It is obvious that if some amount is spent by the assessee for its AE, which may be deductible in the hands of such AE, cannot by any stretch of imagination be claimed as deduction by the assessee. The TP provisions aim at streamlining the effect of shifting of such excess expenses in the hands of the Indian assessee. It shows that the amount spent on an international transaction, if combined by the assessee with its own business expenses, is required to be taken out for processing under the TP provisions to find out the extent of its taxability in the hands of the Indian assessee. The remaining amount incurred towards its own business expenses shall be considered for deductibility as per the regular provisions of the Act. It is wholly illogical to contend that the deductibility of such total expense, also consisting of the amount spent on the international transaction, should be viewed as per the general provisions of the Act. If the contention advanced on behalf of the assesses is accepted and the deductibility of the entire amount of AMP expenses, including that incurred on account of international transaction, is considered under the general provisions of Chapter IV-D, then it would render the TP provisions as a redundant piece of legislation. Obviously this can never be a correct position. When the legislature has inserted a special provision in the Act and that too, which is for the avoidance of tax, the taxability of the amount spent towards the international transaction, included in the total amount of expense, is required to be examined as per the TP provisions. The exercise of separating the amount spent by the assessee in relation to international transaction of building brand for its foreign AE for separately processing as per section 92 of the Act cannot be considered as a case of disallowance of AMP expenses u/s 37(1). In fact, both the sections i.e. 37(1) and sec. 92 operate in different fields.

16.9. The further contention that the advertisement expenses are always revenue in nature and hence deductible in entirety in the year of incurring, in our considered opinion is not disputed. It is not the case of the Revenue that the AMP expenses incurred by the assessee are capital in nature or of a deferred revenue nature and hence should be disallowed or partly allowed. Rather the case is about not allowing deduction to the extent these have been spent by the assessee on the international transaction without receiving any corresponding credit from the AE, which ought to have been received. Similarly, the reliance of the ld. AR on the Accounting standard 26 prescribing the writing off of the entire AMP expenses in the year of incurring, is again of no avail for the same reasons.

16.10.1. We do not find much weight in the submission advanced by the learned AR comparing section 40A(2) and section 92 on the question of deductibility of advertisement expenses by relying on the judgment of the Hon'ble jurisdictional High Court in *Nestle India Limited (supra)* rendered in the context of the former provision. Section 40A(2)(a) provides that : "Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the Assessing Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him there from, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction". A cursory look at this provision indicates that what is sought to be disallowed is the excessive expenditure incurred by the assessee in respect of which payment has been made to related parties as referred to in clause (b) of section 40A(2). The application of section 40A(2) presupposes the expense having otherwise passed through the deductibility test under the relevant provision. If an expenditure is not deductible in full or in part as per the concerned section granting deductions under Chapter IV-D, then that expenditure or the part thereof as is otherwise not allowable, does not come up for consideration for the application of the provisions of section 40A(2). It is only when the expenditure is otherwise deductible under the relevant provisions that the quantum of excessiveness, due to payment made to the related parties, is considered u/s 40A(2). The nutshell of section 40A(2) is that it restricts the deduction to the extent it is reasonable with the presumption of the otherwise deductibility in full of an expenditure under the regular provisions.

16.10.2. On the other hand u/s 92 of the TP provisions has much wider amplitude. This section provides that any income arising from an international transaction shall be computed having regard to the arm's length price. *Explanation* to section 92(1) further clarifies that the allowance for any expense or interest from an international transaction shall also be determined having regard to the arm's length price. Sub-section (2) talks of a situation where two or more enterprises enter into a mutual agreement for the allocation or any contribution to any cost or expense incurred in connection with a benefit, service or facility provided or to be provided. Such transaction as per sub-section (2) is also required to be determined having regard to the arm's length price of such benefit, service or facility as the case may be. Further when we read section 92B in juxtaposition to the word `income' as used in section 92(1), it comes out that the term "income" does not restrict itself only to the items of income earned from sale or lease of any tangible or intangible property or provision of any service etc., but also to the expenses incurred on purchase or provision of service etc. or lending or borrowing of any money or any other transaction having a bearing on profits, income, losses or assets of such enterprise. Thus, it is evident that section 92 requires the benchmarking of all the international transactions whether they relate to the expenses incurred by the Indian AE vis-à-vis its foreign AE or income earned from such foreign AE or any other transaction having any effect over the income, losses or assets of the Indian AE. In contrast to section 92, the scope of section 40A(2) is restricted only to the expenses incurred by the assessee. Section 40A(2) does not embark upon measuring the reasonableness of income earned by the assessee from its related parties. At the same time it also does not operate when a transaction concerns only the assets of the assessee. On a larger canvas, we can say that the ambit of section 92 is much wider than section 40A(2) as it extends beyond the item of expenses, which constitute the only scope of section 40A(2).

16.10.3. It is of utmost importance to note that the role of section 40A(2) is only to determine as to whether the quantum of a particular expenditure is reasonable or not. It does not decide the otherwise question of the very deductibility of expenditure claimed by the assessee in the first instance. Section 92 of the TP provisions, when applied to considering the allowance for any expense arising from an international transaction, tests as to whether the claim of expenditure is at arm's length or not. Suppose the Indian enterprise has paid interest to the foreign AE, section 92 will determine as to whether the payment of such interest by the Indian AE is at arm's length or not or whether it is excessive or unreasonable. To this limited extent, the role of section 92 equates with that of section 40A(2). We have noted earlier that section 92 covers not only the expenses but also items of income of the assessee or transactions having bearing on profits, losses or assets of the Indian AE. Suppose the Indian AE has rendered any service to its foreign AE and has charged less than what an independent comparable entity would have charged, section 92 will intervene to bring the income from such service at arm's length price. It may also be possible that the Indian enterprise does not at all charge from the foreign AE for any service rendered by it. In such a situation also, even though there is no item of income in the profit and loss account of the Indian assessee, still section 92 will apply to dictate that the income should be included in the total income of the Indian AE for rendering such services as an independent comparable entity would have charged. It is so for reason that the non-charging or under-charging by the Indian AE from its foreign AE has bearing on its profits. Coming back to the interplay between section 37(1) and 40A(2) on one hand and section 37(1) and 92 on the other, we have seen that there is a lot of difference between the scope of section 40A(2) and section 92 of the TP provisions. It is impermissible to draw a blind support from the decisions rendered on the deductibility of expenses u/s 37(1) read with section 40A(2) in the context of section 92.

16.11.1. Now we take up the set of cases relied on by the ld. AR including the Delhi Bench of the tribunal in *Nestle India (supra)*, in which it has been held that advertisement and sales promotion expenses incurred by the assessee for promoting sales in India in respect of products manufactured by it under various brands of a foreign company are allowable in entirety even though it might have benefitted the non-resident company who owned the brands of such products and hence there was no question of invoking section 92 for making any disallowance. At the outset, we want to make it clear, as was also admitted by the ld. AR that these decisions were rendered under section 92 which was there on the statute prior to its substitution by the TP provisions. The hitherto section 92 provided as under :-

> "92. Income from transactions with non-residents, how computed in certain cases.-- *Where a business is carried on between a resident and a non-resident and it appears* to the Assessing Officer *that, owing to the close connection between them*, the course of business is so arranged that the business transacted between them produces to the resident either no profits or less than the

> ordinary profits which might be expected to arise in that business**,** *the Assessing Officer shall* determine the amount of profits which may reasonably be deemed to have been derived there from and *include such amount in the total income of the resident.*

(emphasis supplied by us)

16.11.2. It can be observed from the prescription of this section that it extended only to a situation where a business was carried on between a resident and a non-resident and when it appeared to the AO that owing to the close connection between them, the course of business was so arranged that the business transacted between them produced to the resident either no profits or less than the ordinary profits, which might be expected to arise in that business**.** Obviously the advertisement and sales promotion expenses incurred by the assesses in such cases for promoting their sales in India could not have been said to be part of business transacted between such residents and non-residents, so as to suffer hit from section 92. Presently, we are concerned with the post insertion era of the TP provisions. Now the requirement is to subject all the international transactions to the TP provisions for finding out if these have been recorded at arm's length price. Since the provisions of the then existing section 92 were found to be insufficient to tackle the tax evasion in a proper manner, the present anti tax avoidance TP provisions were introduced with a larger and specific scope. There is another significant distinguishing feature between the old and new section 92. Whereas burden of proving that the course of business was arranged in such a way so as to produce less profit in India was on the AO under the old section 92, now this burden has been shifted on the assessee to prove that each and every international transaction has been recorded at arm's length price. The expression "if it appears to the assessing officer", as used in the hitherto sec. 92 clearly demonstrates that the burden was on the Assessing Officer to show as to how it appeared to him that the transactions were arranged between Indian entity and foreign entity with a view to reduce taxable profit in India. New sec. 92 of Chapter X has changed the entire scenario by placing initial burden of proof on the assessee to show that the international transactions with AEs are at arm's length price. Circular no. 214 of 2001 clearly provides in para 15.12 that "under the new provisions the primary onus is on the tax payer to determine arm's length price in accordance with rules and to substantiate the same with the prescribed documentation. Where such onus is discharged by the assessee and the data used for determining the arm's length price is reliable and correct, there can be no intervention by the assessing officer. …. If any such circumstance exists, the assessing officer may reject the price adopted by the assessee and determine the arm's length price in accordance with the same rules." It is further relevant to observe that the Special Bench in *Aztec Software & Technology Services Ltd. Vs. ACIT [(2007) 107 ITD 141 (Bang.) (SB)]*, has clearly held that the burden to establish that international transaction was carried at arm's length price is on the tax payer. In view of the above discussion it is amply clear that sec. 92 of Chapter X as brought out on the statute by the Finance Act, 2001, has shifted the burden of proof on the assessee to establish that the international transaction has been recorded at arm's length price. As there is a vast difference between the scope of the earlier and present section 92, the decisions rendered in the context of the former section 92 *per se* can't be validly applied.

16.12. Under such circumstances it is not possible to accept the contention that the Revenue has subjected the AMP expenses incurred by the assessee to the TP provisions, which are otherwise deductible u/s 37(1). The correct position is that the Revenue by this exercise has only ascertained the cost/value of the service rendered by the assessee to the foreign AE towards creation and improvement marketing intangibles. We, therefore, hold that there is no merit in the contention of the ld. AR that the AO/TPO has made any disallowance out of advertisement expenses, which are otherwise deductible in full u/s 37(1).

Relevant factors for determining cost/value of international transaction of AMP expenses :

17.1. Without prejudice to the above submissions, the ld. counsel for the assessee submitted that DRP/AO were not justified in computing the figures of ₹182.71 crore ₹161.21 crore . It was stated that the TPO considered incomparable cases for the purpose of making comparison of the percentage of assessee's AMP expenses and further failed to give effect to the other relevant factors having bearing on the determination of such figures. The TPO chose certain such companies which were not comparable in terms of nature of products, size of share in the market etc. The ld. AR contended that

that the TPO finally selected only two cases for the purposes of comparison, viz., Videocon Appliances and Whirlpool of India Ltd. Both these cases were claimed to be not comparable due to one reason or the other. If some comparison was to be made, the ld. AR stated that it should have been made with the cases also using a foreign brand, such as Samsung. He also submitted that the TPO has simply gone by the comparable cases and failed to give any weight to other relevant factors such as the tenure of agreement with the foreign AE, payment of royalty and subsidy allowed by the foreign AE on the goods imported etc.

17.2. We find that the first step in making comparability analysis, is to find out some comparable uncontrolled cases. It goes without saying that a comparison can be made with the cases which are really comparable. A case is said to be comparable when it is from the same genus of products and also other relevant factors, such as, type of products, market share, assets employed, functions performed and risks assumed, are also similar. Once proper comparable cases are chosen, then the next step is to neutralize the effect of the differences in relevant facts of the case to be compared and the assessee’s case, by making suitable plus or minus adjustments.

17.3. From the arguments of the ld. counsel for some of the interveners it transpires that the nature and terms of the agreements between the Indian AEs and foreign AEs differ from case to case. In some cases there is payment of royalty for the brand use, while in others it is not. In some cases, the tenure of agreement is less, while in others it is more, while still in some others there is no reference to the termination date of the agreement. In some cases, the Indian entity has paid a consolidated payment towards fees for the use of technical know-how and royalty. In some cases, the payment is only for technical know-how, still in some others the payment is only for royalty. In some cases the Indian enterprise is engaged in manufacturing of the products having foreign brand, while in others, the Indian entity is only a distributor. In some cases, the Indian entity has got subsidy on the purchases made from the foreign AE, while in others, there is no such subsidy. In some cases, the foreign entity has presence in Indian only in one field through one Indian enterprise, while in others it has presence in different fields represented by different Indian entities. In this way we can see that there are also certain other factors distinguishing one case from the other.

17.4. In our considered opinion, following are some of the relevant questions, whose answers have considerable bearing on the question of determination of the cost/value of the international transaction of brand/logo promotion through AMP expenses incurred by the Indian AE for its foreign entity :-

1. Whether the Indian AE is simply a distributor or is a holding a manufacturing licence from its foreign AE ?

2. Where the Indian AE is not a full fledged manufacturer, is it selling the goods purchased from the foreign AE as such or is it making some value addition to the goods purchased from its foreign AE before selling it to customers ?

3. Whether the goods sold by the Indian AE bear the same brand name or logo which is that of its foreign AE ?

4. Whether the goods sold bear logo only of foreign AE or a logo which is only of the Indian AE or is it a joint logo of both the Indian entity and its foreign counterpart ?

5. Whether Indian AE, a manufacturer, is paying any royalty or any similar amount by whatever name called to its foreign AE as a consideration for the use of the brand/logo of its foreign AE?

6. Whether the payment made as royalty to the foreign AE is comparable with what other domestic entities pay to independent foreign parties in a similar situation.

7. Where the Indian AE has got a manufacturing licence from the foreign AE, is it also using any technology or technical input or technical knowhow acquired from its foreign AE for the purposes of manufacturing such goods ?

8. Where the Indian AE is using technical know-how received from the foreign AE and is paying any amount to the foreign AE, whether the payment is only towards fees for technical services or includes royalty part for the use of brand name or brand logo also ?

9. Whether the foreign AE is compensating the Indian entity for the promotion of its brand in any form, such as subsidy on the goods sold to the Indian AE ?

10. Where such subsidy is allowed by the foreign AE , whether the amount of subsidy is commensurate with the expenses incurred by the Indian entity on the promotion of brand for the foreign AE ?

11. Whether the foreign AE has its presence in India only in one field or different fields ? Where it is involved in different fields, then is there only one Indian entity looking after all the fields or there are different Indian AEs for different fields ? If there are different entities in India, then what is the pattern of AMP expenses in the other Indian entities ?

12. Whether the year under consideration is the entry level of the foreign AE in India or is it a case of established brand in India ?

13. Whether any new products are launched in India during the relevant period or is it continuation of the business with the existing range of products ?

14. How the brand will be dealt with after the termination of agreement between AEs ?

17.5. In fact, it is the collective effect of the above factors in the comparable case and the case to be compared with, which needs to be kept in view before determining the cost/value of the international transaction. There can be no straitjacket formula for giving weight to each of these factors. What is result of each of such factors in determining the cost/value of international transaction depends on the facts of each case. It is the duty of the TPO to give due regard to such factors by making suitable plus or minus adjustments before finally determining the cost/value of the international transaction.

17.6. In principle, we accept the contention of the ld. AR about the necessity of choosing properly comparable cases in the first instance before starting the exercise of making comparison of the AMP expenses incurred by them for finding out the amount spent by the assessee for its own business purpose. However the way in which such comparable cases should be chosen, as advocated by the ld. AR, is not acceptable. He submitted that only such comparable cases should be chosen as are using the foreign brand. We find that choosing cases using the foreign brand *ex facie* cannot be accepted. It is but natural that the AMP expenses of such cases will also include contribution towards brand building of their respective foreign AEs. In such a situation the comparison would become meaningless as their total AMP expenses will stand on the same footing as that of the assessee before the exclusion of expenses in relation to brand building for the foreign AE. The correct way to make a meaningful comparison is to choose comparable domestic cases not using any foreign brand. Of course when effect will be given to the relevant factors as discussed above, it will correctly reflect the cost/value of international transaction.

<u>Scope of AMP Expenses</u>:

18.1. The ld. counsel for the assessee and some of the interveners contended that the TPO has included selling expenses in the total AMP expenses for the purposes of determining the ALP. It was submitted that selling expenses cannot constitute part of AMP expenses. Our attention was drawn towards the erstwhile sections 37(3A) and 37(3B), in which disallowance u/s 37(3A) was prescribed in respect of expenses referred to in sub-sec. (3A), which, *inter alia*, included "advertisement, publicity and sales promotion". It was submitted that various courts have held that the selling expenses cannot be included within the scope of sec. 37(3B).

18.2. The learned Departmental Representative opposed this contention by stating that there is no logic in the contention of the learned AR that the expenses causing sales should be taken out of the total AMP expenses for consideration. All the AMP expenses including the expenses in connection with the sales should be considered as one basket of expenses, out of which the AMP expenses for the creation or promotion of marketing intangibles on behalf of the foreign enterprise are to be segregated. It was contended that since by their very nature most of the AMP expenses are common having been incurred for own business and brand building for the foreign AE, the reduction of expenses in connection with sales would prejudice the computation of the AMP expenses for the brand building.

18.3. Having heard the rival submissions on this issue, we find that the AMP expenses refer only to advertisement, marketing and publicity expenses. A divider needs to be placed between the expenses for the promotion of sales on one hand and expenses in connection with the sales on the other. Both these expenses are required to be kept in different compartments. While expenses for the promotion of sales directly lead to brand building, the expenses directly in connection with sales are only sales specific.

18.4. Sub-section (3A) of sec. 37, before its omission, provided that where the expenses incurred by the assessee on any one or more of the items specified in sec. 37(3B) exceed one lac of rupees, then twenty percent of such excess shall not be allowed as deduction in computing the income chargeable under the head `Profits and gains of business or profession'. Clause (i) of sub-sec. (3B) referred to "advertisement, publicity and sales promotion". The Hon'ble jurisdictional High Court in the case of *CIT Vs. Khetu Ram Bishambar Dass [(2008) 166 Taxman 273 (Del.)],* has held that bonus paid to dealers is not in the nature of sales promotion expenses and hence the provisions of sec. 37(3A) cannot be applied to it. The Hon'ble Calcutta High Court in *CIT Vs. The Statesman Ltd. [(1992) 198 ITR 582 (Cal.)]* has enunciated that the expenses incurred by way of commission paid to sales agent do not attract disallowance under sub-sections (3A) & (3B) of sec. 37. The Hon'ble M.P. High Court in the case of *CIT Vs. Mohd. Ishaque Gulam [(1998) 232 ITR 869 (MP)]* has held that the dealer's commission and sales agent commission etc. cannot be brought within the purview of advertisement, publicity and sales promotion expenses, as referred to in sec. 37.

18.5. We do not find any force in the contention of the learned DR made in this regard. The logic in the exercise of finding out the AMP expenses towards creation of marketing intangibles for the foreign AE starts with the expenses which are otherwise in the nature of advertisement, marketing and promotion. If an expenditure itself is not in the nature of advertising, marketing or promotion, that ought to be excluded at the very outset. We, therefore, reject this contention raised by the learned DR.

18.6. As we are presently considering the term `advertisement marketing and promotion expenses', which is analogous to, if not lesser in scope than the term `advertisement, publicity and sales promotion' as employed in the erstwhile sub-sec. (3B) of sec. 37, all the judgments rendered in the context of sub-sec. (3A) & (3B) of sec. 37 will squarely apply to the interpretation of the scope of AMP expenses. We, therefore, hold that the expenses in connection with the sales which do not lead to brand promotion cannot be brought within the ambit of "advertisement, marketing and promotion expenses" for determining the cost/value of the international transaction.

19. In the facts and circumstances of the present case, it is found that the TPO restricted the comparable cases to only two without discussing as to how other cases cited by the assessee were not comparable. Further it can be seen that the TPO has not considered the effect of any of the relevant factors as discussed above. A bald comparison with the ratio of AMP expenses to sales of the comparable cases without giving effect to the relevant factors as discussed above, cannot produce correct result. It can be illustrated

by a simple example. If there is no subsidy in a comparable case but the assessee has received some amount of subsidy from its foreign AE on imports or in any other manner, which fact otherwise needs to be specifically established by the assessee, then the initial amount so computed would require reduction to the extent of such subsidy or *vice versa*. As the TPO has neither properly considered the request of the assessee for inclusion of some other comparable cases nor examined the effect of the above discussed relevant factors on the question of determination of the cost/value of international transaction, in our considered opinion the ends of justice will meet adequately if the order of the TPO and that of the AO giving effect to such order is set aside and the matter is restored to the file of the TPO for determining the cost/value of the international transaction and the consequent ALP afresh as per law after allowing a reasonable opportunity of being heard to the assessee.

VI. <u>METHODS FOR DETERMINING ALP OF INTERNATIONAL TRANSACTION</u>

20.1. We have noticed above that the TP provisions require two variables. Having seen the first variable, being the cost/value of international transaction above, now we shall find the second variable, being the arm's length price of the international transaction.

<u>TNMM applied on one transaction – Whether ALP of other transactions permissible ?</u>

21.1. The ld. Counsel for the appellant started his contentions on this point by urging in the very beginning that no disallowance can be made out of AMP expenses by benchmarking them separately when the overall net profit rate declared by the assessee is higher than other comparable cases. It was submitted that the assessee made imports from its foreign AE which were subjected to the TP provisions under the transactional net margin method (hereinafter called the TNMM) and hence there was no warrant for making any further addition on the transaction of brand building expenses incurred by the assessee for the foreign AE. The ld. counsel stated that the overall higher net profit rate implies that, firstly, there was no advertisement by the assessee for the brand of the foreign AE and secondly, if at all it was there, the same stood compensated by the foreign AE in terms of sale of goods to the assessee at lower rates. The sale of goods at lower prices to the assessee by the foreign AE should be considered as a *quid pro quo* for the foreign brand building. For ascertaining as to whether or not the foreign enterprise sold goods to the assessee at a lower price, the ld. AR urged that the overall net profit rate of the assessee should be considered, which will naturally absorb the effect of incurring such brand building expenses. If the overall profit rate is higher, it will mean that the expenses incurred by the assessee on brand building were compensated by the foreign AE in terms of lower price of goods charged from the Indian AE, necessitating no separate further addition on the alleged presumption of the assessee having incurred any AMP expenses towards brand building. The ld. AR relied on the case of the Hon'ble Supreme Court in *CIT Vs. Calcutta Discount Co. Ltd. [(1973) 91 ITR 8 (SC)]*, to canvass the view that the assessee cannot be expected to earn maximum profit. It was submitted that the action of the Revenue in firstly taxing higher rate of net profit on sales and thereafter further increasing the income by making addition on account of AMP expenses, runs contrary to the cardinal principle laid down in that case. He explained that in that case the Revenue opined that the assessee should have transferred its goods at a higher price than that declared. Rejecting this contention, the Hon'ble Supreme Court came to hold that that once a transaction is *bona fide*, the profit cannot be computed by taking market price, ignoring the real price fetched. In the light of this judgment it was contended that the action of the Revenue in firstly benchmarking the net profit by applying TNMM on the international transaction of imports and then making separate addition for AMP expenses is akin to the stand of the Revenue in that case, being the maximization of profit in all possible ways, which cannot be sustained. With reference to certain material from the paper book, the ld. AR submitted that the assessee's net profit rate was better than certain other comparable cases. Since the overall net profit of the assessee was relatively higher, it was pleaded that no addition was called for by separately processing any item of expense including the AMP under the TP provision. Similar arguments were advanced by the ld. counsel for some of the interveners.

21.2. Per contra, the ld. DR strongly opposed this contention by submitting that there is no requirement under law that if one transaction has been subjected to the transfer pricing provisions by applying the TNMM then no other international transaction can be separately considered. It was accentuated that all the international transactions are required to be viewed independent of each other.

21.3. We have heard the rival submissions on this issue in the light of material placed before us and precedent relied. The crux of the ld. AR's submission in this regard is that when the international transaction of import of raw material was scrutinized by the TPO under TNMM and the overall net profit of the assessee was found to be higher than other comparables, then no other international transaction could have been processed under the TP provisions. There are two sub-arguments in this main argument of the ld. AR. First, that the international transaction of import of raw material has been processed under the TNMM on entity level and second that when on doing this exercise, the overall net profit was found to be better than other comparables, then the no addition was called for by subjecting the AMP expenses to the TP provisions.

21.4. There is a basic fallacy in the first sub-argument, which lies in not properly appreciating the *modus operandi* of applying the TNMM. This method provides for benchmarking of `an' international transaction by considering the operating profit from the concerned international transaction *vis-à-vis* certain basis as given in Rule 10B(1)(e), being total cost, sales, capital employed etc. Here it is significant to note the meaning of the term `transaction' as given in rule 10A(d). It provides that : `transaction includes a number of closely linked transactions'. Plural of transactions becomes singular when the transactions are closely linked to each other or are identical. These closely linked transactions can be processed as one transaction under any of the prescribed methods. If an Indian enterprise has made sale of similar goods to its foreign AE through several invoices and has also incurred some expenses or paid interest to it, it would mean that all the transactions of sales are closely linked and these can be processed as one unit. However the transactions of payment of interest or incurring of any other expense would be required to be separately scrutinized under Chapter-X because these are of a different nature *vis-a-vis* the transactions of sales.

21.5. It is undisputed that under the TNMM, it is always the operating profit from the concerned international transaction that is viewed in relation to the total cost, sales or capital employed etc. of that international transaction. It is not as if the percentage of the margin is to be determined by considering the net profit of the entity in relation to the total sales of the entity. When we consider operating profit to total costs of an international transaction, all the items of non-operating expenses and non-operating income *qua* such international transaction are liable to be excluded. The correct approach under the TNMM is to consider the operating profit from each international transaction in relation to the total cost or sales or capital employed etc. of such international transaction and not the net profit, total costs, sales, capital employed of the assessee as a whole on entity level. Section 92C unequivocally provides that the ALP in relation to `an’ international transaction shall be determined by any of the prescribed methods. In turn, rule 10B(1)(e) also talks of the net profit margin realized by the enterprise from `an' international transaction. When the mandate of the section and the relevant rule is unambiguous so as to apply on each transaction, as is apparent from the use of the article `an', then the computation of the ALP of `an' international transaction on the entity level is inappropriate. Our conclusion that each international transaction is required to be separately scrutinized under Chapter-X also becomes apparent from the language of section 92(3) as discussed *infra*. Thus it is clear that the sanction is for applying the TNMM only on a transactional level and not on entity level. Of course, the TNMM can be correctly applied on entity level if all the international transactions are of sale by the assessee to its foreign AE and there is no other transaction of sale to any outsider and also there is no other international transaction. But if there are several unrelated international transactions, as is the case before us and the assessee or the TPO has applied the TNMM in a wrong manner on entity level for testing any of such transactions, then the remedy lies in correcting such mistake rather than drawing legally unsustainable conclusions by taking such mistake as a correct legal position.

21.6. Now we espouse the second sub-argument that when on applying the TNMM on entity level for the transaction of import of raw material the overall net profit is better than other comparables, then no addition is called for by subjecting the AMP expenses to the TP provisions. We have held in an earlier para that when there are different unrelated international transactions, the application of TNMM on entity level for examining one of such transactions, is itself an incorrect approach. Notwithstanding that, we deem it expedient to deal with the argument of the ld. AR that if rate of net profit of the assessee is better than other comparables, then no adjustment can be done under Chapter-X.

21.7. On a specific query from the Bench, it was admitted by the ld. AR that no addition was made by the TPO on account of application of the TNMM on the imports made by the assessee from its foreign AE. In our considered opinion, there is a noteworthy difference between two situations, viz., one where the TNMM is wrongly applied on entity level and some addition is made to the overall net profit of the Indian AE while testing the international transaction of imports of raw material and also some further addition is made by applying the TP provision on AMP expenses; and the situation in which no addition is made to the overall profit on account of application of the TNMM but an addition is made by applying the TP provisions on the transaction of AMP expenses incurred towards brand building for the foreign AE.

21.8. We find no bar on the power of the TPO in processing all international transactions under the TP provisions when the overall net profit earned by the assessee is better than others. Earning an overall higher profit rate in comparison with other comparable cases cannot be considered as a licence to the assessee to record other expenses in international transactions without considering the benefit, service or facility out of such expenses at arm's length. All the transactions are to be separately viewed. This position can be seen with a simple illustration. Suppose an Indian entity is engaged in manufacturing of some products and all the sales are to its foreign AE. In such international transaction, it earns actual profit of, say, ₹120/-. Further suppose the arm's length profit on total sales earned in comparable uncontrolled transactions is ₹100. In such a case, there can be no question of making any addition on account of arm's length profit from such international transaction of sale to foreign AE because the actual overall profit is more than the arm's length profit. It may also be possible that the actual profit of the Indian AE was ₹140/- but the AMP expenses have been so claimed as deduction so as to include a part representing branding building for the foreign AE to the tune of ₹20/-. In such a case, notwithstanding the fact that the assessee's overall profit at ₹120/- is more than the arm's length profit earned by comparable cases at ₹100/-, still there will be a requirement for making adjustment of ₹20/- on account of advertisement expenses incurred by the assessee towards the brand building on behalf of the foreign AE. If we accept the assessee's contention that since ₹120/-, being the profit declared by the assessee from the international transaction is more than the arm's length profit of ₹100/- and hence no further adjustment on account of AMP expenses should be made, then the assessee's income would stand reduced to ₹120/- as against the actual income of ₹140/-. We fail to appreciate as to how the judgment in the case of *Calcutta Discount Co. Ltd. (supra)* advances the case of the assessee. There cannot be any quarrel on the proposition that the assessee cannot be compelled to earn maximum profit. As it is the real profit which is to be taxed and the assessee cannot be expected to earn maximum profit, in the same way, the assessee cannot be allowed to reduce its real profit by including certain expenses which are for the benefit of the foreign AE.

21.9. It is pertinent to note that presently we are dealing with a case in which the majority of the assessee's sales is to Indian customers. Naturally the TP provisions cannot be applied in respect of sales to Indian customers because these are not international transactions. In such a case, there can be no benchmarking of the profits realized from such Indian customers so as to form a platform for contending that the TNMM has been applied on the overall profits and hence the AMP expenses should not be subjected to the TP provisions. In fact, the assessee is a manufacturer and only raw materials are imported from its foreign AE. The transaction of import of raw-material is a separate international transaction liable to be subjected to the TP provisions. Apart from such purchase of raw-material, the assessee, as a manufacturer is also required to incur several other expenses on manufacturing, financing and selling which constitute part of the total cost of product along with the cost of raw materials. Subjecting the international transaction of purchase of raw material to the TP provisions would only show that purchase price of raw-material is not unnecessarily inflated. It is self evident that net profit is not dependent only on the purchase cost. A host of other factors contribute to the earning of profit. It may be possible that a manufacturer succeeds in making economical purchases but suffers setback in incurring other expenses thereby resulting into a comparatively low profit. Similarly there can be a converse situation in which the purchases are made costly but the economies in other areas are achieved thereby leading to higher profit. The crux is that purchase cost is only one of several other important factors having a bearing on the overall profit. All other costs, including the AMP expenses are independent of such cost of import of raw material, having some correlation with the overall profit. In our considered opinion there is no logic in not applying the TP provisions on AMP expenses, if the international transaction of import of raw-material from the foreign AE has been subjected to the TP provisions. As the transactions of import of raw-material and AMP expenses are distinct from each other, having independent effect on the overall net profit of the Indian AE, both are required to be separately processed as per the TP provisions.

21.10. It was also contended on behalf of the assessee that if the overall profit of the Indian entity is more than the comparable cases then it should be presumed that the foreign enterprise supplied goods at relatively low price to make up for the AMP expenses incurred in India towards brand promotion. In our considered opinion there are no roots for such a presumption. In order to take benefit of such a contention the assessee is required to directly prove the fact of cheap purchases *de hors* the overall higher net profit rate. This fact can be established by demonstrating that the foreign AE charged a specially low price from the assessee in comparison with that charged for the similar goods supplied to other independent entities dealing with it in India or in case there is no other independent entity in India, then the price charged for similar goods from other foreign parties. It can also be proved by showing that goods with identical features are available in the Indian market at a higher price. The fact that the assessee has a better net profit rate in comparison with other comparable entities is not decisive in itself of the assessee having purchased the goods at a concessional rate from its foreign AE as a compensation for its incurring AMP expenses towards the promotion of their brand.

21.11. At this stage, it is relevant to note sub-section (1) of section 92, which provides that : `Any income arising from *an international transaction* shall be computed having regard to the arm's length price.' Similarly it is pertinent to take stock of sub-section (3) of section 92, which provides that : `The provisions of this section shall not apply in a case where the computation of income under sub-section (1) or the determination of the allowance for any expense or interest under that sub-section, or the determination of any cost or expense allocated or apportioned, or, as the case may be, contributed under sub-section (2), has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction was entered into'. On a careful perusal of sub-section (3) in combination with sub-section (1), it transpires that if the computation of income having regard to ALP of an international transaction has the effect of reducing the income chargeable to tax computed on the basis of entries made in the books of account, then the provisions of section

92 will be ignored. It can be understood by way of a simple example. If the arm's length price of an international transaction in the nature of expense is ₹100 and the amount of actual expense recorded in the books of account is ₹80/-, then the arm's length price of such expense at ₹100 will be ignored, because acting upon such ALP will lead to lowering of the total income by ₹20, which isn't permissible as per sub-section (3). If however the ALP of such expense turns out to be lower at ₹60, then sub-section (1) of section 92 will apply and the total income of the assessee will be computed by considering the ALP of expense at ₹60, making a northwards sojourn to the total income by ₹20.

21.12. We have noticed above that sub-section (1) of section 92 read with rule 10B requires computation of income from `an' international transaction having regard to its arm's length price. It means that each international transaction is required to be subjected to the TP provisions distinctly. What is relevant to note on a conjoint reading of sub-section (1) and sub-section (3) of section 92 is that if there are two distinct international transactions and the determination of ALP in respect of the first transaction leads to an increase in total income as per sub-section (1) but no adjustment is called for in respect of the second transaction as per sub-section (3) because of the ALP on the negative side, then the ALP in respect of the first transaction shall be considered in computing the total income, but the ALP of the second transaction shall be ignored. There is no provision which permits set off of negative adjustment with the positive adjustment to the income on account of different international transactions. The outcome of both the transactions has to be given effect distinctly. It, therefore, divulges that two or more international transactions are required to be separately processed under the TP provisions. The contention that if TNMM has been applied on one international transaction, then it would oust the jurisdiction of the TPO to process other international transactions under Chapter-X, really does not stand in the scheme of the provisions. Further, it this contention is taken to logical conclusion, then sub-section (3) of sec. 92 will become redundant to some extent.

21.13. There is one more way of fortifying our above conclusion. TNMM is one of the five recognized methods for determining the ALP of an international transaction. Such ALP can be determined *inter alia* by comparable uncontrolled price (CUP) method or Cost Plus method or even by the TNMM. All the five methods, as prescribed under section 92(1) and rule 10B, aim at determining the ALP of an international transaction in one way or the other. First is the CUP method, by which the price charged or paid for property transferred etc. in a comparable uncontrolled transaction is identified. Such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transaction. The adjusted price arrived at is taken as ALP in respect of the property transferred etc. in the international transaction. In the like manner all the methods including TNMM provide for determining the ALP of an international transaction. The main focus of the ld. AR was on restricting the application of the provisions of Chapter-X to other international transactions when one transaction has been processed under the TNMM. It has been argued so on the ground that under the TNMM, the net profit of the entity is considered which includes the effect of all other transactions also. The natural consequence of the ld. AR's argument on this issue is that if the ALP of an international transaction is determined by the TNMM then no other international transaction can be subjected to the TP provisions. From here it follows that if any other method, such as CUP or Resale price method etc., is applied for determining the ALP of an international transaction, then the processing of the other international transactions is permissible. The irrationality of the contention can be measured from this factor alone. As all the five methods are aimed towards one end, being the determination of ALP of an international transaction, it is but natural that the consequences of application of each such method *qua* the other international transactions cannot be varying. It is not possible to hold that if one method is employed for determining the ALP of an international transaction then it is open to the TPO to process other international transactions through the TP provisions, but if some other method is so used, then all other international transactions are immune from such processing. The ld. AR could not draw our attention towards any such provision in the Act. At best, the application of any method including TNMM shows that the said transaction is at ALP. In our considered opinion, the requirement of benchmarking all other international transactions of expenses including AMP, also needs to be scrupulously done, apart from testing one international transaction under the TNMM.

22.1. Notwithstanding his argument that the when the TNMM is applied to international transaction of imports, no addition can be made by processing any other international transaction, the ld. AR then contended that the addition by way of adjustment made is not sustainable because the determination of ALP in this case is not based on any of the methods prescribed under the transfer pricing regulations. Referring to sec. 92C, the ld. AR submitted that five methods have been listed in specific and there is a general clause i.e. (f), which states – "such other methods as maybe prescribed by the Board". It was stated that such other method as per clause (f) of sec. 92C(1), has been brought into existence by means of Notification dated 23-5-2012 through Income-tax sixth Amendment Rules 2012 coming into force on first day of April 2012, applicable from the A.Y. 2012-13. Relying on the judgment of the Hon'ble jurisdictional High Court in the case of *Maxopp Investment Ltd. & Ors. Vs. CIT [(2012) 247 CTR (Del.) 162]*, the ld. AR contended that Rule 10AB, specifying the sixth method, cannot have retrospective operation when it has been made applicable from A.Y. 2012-13.

22.2. Coming back to his point, it was argued that the TPO/DRP have determined ALP in respect of AMP expenses by applying the bright line test, which is not one of the five recognized methods under the Indian legislation. As determination of ALP has not been done as per any of the methods u/s 92C, the ld. AR contended that the same should be set aside. He relied on an order passed by the Mumbai Bench of the Tribunal in *CA Computer Associates Pvt. Ltd. Vs. DCIT* dated 28-1-2010, in which the assessee paid royalty to its parent company. The TPO rejected the ALP of royalty payment as shown by the assessee on the ground that some of the sales did not materialize for various reasons and the same were written off by the assessee in the same financial year. It was opined that there was no question of paying royalty on such sales merely on the basis of raising invoices. The Tribunal rejected the Departmental stand by holding that the ALP was not determined by the TPO as per any of the methods prescribed in Rule 10B. To this extent the action of TPO was set aside. The said order passed by the Tribunal has been upheld by the Hon'ble Bombay High Court in the case of *CIT Vs. CA Computers Pvt. Ltd.* *vide* its judgment dated 3-7-2012. In view of this legal position, the ld. AR contended that since the bright line method adopted by the authorities below is not a recognized method, the determination so made should be set aside and the matter need not be restored for a fresh determination. It was also contended that the Revenue cannot be allowed to have second innings for its own fault. The ld. AR further submitted that the TPO did not confront the assessee with the computation of the ALP by applying the bright line test, which goes against the principles of natural justice.

22.3. The learned Counsel for one of the interveners submitted that any contract for purchase/service involves two elements viz. quantity and price. Chapter-X of the Act only touches price aspect and not quantity aspect. By adopting the bright line method, the learned counsel contended that the TPO has impinged on the quantum aspect of the advertisement expenses which cannot fall within the purview of Chapter-X. He submitted that by applying the bright line method, the TPO/AO have taken a view that the assessee should not have incurred so much expenses on AMP. He also contended that Chapter-X of the Act is a complete code in itself inasmuch as it includes not only the substantive but also the machinery provisions. If machinery provision cannot be applied then the subject matter goes out of the tax net. In support of this contention, he relied on the judgment of the Hon'ble Supreme Court in the case of *CIT v. B.C.Srinivasa Setty [(1981) 128 ITR 294 (SC)]* and another judgment of the Hon'ble Supreme Court in the case of *PNB Finance Limited v. CIT [(2008) 307 ITR 75 (SC)]*. In the light of these judgments it was submitted that the Hon'ble Supreme Court has clearly held that where machinery provision fails, the charge cannot be attracted under the substantive provision. Since the Revenue's case hinges on the computation of ALP of AMP expenses on the basis of a bright line method which is not prescribed u/s 92C, the ld. AR contended that the entire exercise must fail.

22.4. Per contra, the ld. DR emphasized on the word "any" as used in sub-section (1) of section 92C(1). His contention was that the word "any" in sub-section (1) cannot be read as restricting itself to any one of the five methods but it may also be a combination of two or more of such methods. He relied on certain tribunal orders to buttress his point that the ALP can be determined be any method even though it is not specifically one of such five methods. He invited our attention towards an order passed by the Bangalore Bench of the Tribunal in which it has been held that Excess Earning Method (EEM) should be applied for determination of ALP which is nothing but enlargement of the CUP method. He also referred to another order passed by the Bangalore Bench of the Tribunal in which scope of the CUP method has been enlarged. In this case the Tribunal directed the determination of ALP by computing written down value of the asset as against the value as per the Registered Valuer's report, which was adopted by the TPO. The learned DR contended that the main thrust of the TP provision is on the determination of ALP and methods are only means to achieve this end result. He argued that if there is an international transaction and the ALP cannot be determined by any of the prescribed methods, then there can be no fetters on the powers of the TPO to adopt any other method for determining ALP.

22.5. Without prejudice to his above submission, the learned DR contended that the action of the DRP in enhancing the cost/value of the international transaction of ₹161.21 crore by a mark-up of 13% led to the implicit application of the `cost plus method'. It was submitted that merely because there is no express mention of the use of cost plus method, the reality and the substance of the application of such method cannot be denied.

22.6. Replying to the contention raised on behalf of the assessee for cancelling the assessment itself for the reason of application of a non-prescribed method, the learned Departmental Representative contended that the DRP applied cost plus method. Even if in any case there is a wrong application of method by the authorities, the right course is to send the matter back to the AO/TPO for correcting the deficiency instead of taking away the jurisdiction itself.

22.7. In rejoinder, the learned AR found fault with the argument of the ld. DR on the application of the cost plus method by contending that this method cannot be applied as the transaction is not in the nature of rendering of service. His contention was that unless an assessee itself is regularly engaged in the provision of service which is provided to the AE, the cost plus method u/s 10B(1)(c) cannot apply.

22.8. We have considered the rival submissions. Before proceeding further it is imperative to note that we have dealt with the contention of the ld. AR about the application of bright line test by the authorities below by holding that such method has been employed to determine the cost/value of international transaction and not its ALP. Another contention has been raised by the ld. AR that unless an assessee itself is regularly engaged in the business of providing services, there can be no provision of service to the other AE. This contention has also been dealt with and rejected by holding that the present international transaction is in the nature of `provision of service'. Now we will proceed to see if it has to be any of the prescribed methods or it can even be a combination thereof and further if an inappropriate method is applied by the authorities below then what are the consequences.

22.9. Section 92(1) of the Act provides that any income arising from an international transaction shall be computed having regard to the arm's length price. Computation of arm's length price has been set out in section 92C. Sub-section (1) provides that the ALP of an international transaction shall be be determined by any of the following methods, being the most appropriate method. Five methods are distinctly prescribed u/s 92C(1) and then there is clause (f) which talks of any other method as may be prescribed. Since sixth method has been prescribed under rule 10AB through the Income-tax (6th Amendment) Rules, 2012 which has been made applicable from the A.Y. 2012-13, the same cannot apply to the assessment year under consideration in view of the judgment of the Hon'ble jurisdictional High Court in *Maxopp Investment Ltd. (supra).* Rule 10B provides the *modus operandi* for the computation of ALP under these five methods. Sub-section (1) of section 92C starts with : "The arm's length price in relation to an international transaction shall be determined by *any* of the following methods, being most appropriate method ……………". In our considered opinion, the contention of the ld. DR laying emphasis on the word `any' for propelling his point of view that the method for determining the ALP can also be a combination of the prescribed methods, is devoid of force. There is no doubt that the word "any" has been used u/s 92C(1) which would have ordinarily implied that any specific or non-specific method or even a combination of one or more prescribed methods is sufficient. However it is relevant to note that the scope of the word "any" is circumscribed by the succeeding words "of the following methods being the most appropriate method". The ambit of the word "any" in sub-section (1) has been restricted by the `following' five specific methods given in the later part of the provision. Rule 10B also provides in the same manner that "…. the arm's length price in relation to an international transaction shall be determined by *any* of the *following methods*, being the most appropriate method…….". Here also the word `any' is succeeded by the word `following', which implies that it can be any of the five methods prescribed in the following part of the rule. When we read sub-section (1) of section 92C in entirety along with Rule 10B(1), there remains no doubt that the arm's length price is required to be determined by any single method out of the five prescribed methods. It is further pertinent to note the prescription of Rule 10C which deals with the determination of most appropriate method to be applied for determining ALP. Sub-rule (1) provides that the most appropriate method for the purpose of section 92C(1) shall be the method which is best suitable to the facts and circumstances of each case. Sub-rule (2) which assumes significance in the present context provides that : "In selecting *the* most appropriate method as specified in sub-rule (1), the following factors shall be taken into account………". Use of the definite article "the" in sub-rule (2) along with the most appropriate method, makes it abundantly clear that it can be any of the methods given in sub-rule

(1), that, in turn, draws strength from section 92C(1), which refers to the five methods. In our considered opinion the general and a non-case specific argument advanced by the ld. DR that there can also be a combination of the one or more of the five methods for determining the ALP, is not correct.

22.10. As regards the contention that methods are tools for determining the ALP, we find that there is no dispute that the main purpose of Chapter X is to determine the ALP of an international transaction, but such determination can be done only by way of the methods specified by the statute. When the legislature has specifically enshrined a provision u/s 92C requiring the computation of ALP by any of the prescribed methods, it does not fall in the realm of the TPO or for that matter any other authority to breach such mandate and apply or direct to apply any other method. Going by the dictate of the provision as subsists under sub-section (1) of section 92C, there can be absolutely no doubt on adoption of any single method out of those set out in section.

22.11. Rule10B has specified a set procedure to be followed for determining the ALP distinctly under the five methods. It is equally not permissible to invent a new procedure and try to fit such procedure within any of the existing procedures prescribed as per these methods. No one is authorized to add one or more new steps in the prescribed procedure or to substitute any other mechanism with the one prescribed under the rule. It is neither possible to invent a new method nor to substitute a new methodology in place of the one prescribed in the rule.

23.1. We have noticed from the orders of the authorities below that there is no express reference to any method employed for determining the ALP of the international transaction. This factor in itself, cannot be considered as detrimental to the computation of the ALP, if in substance it has actually been computed by any of the prescribed methods. In our considered opinion the DRP as well as AO in passing the impugned order were right in applying the spirit of the `cost plus method' to the facts of the instant case by firstly identifying the cost/value of service provided to the assessee and thereafter adding mark-up. The mere fact that DRP did not specifically mention it in so many words, will not *ipso facto* mean that it did not apply the cost plus method, when the essence of the working matches with the methodology provided in that method.

23.2. At this stage it will be apt to note the directive of `cost plus method' as per rule 10B(1) (c), which is as under :-

> *"(c) cost plus method, by which,—*
> *(i) the direct and indirect costs of production incurred by the enterprise in respect of property transferred or services provided to an associated enterprise, are determined ;*
> *(ii) the amount of a normal gross profit mark-up to such costs (computed according to the same accounting norms) arising from the transfer or provision of the same or similar property or services by the enterprise, or by an unrelated enterprise, in a comparable uncontrolled*

> *transaction, or a number of such transactions, is determined ;*
> *(iii) the normal gross profit mark-up referred to in sub-clause (ii) is adjusted to take into account the functional and other differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect such profit mark-up in the open market ;*
> *(iv) the costs referred to in sub-clause (i) are increased by the adjusted profit mark-up arrived at under sub-clause (iii) ;*
> *(v) the sum so arrived at is taken to be an arm's length price in relation to the supply of the property or provision of services by the enterprise ;"*

23.3. Going by the cost plus method as per rule 10B(1)(c), we find that the first step is to determine the cost of services provided by an enterprise to its associated enterprise. We have noticed above that the authorities below have computed the cost/value of the service provided to the foreign AE at ₹161.21 crore. It is this amount which constitutes the first step under the cost plus method. The second step is to determine the amount of normal gross profit mark-up to such costs arising from the provision of similar service by an unrelated enterprise in an uncontrolled comparable transaction. The third step under the cost plus method is to adjust the gross profit mark-up as determined under the second step to take into account the functional or other differences between the comparable uncontrolled transaction and the international transaction. The DRP determined 13% profit mark-up. The adoption of 13% constitutes steps 2 and 3 of the cost plus method. Step 4 talks of increasing the cost as determined under step 1 by such adjusted profit mark-up. In this case, the DRP increased cost of ₹161.21 crore under step 1 with 13% as determined under steps 2 and 3 to find out the amount as per 4th step at ₹182.71 crore. Step 5 declares that the figure computed under step 4 should be taken as an arm's length price for the provision of services by the enterprise. Thus it is vivid that the DRP determined a sum of ₹182.71 crore as the ALP under the cost plus method of the international transaction in the nature of provision of service with its cost/value at ₹161.21 crore.

23.4. It is relevant to note that under second and third steps what is required to be determined is the rate of normal gross profit mark-up as arising to the enterprise from an uncontrolled transaction or to an unrelated enterprise in a similar situation. Here it is significant to note that a comparable uncontrolled transaction to be considered for benchmarking the normal gross profit mark-up has to be similar to the international transaction under consideration. Consequently, the profit mark-up under steps 2 and 3 should in the present case be the rate which an independent third party earns for creating marketing intangible for and on behalf of the foreign enterprise. In the present case, the DRP suggested 13% mark-up. The DRP went wrong in applying steps 2 and 3 by arbitrarily determining the rate of mark-up at 13% without showing as to how much an independent comparable entity has earned from an international transaction similar to one which is under consideration.

23.5. At this juncture we consider it expedient to refer clause (ii) of section 92F which defines "arm's length price" to mean "a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions". Rule 10A of the Income-tax Rules, 1962 gives meaning to "uncontrolled transaction" under clause (a) as "a transaction between enterprises other than associated enterprises, whether resident or non-resident". It is this expression "uncontrolled transaction" which has been used in Rule10B(1) *inter alia* in clause (c) i.e. cost plus method. A reading of section 92F(ii) with Rule 10A(a) and 10B(1)(c) in unison clearly points out that the arm's length price is a price which is applied in a transaction between non-AEs in uncontrolled conditions. Steps 2 and 3 of rule 10B(1)(c) contemplate the determination of normal gross profit mark-up of a comparable uncontrolled transaction, which would mean a transaction between non-AEs. One has to necessarily pass through these steps for determining ALP under the cost plus method. When these steps unequivocally provide for determining normal gross profit mark-up from the provision of similar services by an unrelated enterprise in a comparable uncontrolled situation, what is required to be done is to first find out some comparable uncontrolled transaction; then ascertain the profit mark-up of such comparable uncontrolled transaction; and then adjust it to bring it at par with the international transaction under consideration by removing the effect of factors of non-comparability. The cost plus method under Rule 10B(1)(c) does not provide for assuming a hypothetical profit mark-up under steps 2 and 3 for determining ALP. It has to be a profit mark-up of a comparable uncontrolled transaction. The DRP suggested 13% mark-up without showing such mark-up in a comparable uncontrolled transaction. This course of action cannot be sanctioned. When the rule prescribes a particular method to be followed and the steps so given are unambiguous, it is impermissible to substitute such steps with any other mode. Accordingly we do not approve the action taken by the A.O. in implementing the direction of the DRP to mark-up 13% on the cost/value of international transaction.

23.6. We have held earlier in this order that the TPO was not justified in restricting himself only to the two comparable cases as against certain other comparable cases cited by the assessee without verifying or discussing the comparability or otherwise of such cases cited by the assessee. These observations have been made in the context of determining the cost/value of international transaction which was worked out by the authorities below at ₹161.21 crore. Certain relevant factors have also been discussed by us in that part of the order which should be taken into consideration before determining the cost/value of the transaction. Resultantly, we have set aside the cost/value of international transaction at ₹161.21 crore and restored the matter to the file of AO/TPO for determining such value afresh after allowing a reasonable opportunity of being heard to the assessee. This determination would provide the figure of first step as per the cost plus method, being the cost/value of the international transaction. As the DRP also did not correctly proceed to compute the correct rate of mark-up as per law, in our considered opinion the ends of justice would adequately meet if the process of determining normal profit mark-up as per steps 2 and 3 of Rule 10B(1)(c) as against 13% applied by the DRP/AO, is also restored to the file of the AO/TPO so that he may determine the cost/value of international transaction in the first instance and then the ALP of this international transaction.

24.1. We do not find any substance in the contention of the learned AR that since the authorities below did not apply any of the recognized methods, their orders be declared as void *ab initio* without requiring any restoration for fresh determination. The obvious reason is that, even if it is presumed that the contention of the ld. AR is correct, which is otherwise not because of the application of the essence of the cost plus method by the DRP/AO in the present case, it would at the most be a case of defect in application of the procedural provision in the sense that the ALP has not been computed strictly as per the force of the prescribed methods. It would not be a case that the authorities lacked jurisdiction to determine ALP or their action was barred by the limitation period. In that sense it would be a case of irregularity. Once an irregularity intervenes at a particular stage of the proceedings, the requirement is to take the hands of clock back to such stage and then make the necessary correction. Any proceedings become nullity when these are taken without any jurisdiction or beyond the limitation period. The test to determine as to whether the order passed is invalid or irregular is to see whether there is a lack of jurisdiction or a procedural default. Coming back to our context, we find that the lapse came in applying the procedure of determining ALP correctly. Such a lapse coupled with the fact that there was otherwise valid jurisdiction and the action was well within the time limit, cannot in our considered opinion lead to the declaration of the order as a nullity. There occurred an irregularity due to such lapse which can very well be cured by correcting it from the stage at which such lapse occured. In view of the foregoing discussion, we are of the considered opinion that there is no merit in the contention of the learned AR that the entire proceedings be declared as null and void simply because of some procedural lapse in determining the ALP of the international transaction.

24.2. There can be no dispute on the legal proposition raised by the ld. counsel for the assessee and some of the interveners that if the computation provision is not capable of application, then the charge shall cease under the substantive provision. In our considered opinion there is even no failure of any procedural provision in that sense of the matter. It is not as if the ALP of the transaction is not capable of ascertainment. The same has actually been ascertained in the order appealed against and we have held above that the `cost plus method' is correctly applicable for determination of the ALP. The raising of this argument by the ld. AR seems to have been prompted because of incorrectly proceeding with the presumption that the bright line test was applied to determine the ALP of the international transaction, whereas the correct position is that the resultant figure is the cost/value of the international transaction.

25. Once the assessee has disclosed the ALP of a transaction, it is for the TPO to satisfy himself as to the correctness of such ALP. If the TPO is not satisfied with such correctness or where the assessee has failed to compute such ALP, as is the case under consideration, it is always the duty of the TPO to find out the ALP of international transaction. If similar transaction is not there, it is not that the TP provision would become redundant or the TPO will become *functus officio*. In that case it will again be on the TPO to find out a case, which is comparable to some extent and then make suitable adjustments to the price in such a case so as to bring it at a level with the international transaction of the assessee which is sought to be compared. Rule 10B(3) provides to this extent by providing that an uncontrolled transaction shall be comparable to an international transaction if none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transaction in the open market or "reasonably accurate adjustments can be made to eliminate the material effects of such differences". Thus it is evident that the TPO is required to eliminate the material effects of difference between a partly comparable uncontrolled transaction and the transaction under consideration by making suitable adjustments, so as to bring both the transactions to the level of comparability.

26. Insofar as the contention of one of the interveners that the Department cannot process the quantity aspect under the TP provisions is concerned, we find that the Revenue has not proceeded

to determine the quantity aspect of the international transaction but only the price aspect. The case of the Revenue is that out of say ₹100 advertisement expenses incurred by the assessee, only , say, ₹30 pertain to the assessee for its business purpose and remaining ₹70 are towards creating or promoting marketing intangible for and on behalf of the foreign AE. The Department is not making out a case that the assessee should have incurred ₹90 or ₹80 or any other lower amount and not ₹100. Their point of view is that the incurring of ₹100 is fine but the bifurcation is required to be made for determining that which part of it was incurred for the assessee's own business in India and which part was incurred towards the creation of marketing intangible for the foreign AE. By doing this exercise, the Revenue has simply tried to ascertain the AMP expenses incurred by the assessee for its business and AMP expenses incurred by the assessee towards creating marketing intangible for the foreign AE thereby determining the cost/value of international transaction at ₹161.21 crore.

27. Now we take up the contention that the TPO did not confront the assessee with the determination of the ALP. Having regard to the prevailing legal position in this regard and the facts of the instant case we find that it is the primary duty of the assessee to declare the ALP in respect of an international transaction. Where such duty has been discharged then the burden shifts on the Revenue to show that how the ALP computed by the assessee is not correct. In a case, where the assessee does not show an international transaction and further fails to compute the ALP in respect of such international transaction, then

the TPO gets full power to determine the ALP of the international transaction at his own. Sub-section (3) of section 92C provides that where during the course of any proceedings for the assessment of income, the A.O. is, on the basis of material or information or document in his possession of the opinion that : "(d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D, the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him". Section 92D(1) enjoins duty on every person entering into international transaction to keep and maintain the necessary information and document in respect thereof. Sub-section (3) of section 92D provides that the AO may in the course of proceedings under this Act, require any person to furnish any information or document in respect thereof, as may be prescribed under sub-section (1) within the stipulated period. When we read section 92D along with section 92C(3), it becomes apparent that if the assessee does not consider a particular transaction as international and further fails to maintain relevant records in this regard, the Assessing Officer is free to determine the ALP on the basis of such material or information or document as are available with him. It goes without saying that despite the fact that the ALP in such circumstances is determined by the TPO, yet the assessee has to be confronted with it. If certain objections are raised by the assessee, these are also required to be addressed. Here is a case in which the assessee did not maintain any document, information or evidence about the international transaction in question. In such a situation, it became incumbent upon the authorities to determine arm's length price as per section 92C(1) and (2). Similar is the position about section 92CA(3) which empowers the TPO to determine ALP after considering the relevant evidence as produced by the assessee and the relevant material as gathered by him. It has been discussed above that the assessee contended about the TPO not considering some of the comparable cases put forth by it. The detail of such cases has been placed in the paper book, which is admittedly not additional evidence. It is beyond our comprehension as to how the assessee came to place such details without the TPO confronting it with the entire issue. It is further evident from the order of the DRP that there is no discussion on any such plea raised by the assessee. Rather it can be seen that the assessee assailed the order of the AO/TPO tooth and nail before the DRP on merits. Be that as it may, we have set aside the computation of the ALP by the authorities below for the reasons given above with a direction to do it afresh as per law after allowing a reasonable opportunity of being heard to the assessee. Now the assessee will get full opportunity to put forth its case against any part of the computation of ALP of the international transaction by the TPO.

28. In view of the above discussion we are of the considered opinion that there is no merit in the contention of the ld. AR that the ALP has been determined by applying the bright line test, which is

not one of the recognized methods in India and hence the provisions of Chapter-X will not apply.

VIII. MARUTI SUZUKI'S CASE

29.1. The judgment of the Hon'ble jurisdictional High Court in the case of *Maruti Suzuki India Ltd. vs. Addtl. CIT/TPO (2010) 328 ITR 210 (Del)* has been deliberated upon during the course of the arguments. The learned AR put up his position in this regard by contending that it was a case of writ petition before the Hon'ble Delhi High Court and while passing the order, the Hon'ble High Court also went on to give directions on the question of allocation of expenses. It was submitted that this judgment was challenged before the Hon'ble Supreme Court and the judgment of the Hon'ble jurisdictional High Court has been rendered *non est* as having been overruled in *Maruti Suzuki India Ltd. VS. Addl. CIT [(2011) 335 ITR 121 (SC)]*. It was stated that the judgment of the Hon'ble High Court has merged with the judgment of the Hon'ble Supreme Court and hence cannot be considered as independently existing or having any binding force. In that view of the matter, it was stated that the reliance by the Revenue on the judgment of the Hon'ble jurisdictional High Court is misplaced and unfounded as it is no more a good law as having been directly overruled by the Hon'ble Supreme Court in Maruti's own case.

29.2. On the other hand the learned Departmental Representative submitted that there is no change in the status of the judgment of the Hon'ble Delhi High Court. He relied on the *ratio* of the judgment of the Hon'ble jurisdictional High Court in the case of *Maruti Suzuki (Del)(supra)* to drive home the point that the instant transaction is an international transaction; and the *modus operandi* adopted by the authorities for determining the ALP of the transaction of brand building for the foreign AE in making the addition of ₹182.71 crore is correct. He also stated that the Hon'ble Supreme Court simply directed the TPO to pass fresh order uninfluenced by the observations of the Hon'ble Delhi High Court on the merits of the case and as such the legal principles as found in the said judgment cannot be said to have lost their value.

29.3. In order to appreciate the rival contentions in this regard, it will be apt to go through these judgments of the Hon'ble Courts. Firstly, we take up the case of the Hon'ble Delhi High Court. The assessee company in that case ('Maruti'), was engaged in the business of manufacture and sale of automobiles, with its registered trade mark/logo 'M'. On 4-12-1992 Maruti entered into a License Agreement with Suzuki for manufacture of cars with the brand "Maruti Suzuki". From 1993 onwards it started using the logo "S", the logo of Suzuki and also continued to use the mark "M" along with the word "S" on the rear side of the vehicles manufactured and sold by it. Reference was made by the AO u/s 92CA(1) to the TPO for determination of ALP of international transaction. A notice dated 27-8-2008 was issued by the TPO to the assessee on the premise that it amounted to sale of the brand "Maruti" to "Suzuki". Since Suzuki had taken substantial amount of royalty from Maruti without contributing anything towards brand development in Indian market and Maruti had incurred expenditure amounting to ₹4092 crores on advertisement, marketing and publicity etc., the TPO *prima facie* opined that such advertisement expenses with 8% mark-up amounting in total to ₹4420 crores was the value of the brand. The assessee was called upon to explain as to why the international transaction be not adjusted on the basis of its deemed sale of the brand Maruti to Suzuki. The assessee submitted that it had not charged any additional consideration for the use of its logo on the vehicles manufactured. The jurisdiction of the TPO was disputed by the assessee by way of writ petition seeking stay of the proceedings. The Hon'ble Court allowed the proceedings to continue but directed the TPO not to give effect to order, if any, passed by him. Subsequently, during the course of proceedings before the TPO, he abandoned his earlier stand and propounded a new view that Suzuki had piggybacked on the Maruti brand and all the expenses on branding building were incurred by the Indian company. Maruti was found to have paid royalty to Suzuki, without Suzuki paying any compensation to the Maruti for such brand building. As Maruti had paid certain royalty to Suzuki in the relevant year and since no bifurcation of the royalty paid to Suzuki was furnished towards license for manufacture and use of trade mark, the TPO apportioned 50% of the royalty paid to the use of the trade mark. He also held that Maruti had developed marketing intangibles for Suzuki in India at its cost and it had not been compensated for building those marketing intangibles for Suzuki. Non-routine advertisement expenses amounting to ₹107.22 crores were held to be liable for adjustment. In the mean time, the assessee amended its writ petition so as to challenge the final order passed by the TPO. It was contended that the TPO had completely given up the grounds set out in the notice issued by him on 27-8-2008 for initiating transfer pricing proceedings. It was stated that the only ground given in such notice was that change of the brand logo 'M' of Maruti to Suzuki amounted to sale of the brand of Maruti to Suzuki and there was no allegation in the show cause notice that the trade mark "S" had piggybacked on the trade mark "M".

29.4. On perusal of the terms and conditions contained in the agreement between Maruti and Suzuki, the Hon'ble High Court observed that Maruti had not transferred its brand or logo to Suzuki. Rather it was only Maruti which was given the right to use the brand name and logo of Suzuki on its products. As the brand name/ logo had not been transferred to Suzuki nor had the same been used by Suzuki, either in India or in other country, the Hon'ble High Court held that TPO failed to make out any case of sale of a brand name Maruti or logo "M" by the assessee to Suzuki. Further, since the case set up in the show cause notice was abandoned by the TPO himself, the Hon'ble High Court laid down certain principles for the determination of the ALP in respect of the international transaction of brand building for the foreign AE. It also heard the parties on the merits of the case, examined the facts and finally directed the TPO to decide the new issue of brand building afresh in accordance with its view point.

29.5. As we are presently concerned only with the question of AMP expenses leading to the brand building for the foreign AE, the relevant parts of the judgment of the Hon'ble High Court can be noted as under : -

I.

(1). Page 236 of ITR Vol. 328: `The transaction in question is definitely covered in the above referred definition, since not only does it include sale of tangible properties such as parts and components and licensing of trade mark by Suzuki to Maruti, it also had a bearing on the profits and losses of both the entities. If there was a mutual arrangement between Maruti and Suzuki relating to their respective costs and expenses in connection with the services provided by Suzuki to Maruti or by both the entities mutually to each other, that also would come within this definition.'

From the above it is clear that the Hon'ble High Court has held the transaction of brand promotion for the foreign AE as an international transaction. It is also self evident because the further part of the judgment is based on the mode of determination of ALP in respect of this international transaction.

II.

(1). Page 266 of the report : "(vii) The expenditure incurred by an independent domestic entity on advertising, promotion and marketing of its products using a foreign trade mark/logo does not require any payment or compensation by the owner of the foreign trade mark/logo to the domestic entity on account of use of the foreign trade mark/logo in the promotion, advertising and marketing undertaken by it, unless agreed by the domestic entity."

(2). Page 267 of the report : "(ix) If the expenses incurred by a domestic entity which is the associated enterprise of foreign entity, using a foreign brand trade mark and/or logo while advertising, marketing and promoting its products, are more than what a similarly situated and comparable independent domestic entity would have incurred, the foreign entity needs to suitable compensate the domestic entity in respect of the advantage obtained by it in the form of brand building and increased awareness of its brand in the domestic market."

(3). Page 267 of the report - "(x) In case the foreign entity is liable to compensate in terms of (ix) above, the Transfer Pricing Officer needs to determine the arm's length price in respect of the international transaction made by the domestic entity, with the foreign entity, which is its associated enterprise within the meaning of section 92A of the Act, taking into consideration all the rights obtained and obligations incurred by the two entities, including the advantage obtained by the foreign entity."

(4). P. 258 of the report : -`In our opinion, if the agreement between two entities which are not independent entities, carries an obligation to use a joint trade mark, either some appropriate payment needs to be made or appropriate rebate in the charges payable to it needs to be given by the foreign entity to the Indian entity, for being obliged to carry the name of the foreign entity on all its products even if it does not see any advantage from carrying that name on its products. Of course, the Department cannot insist upon such a payment in case the parties entering into the contract are independent parties.'

III.

(1). P. 258 of the report : `We are unable to agree that there can be no possible benefit to "Suzuki" on account of compulsory use of the joint trade mark "Maruti Suzuki" on all the parts and products manufactured and sold by Maruti in India. Once the name "Suzuki" becomes widely known in the domestic market, nothing prevents Suzuki from refusing to extend its agreement with Maruti or to independently enter the

Indian market for manufacture and/or sale of similar products under its own brand name.'

(2). P. 252 of the report : - `The TPO has not tried to find out what royalty, if any, a comparable independent Indian entity would have paid for the benefits derived by Maruti from Suzuki under the agreement dated December 12, 1992. The case of Maruti before the TPO was that in fact, it had got a subsidy from Suzuki in payment of royalty…... The TPO, however, rejected the contention without trying to make an effort to find out how much royalty, fixed and running, would a comparable independent domestic entity have paid in consideration of an agreement of this nature. This becomes important since, according to the petitioner, even if some benefit on account of promotion and brand building of the brand "Suzuki" accrued to Suzuki in the form of marketing intangibles, that was more than offset by the subsidy which Suzuki granted to Maruti by accepting a lesser royalty.'

(3). Pages 253 and 254 of the report : `We do not know whether the price being charged by Suzuki from Maruti for those components and parts is a fair price or not. … If Suzuki has been charging less than the amount, which a comparable independent entity would have paid to it for those parts and components, that would be considered as a subsidy by Suzuki to Maruti and will be taken into consideration while determining the arm's length price under the composite agreement dated December 12, 1992.

…….

We hasten to add here that the TPO would not be justified in determining the fair price in respect of components and parts being supplied by Suzuki to Maruti solely on the basis of the price charged by domestic auto part manufacturers from Maruti, since the case of Maruti has been that Suzuki owns intellectual property rights in respect of the parts and components supplied by it to Maruti, whereas Indian vendors did not have any such rights which are essential for the manufacture and supply of those parts.

………

The correct approach to determine the fair price of such parts and components would be either to ascertain the price at which such components and parts were being exported by Suzuki outside Japan or the price at which they were being sold in Suzuki`s domestic market. The other alternative can be to ascertain the price which a comparable independent domestic entity would have paid for importing such parts from Suzuki or from some other comparable foreign manufacturer of repute.

………..

Of course, necessary adjustments will have to be made by the TPO wherever required in this regard. Unless the TPO determines the price which an independent Indian entity would have paid for the benefits derived from Suzuki in the form of marketing intangibles, it may not be possible to determine a fair arm's length price, that should have been paid under the agreement between Suzuki and Maruti.'

(4). P. 248 of the report : `The comparables chosen by the TPO were Hindustan Motors Limited, Mahindra and Mahindra Limited and Tata Motors Limited. …In order to compare the advertisement, marketing and promotion expenses incurred by the petitioner, with similar expenditure incurred by other automobile companies, the TPO compared the advertisement costs of three other companies Hindustan Motors Limited, Mahindra and Mahindra Limited and Tata Motors Limited. He noticed that there was no advertisement costs of Hindustan Motors and TATA Motors Limited whereas it was 0.876 per cent. of net sales in the case of Mahindra and Mahindra Limited. He found that the advertisement/net sales ratio in the case of Maruti was 1.843 per cent. as against 0.876 per cent. of Mahindra and Mahindra Limited.…….the TPO found no justification for the expenditure incurred by "Maruti" in this regard and was of the view that half of these expenses should be payable by "Suzuki" to "Maruti". In our view, the comparables chosen and the method adopted by the TPO in this regard was faulty and unjustified. …..For this reason alone, the expenses incurred by Mahindra and Mahindra on advertising, promotion and marketing, etc., cannot be

> compared with the expenses incurred by "Maruti" under these heads.
>
> ………..
>
> We find from a perusal of the order of the TPO that Maruti had suggested the name of Honda SIEL and Hyundai Motors for this purpose. ……..In any case, if the TPO did not find Honda Siel and Hyundai Motors to be appropriate comparables, he ought to have looked for other entities which could be really compared with Maruti…The appropriate method for the TPO would have been to take all automobile companies manufacturing and selling vehicles in the domestic market, eliminate those which were incomparable, adopting a methodological approach, and then carry out comparison with those which were really comparable independent entities. Adjustments wherever needed could then be made, considering individual profiles of those entities.'

29.6. Decision part of any judgment or an order chiefly comprises of, firstly, noting the principle of law, if already settled, on the interpretation of the relevant provisions germane to the issue under consideration. Then the facts of the case are evaluated on such principle. The case is decided accordingly by seeing if the facts of the case pass or fail such principle. If the principle of law already settled, requires passing through a set procedure for testing the merits of the case ; and the court finds that some part(s) of the procedure have either been skipped or not properly examined, then the matter is restored to the lower authority to check the merits of the case on the bedrock of such principle. In such a case, where there already exists a principle of law on the point, the decision part of the judgment will involve a simple evaluation of facts on the touchstone of such principle. In another case, where there does not exist an already settled principle of law, it becomes the duty of the court to first evolve the principle of law on the interpretation of the relevant provisions and then decide the merits of the case on the strength of such principle. If all the relevant facts for applying such evolved principle are available, then there arises no difficulty in taking appropriate decision on the merits of the case accordingly. If, however, the lower authorities had proceeded on a line of action, which is not fully or partly in consonance with the procedure required for the application of the principle of law so deduced by the court, then a redo is directed as per the correct procedure emanating from the principle so propounded. It may be possible that the Court, while restoring the matter to the lower authority, apart from asking it to apply the principle of law so laid down by it, also prescribes the case-specific ways of applying such principle of law. In that case it will mean that the court has not only laid down the principle of law to be applied but has also given certain directions on the merits of the case before it.

29.7. The judgment of the Hon'ble jurisdictional High Court in *Maruti Suzuki (supra)* is a perfect depiction of the last situation as discussed above. From the relevant extracts of the judgment and the summary of its conclusions as reproduced above, it can be noticed that its decision part can be conveniently divided into three parts. Ist part upholds the character of brand promotion expenses for the foreign AE as an international transaction. IInd part comprising of four sub-points, outlines the principle of law in two parts. First, the incurring of AMP expenses by an independent domestic entity does not require compensation by the foreign AE to the Indian enterprise. Second, if the AMP expenses are incurred by a domestic entity which is an associated enterprise of foreign entity, then there is a requirement on the part of the foreign entity to compensate the domestic entity in respect of the advantage obtained by it in the form of brand building to the extent the expenses are more than what a similarly placed comparable independent domestic entity would have incurred. When the foreign AE is required to compensate, then the TPO needs to determine the ALP in respect of such international transaction. IIIrd part comprising of four sub-points, deals with the merits of the case in pointing out that where the TPO went wrong and how he should go ahead in the fresh proceedings restored to him for determining the ALP of the AMP expenses incurred by the assessee towards the brand building for the foreign AE.

29.8. Both the sides have heavily banked upon the judgment of the Hon'ble Supreme Court in *Maruti Suzuki Limited (supra)* in support of their respective stands. Whereas the ld. AR has contended that this judgment of the Hon'ble Summit Court has overruled the judgment of the Hon'ble Delhi High Court, the ld. DR has stressed that there is no such overruling of the principle of law laid down by the Hon'ble High Court.

29.9. The judgment of the Hon'ble Apex Court is a short one, which is reproduced in entirety, as under: -

> `Order
> Leave granted.
> By consent, the matter is taken up for hearing.

In this case, the High Court has remitted the matter to the Transfer Pricing Officer ("the TPO" for short) with liberty to issue fresh show-cause notice. The High Court has further directed the Transfer Pricing Officer to decide the matter in accordance with law. Further, on going through the impugned judgment of the High Court dated July 1, 2010, we find that *the High Court has* not merely set aside the original show-cause notice but it has *made certain observations on the merits of the case* and has given directions to the Transfer Pricing Officer, which virtually conclude the matter. In the circumstances, *on that limited issue*, we hereby direct *the Transfer Pricing Officer,* who, in the meantime, has already issued a show cause notice on September 16, 2010, *to proceed with the matter* in accordance with law *uninfluenced by the observations/directions given by the High Court* in the impugned judgment dated July 1, 2010.

The Transfer Pricing Officer will decide this matter on or before December 31, 2010.

The civil appeal is, accordingly, disposed of with no order as to costs.'

(emphasis supplied by us)

29.10. From the above judgment of the Hon'ble Supreme Court it is evident that firstly, there is a reference to the observations made by the Hon'ble High Court on the *merits of the case,* and secondly, the TPO has been advised *to proceed with the matter* in accordance with law *uninfluenced by the observations/directions given by the High Court.* The decision of the Hon'ble Supreme Court is *on that limited issue.* The word `*that*' in the term `*that limited issue*' refers to the observations of the Hon'ble High Court on `*the merits of the case*'.

29.11. Two things emerge from the judgment of the Hon'ble Supreme Court. First, that the afore discussed Part I (comprising of one sub-point) and Part II (comprising of four sub-points) of the judgment of the Hon'ble jurisdictional High Court, being the decision on AMP expenses towards brand building of the foreign AE as an international transaction and the principle of law laid down about the procedure for determining the ALP of such AMP expenses, have neither been considered nor commented upon by the Hon'ble Supreme Court. Second, only the afore discussed Part III (comprising of four sub-points), being the *merits of the case*, has been summarily touched upon by laying down that the TPO should decide the quantum of determination of ALP in respect of AMP expenses *uninfluenced by the observations/directions given by the High Court*.

29.12. Here it is of paramount importance to note that the decision of the Hon'ble jurisdictional High Court on the *merits of the case* has not been overruled, either impliedly or expressly. The argument of the ld. counsel for the assessee that the judgment of the Hon'ble jurisdictional High Court in the case of *Maruti Suzuki (supra)* has been overruled by the Hon'ble Supreme Court is wholly devoid of merits. There is a marked difference in a situation where the judgment of a lower court is considered and overturned by a superior court and a situation where it is considered but not commented upon. Such difference in the two situations can be better understood with the help of an example. Suppose an authority intends to complete some proceedings. First can be a case where such authority is directed to exercise option A and not options B or C for completing the proceedings. In the second case, the higher authority directs the lower authority to complete the proceedings by exercising any of the options at his command. In such a case the lower authority gets choice to exercise any of the options A, B or C. It cannot be said by such later direction of the higher authority, exercising option A has been debarred. The change is only to the extent that the otherwise mandatory option A in the first situation has been substituted with the discretion of the authority to choose any option. If the authority still chooses A option, his action will not become void for this reason alone.

29.13. Applying the same logic to the facts of the instant case, it is noticed that with the advent of the judgment of the Hon'ble Supreme Court, the directions given by the Hon'ble High Court to the TPO for determining ALP as per the afore discussed Part IIIrd has lost the tag of binding force. Now the TPO is free to determine the ALP in any of the ways open before him. Thus the contention of the ld. AR that the judgment of the Hon'ble jurisdictional High Court has been reversed, is jettisoned.

29.14. Now we take up the next contention of the ld. AR about the merger of the judgment of the Hon'ble jurisdictional High Court with that of the judgment of the Hon'ble Supreme Court. Judgment/order of a lower authority merges with that of the higher authority when it is considered and decided by such higher authority either way. It is a trite law that merger can be full or in part. If an issue as decided by the Hon'ble High Court has not received attention and consideration of the Hon'ble Supreme Court, then the Hon'ble High Court's decision cannot be said to have merged to that extent. The reasoning and conclusion of the Hon'ble High Court on such issue stand on its own force.

29.15. We have noticed above that merger can be full or in part. Whether the merger is on wholesome manner or is issue based is a question to be decided by considering all the relevant facts and circumstances and also going through the orders of the both the lower and higher authorities. It is observed that the concept of partial merger is not alien to the Act. Clause (c) of Explanation to sub-section (1) of Section 263 is an example of a provision encompassing both full and partial merger of the assessment order with that of the CIT(A) so as to permit the CIT to exercise the revisional power on that part of the assessment order which has not been considered and decided by the first appellate authority. To bring a decision of some lower authority within the meaning of merger with that of some higher authority, it is quite natural that there must exist decisions of both the authorities on such point. If there is only a decision of the lower authority on an issue, without there being any decision on that issue by the higher authority, obviously the theory of merger will fail. In fact, the partial merger pre-supposes that with the decision of the higher authority on a particular point, the decision of the lower authority ceases to exist independently. Unless there are decisions by both the authorities, the question of such merger cannot arise.

29.16. Coming back to the Maruti's case it is crystal clear that the above discussed Ist and IInd Parts of the judgment of the Hon'ble jurisdictional High Court laying down the principles of law have not at all been considered and decided by the Hon'ble Supreme Court. As such it cannot be said that there is a merger of the judgment. In our considered opinion it is absolutely erroneous to argue on behalf of the assessee that the judgment of the Hon'ble jurisdictional High Court has become non-existent as having been overruled or fully merging with that of the Hon'ble Supreme Court. If, for a moment, the contention of the ld. AR that the judgment of the Hon'ble Delhi High Court has completely merged with that of the Hon'ble Supreme Court is presumed to be correct, which we really do not accept as correct, it would mean that only the judgment of the Hon'ble Supreme Court in the case of *Maruti Suzuki (supra)* is existing. The relevant part of this judgment is that : "In the circumstances, …, we hereby direct the Transfer Pricing Officer, who, in the meantime, has already issued a show cause notice on …. to proceed with the matter in accordance with law ….". We have noticed above that there was no express agreement for brand building between Maruti and Suzuki. It shows that as per this judgment, the Hon'ble Supreme Court has directed the TPO to make a *de novo* determination of the ALP of the transaction of brand building for the foreign AE in such circumstances. The direction for such determination inherently recognizes that there is a transaction of brand building between the assessee and the foreign AE, which is an international transaction as per section 92B and the TPO has the jurisdiction to determine the ALP of such transaction.

WHETHER MARK-UP IS PERMISSIBLE?

30.1. Now we take up the second question as to whether a mark-up is permitted in respect of AMP expenses incurred for and on behalf of the AE. We have observed above that the AO in the impugned order has computed the ALP of the transaction at ₹182.71 crore, by adding mark-up of 13% to the cost/value of international transaction at ₹161.21 crore, in conformity with the DRP's direction. It has been noticed that the DRP applied the essence of `cost plus method' in determining the ALP of the transaction. Such addition of mark-up to the costs has the sanction of law as can be seen from sub-clause (iv) of clause (c) to rule 10B(1). *Albeit* we have restored the matter of determining the correct mark-up in the facts and circumstances of the present case to the file of the TPO, yet we do not see any hitch in holding that mark-up can be validly imposed.

30.2. Thus, on principle, we answer both the questions posted before this special bench in positive by holding that firstly, the transfer pricing adjustment in relation to advertisement, marketing and sales promotion expenses incurred by the assessee for creating or improving the marketing intangible for and on behalf of the foreign AE is permissible and secondly, earning a mark-up from the Associated Enterprise in respect of AMP expenses incurred for and on behalf of the AE is also allowable. However in so far as answering these two questions on the facts and circumstances of the present case is concerned, we have restored the matter to the file of the TPO for *de novo* adjudication in the light of certain guidelines outlined above.

31. Before parting with this matter we wish to place on record our deep appreciation for the illuminating arguments advanced by both the sides, which greatly assisted us in the disposal of the issues raised in this appeal. We also want to make it clear that all the cases relied on by both the sides have been duly taken into consideration while deciding the matter. The omission of reference to some of such cases in the order is either due to their irrelevance or to ease the order from the burden of the repetitive *ratio decidendi* laid down in such decisions.

32. Now the instant appeal is directed to be placed before the Division Bench for disposal as per law having regard to the decision of the special bench on the questions raised before it.

Order pronounced on this day of December, 2012.
आदेश की घोषणा दिनांकः को की गई ।

- sd -	As per separate order	- sd -
(G.D.Agarwal)	**(Hari Om Maratha)**	**(R.S.Syal)**
Vice-President	**Judicial Member**	**Accountant Member**

New Delhi : January, 2013.
Varma/Devdas*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT concerned
4. The CIT(A)- , Delhi.
5. The DR/ITAT, Delhi.
6. Guard File.

TRUE COPY.

By Order

Assistant Registrar, ITAT, Delhi.

		Date		
1.	Draft dictated on	Different dates.		Sr.PS
2.	Draft placed before author	26.11.2012		Sr.PS
3.	Draft proposed and send to the Hon'ble V.P.	26.11.2012 (through email) 13.12.2012 (hard copy after discussion)		
4.	Draft proposed and placed before the Hon'ble J.M.	26.11.2012 (through email).		
5.	Draft discussed/approved by Hon'ble VP	13.12.2012		
6.	Draft discussed/approved by Hon'ble JM			JM/AM
7.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
8.	Kept for pronouncement on			Sr.PS
9.	File sent to the Bench Clerk			Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			

*

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : NEW DELHI.

ITA No. 5140/Del/2011
[A.Y. 2007-08]

M/s L.G. Electronics India P Ltd Vs. ACIT, Circle 3
Noida **Noida**

PER HARI OM MARATHA, JM:

Invariably, the constitution of a Special –Bench is triggered either when there is a need to decide a maiden issue which is likely to recur in numerous cases or with a view to resolve a conflicting view taken or is likely to be taken on any issue by different benches. The Special Bench so constituted u/s 255(3) of the Act has a designated responsibility to decide a momentous issue. That is why wider hearing is given to professionals (referred to as Interveners) representing cases in which similar or near to similar issues are involved. After cogitating the submissions advanced for and against the referred issue(s) and after circumspecting entire relevant facts, law, precedents and even literature on the subject, finally a decision is taken to resolve that issue to the extent it is possible. The issue before this Special Bench is very dicey, subtle and tenuous in nature; the decision thereof is likely to have a far-reaching effect on the decision-making in similar cases. I have perused the order proposed by ld. A.M. and have carefully treaded through it umpteen times with the intention to toe the line of reasoning undertaken therein to arrive at the conclusion that the AMP expenses to the extent these are treated as non-routine is an 'international-transaction', in itself, between the assessee and its AE, requiring TP adjustment by the TPO no matter it was not even referred to him by the A.O. Despite making fastidious circumspection of the record *vis-a-vis* the oral submissions of the parties in the light of voluminous other records, paper books, etc produced before the bench, I could not convince myself to fall in line therewith. I could not convince myself to agree with the proposed answer supplied to question No. (i) itself due to reasons discussed in my separate dissenting order which I am proceeding to write. It would be appropriate to mention that in the confabulations, discussions and deliberations undertaken amongst us during and after the hearing, I had agreed to differ when I failed to bring home to other ld. Members my point of view on the disputed issues.

2. The main issue, referred to in Q. No. (1) to the Special Bench is not only convoluted but its impending solution also seems intractable for which we don't have a beaten path and, therefore, we have to carve out our own way. I do not agree with the view taken in the given facts and the circumstances of L.G. Electronics India Private Limited that the advertisement marketing and sales-promotion, expenses [in short 'AMP', expenses], to the extent these have been christened as 'non-routine' and attributed to brand building / brand promotion / brand maintenance, with whatever name it is referred to, have to be 'compensated' by assessee's foreign AE and hence, this is an 'international transaction' for which TP adjustment is required to be done by the TPO/A.O. These expenses, admittedly, were incurred in India and paid to an Indian tax-payer entity or entities who have undeniably paid their tax in the Indian jurisdiction. I don't agree with the proposition that the alleged non-routine expenditure has to be treated as a 'transaction' between the assessee and its foreign AE fitting in the definition of an 'international transaction' given in the Act, for which T.P. adjustment having regard to Arm's Length price

(ALP) is required to be made u/s 92 of the Act. In my humble view in the given facts and circumstances of this case as per the provisions of the law as applicable to an 'international transaction' especially in relation to A.Y. 2007-08, the so-called 'non-routine' expenses segregated out of the AMP expenses, alleged to have been incurred towards brand-promotion, cannot tantamount to 'an international transaction', for which T.P. adjustment is necessitated.

3. The first question referred to the Special Bench reads as under :-

> "*Whether, on the facts and in circumstances of the case, the Assessing Officer was justified in making transfer pricing adjustment in relation to advertisement, marketing and sales promotion expenses incurred by the assessee?*"

4. At the very outset, let me make it abundantly clear that we are not required to decide the appeal of the case of L.G. Electronics India Private Ltd., the appellant, in which case this Special Bench has been constituted. This position was made clear by the Bench, in the very beginning, in the open court, that it was going to answer only the two

questions referred to it u/s 255(3) of the Act, and is not going to decide the appeal.

5. Albeit the facts of the case have been extensively narrated by ld. A.M. yet I will not hesitate in repeating certain very relevant facts for the sake of coherence, congruence and ready-reference. I would like to narrate very basal facts which are *ad rem* to the questions under adjudication as most of the facts have been narrated in Para 2 of the proposed order and not required to be repeated. I think it is quintessential to incorporate all the facts which led the TPO/A.O., to tax the impugned AMP expenses. These facts are contained in the 'Transfer Pricing Officer's [TPO's] order dated 29.10.2010, passed u/s 92CA(3) of the Act, in its internal pages 29 and 30, and are being extracted, verbatim, as under:

> *"4.3 <u>Advertisement, Publicity and Sales Promotion and GCC Contribution Received:</u>*
>
> *The assessee has received contribution from its AE, for the expenditure incurred on sponsorship of cricket events. The*

quantum of contribution received is considered as a part contribution for the brand promotion carried out by the assessee on behalf of the AE. The reasonableness of the quantum needs to be examined.

The following is an analysis of the quantum of contribution to the made by AE for brand promotion by the assessee.

The basic objective of making comparability analysis is to determine bright line limit i.e., routine, Advertisement, Marketing and Promotional expenditure including trade discount and volume rebate (AMP Expenditure) which a no risk entity (which is not the owner of brand name or intangible) is expected to spend, to exploit the items of intangible property to which it is provided. Indian Transfer Pricing provisions stipulate of (Supreme Court) determination of arm's length price of each transaction. Accordingly arm's length price of reimbursement for expenditure should be determined separately using TNMM.

In order to benchmark the transactions, I had proposed to compare AMP expenditure of the tested party with AMP expenditure of other comparables engaged in similar business using Advertisement, Marketing and Promotional expenditure (including trade discount and volume rebate) to the sales ratio for comparability analysis. For the purpose of comparability, I *had proposed to use the current year's data (March, 2007) of the comparables.*

Sl. No.	Company Name	AMP	Sales	AMP/Sales	Remarks
1	Applicomp (India) Ltd.				Relevant data for carrying out Amp analysis not available Relevant data for
2	Penguln Electronics Ltd.				
3	Videocon Appliances	1.63	1339.3	0.12	Accepted
4	Videocon Communication Ltd.				Relevant data for carrying out Amp analysis.
5	Whirlpool of India Ltd.	42.46	1591.8	2.66	Accepted
	Arthmetic Mean			1.39	

Following companies were selected for the purpose of determining the bright line :

Sl. No.	Company Name	AMP/Sales
1	Videocon Appliances	0.12
2	Whirlpool of India Ltd.	2.66
	Arithmetic Mean	1.39

The mean of the 'expenditure incurred on AMP/sales" of such comparable companies is the "bright line". Any expenditure in excess of the bright line is for the promotion of brand/trade name (which is owned by the AE) that needs to be suitably compensated by the AE.

On the basis of above it can be seen that the expenditure on AMP incurred by LG India exceeds the bright line limit. Such excess expenditure of should have been compensated by the AE. I, therefore, proposed (sic. Propose) to make TP adjustment accordingly.

6. The TPO show-caused the assessee for making above proposed adjustment. The assessee gave a detailed reply which has been incorporated by the TPO at pages 30 to 56 of his order. Being not satisfied, the TPO has given his finding in following words:

"The Assessee promotes the brand 'LG' in India. The assessee was asked to give copies of advertisements and sponsorships and payment details pertaining to brand ambassadors. The terms brand ambassador clarifies that the payment by the assessee is for promotion of brand. The brand 'LG' is owned by LG Electronics Korea (LGE Korea) and not by the assessee and hence, any expenditure incurred on brand promotion should be funded by LGE Korea.

It is the Indian company which has promoted the brand name of LG in India over the last 14 years. It has spent aggressively on *marketing activities through media, electronic and print. The advertisements only promote LG bran din India.*

It is obvious that any form of advertisement would create brand awareness apart from creating awareness about the products. The endeavour is to quantify the value of brand related advertising cost out of the total advertising cost. The brightline approach is recognized as an appropriate mechanism to quantify the excess expenditure of the assessee which would not have been incurred by an uncontrolled used of the license. Therefore, an adjustment based on the brightline approach is made.

Following the principles of allocation employed by the Transfer Pricing Officer in the previous years, the cost of the sponsorship should be shared by LG Electronics, Korea and assessee based on the percentage of profit of assessee-company and its parent company LG, Korea.

	12 Months Ending 31-Dec., 2006.
Gross Profit (Million Won)	*5,443,316.00*
LGEK (in Rs.)	*251,680.20*
LGEIL (in Rs.)	*14,483.80*
Percentage of profit	*5.75%*

The total contribution towards ICC agreements by LG India (40%) is Rs. 257,314,212. The share of LG India based on the ratio of *profit is 5.75% comes to Rs. 37,020,071. However, since the brightline approach has been employed to determine the quantum of expenditure pertaining to brand promotion out of the total advertising expenses of the assessee, the contribution towards the ICC agreement by LGE Korea is a part of the overall adjustment pertaining to advertising and promotion expenses.*

Adjustment

Assessee's AMP / Sales	*3.85%*
Comparable's AMP/ Sales	*1.39%*
Difference	*2.46%*
Sales	*65,536,565,000*
Adjustment	*1,612,199,499.00*

7. The TPO has compared the AMP:sales ratio of the assessee with that of Videocon Appliances and Whirlpool of India by treating only them as 'comparables' and has ignored the Carrier Aircon, Hitachi Home and Life Solutions, Bajaj Electronics, Blue Star Ltd, Usha International, Voltas Ltd, Mirc Electronics, Timex and Titan. He has taken the mean of the two comparables and 'treating' it as a benchmark, has made the impugned TP adjustment of Rs. 1,612,199,499/. Thereafter, draft assessment order was passed u/s

144C/143(3) on 27.12.2010 and was served on the assessee. The assessee chose to file objections before the Dispute Resolution panel [DRP], who issued the necessary directions u/s 144C(5) on 27.9.2011. As per DRP the approach regarding creation of a marketing intangible and application of the 'brightline test' for its benchmarking is not a new phenomenon. They have observed that in the countries like USA, Canada, U.K., Australia, China, France, etc., this aspect is being considered not only by tax-authorities but also by the tax-courts. They have further observed that in the case of Maruti Suzuki, the Hon'ble Delhi High Court has approved this approach. Since the taxpayer has incurred extra-ordinary expenses for the promotion and development of LG brand and has helped in creation of a marketing-intangible in India, they have approved the finding of the TPO that the assessee must be compensated suitably on that account by its foreign AE. **They have even observed that a good quality product also needs an active and sustained effort for the promotion of the brand and the quality alone may not necessarily retain the customers or enhance the sales [emphasis supplied].** They have further directed to charge mark-up because no independent person would carry out such marketing activity involving promotion of brand name owned by other party without recovering the opportunity cost. They have directed that a markup of 13% should be applied on the total amount of reimbursement [amount shown by the taxpayer in the books and the excess amount worked out by the TPO; but they have not directed that opportunity cost [10.50%] should be charged on the expenses for which the reimbursement was received immediately after the same were incurred. Thereafter, the A.O. has passed the assessment order dated 31.10.2011 u/s 143 r.w.s 144C of the Act, after considering the directions of the DRP and upholding the adjustment of Rs. 1,61,21,99,499/- in respect of AMP expenses.

8. Thus, it becomes evident from the ratiocination of TPO in taking arithmetical mean of ratios of their “Sales to AMP Expenditure” disclosed by the two Comparable Companies, which comes to 1.39%, for benchmarking the AMP expenses into routine and non-routine by using ‘Bright Line Test’. He has opined that it is the Indian Company who has promoted the brand name LG in India over the past 14 years. He has noted that the assessee has spent aggressively on

advertisement and marketing activities through electronic and print media. According to the TPO, only these advertisements have promoted the LG-brand in India. The 'brightline' approach employed to determine the quantum of expenditure pertaining to brand promotion out of the total advertisement expenses, the contribution towards ICC agreement by LGE Korea has been treated as a part of overall adjustment pertaining to advertisement and promotion expenses. Accordingly, the TPO/AO has made impugned adjustment by applying differential ratio of AMP: Sales [3.85% - 1.39% = 2.46%] at 2.46% to total sales of Rs. 65,536,565,000/- resulting into total adjustment of Rs. 1,612,199,499/-. In doing so, the TPO has rejected the objections of the assessee-company made through its written-submission filed against the proposed ALP adjustment. The gist of assessee's objections against TPO's proposed adjustment, which were again repeated before us by the ld. A.R. Shri Vohra, can be summarized as under: [Note : LGEIL = LGI & LGEK = LGK]

(i)That the assessee has undertaken an appropriate analysis to benchmark its international transactions as per chapter X of the Act.

(ii)That the net-profit margin reached by employing TNMM method, from international transaction entered into with its AE has been computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base.

(iii) That A.O. has no jurisdiction to come to a conclusion that there is such an international transaction unless it is proved by him that a international transaction for which TP adjustment is to be done having regard to ALP, exist between the Assessee and its AE.

(iv) That the bright-line test is not a prescribed method under the Act.

(v) That the advertisement expenses may not necessarily result in the increase in sales, so the ratio of AMP-expenditure with its sales may not be a correct approach.

(vi) That the comparison would be meaningful only if companies engaged in trading of similar products under similar market conditions are used for comparison.

(vii) That there may be a difference in classification of AMP expenditure in the books of accounts in different business models.

(vii) That, LGEIL is the sole beneficiary of advertising and sales promotion expenditures. These expenses were incurred wholly and solely for the purpose of LGEIL's business and accordingly should be borne entirely by LGEIL. The LGEK is not directly involved in the business of manufacture/trading of electronic goods in India either of its own or through any on its other subsidiaries.

(viii) That, the assessee is an independent risk bearing entity and any cost incurred towards advertising, promotion and publicity would be for the sole benefit of LGEIL, since it earns profits from the increased sale of products as result of such marketing activities. That advertisement, publicity and business promotion are planned and carried out by the management of LGEIL based keeping in mind the market condition.

(ix) That, the assessee is operating in the hyper competitive market, featured by diversified range of product portfolio, in order to attract customers, product specific advertising is critical and clearly the increment to the value of the brand in India as a result of the advertising is beneficial to LGEIL only since it is the sole company dealing with LG products in India.

(x) That, payments for these expenses have been made to third parties in India, who are not in any way related to the parent entity.

(xi) That, increase in the demand for the finished product due to the excessive advertisement and marketing activities results in the increase of purchase / import of the raw materials and finished goods. All decisions relating to the purchase of raw material indigenously or through import from its AEs etc. lies with the management of LGEIL, which are taken based on the market conditions prevailing at that time and, therefore, any derived demand for finished goods, raw material, components and spaces as a result of demand for LGEIL's products cannot be construed to be the benefit derived by LGEK due to advertising done by LGEIL in India.

(xi) That, any benefit to LGEK is incidental in nature only; although expenditure has been incurred on advertisement to attract attention of the customers in the market, full of numerous brands, and expenditure on advertisement is a ongoing and continuous process.

(xiii) That, no brand royalty was paid by LGEIL and that without prejudice to all the above contention, the AMP expenses incurred by LGEIL are within the brightline limits.

9. The undeniable and undisputed facts of this case, which emerge and which I could cull out from the available record, are as under:

(a) The LGI was incorporated in the year 1997 and is a wholly owned subsidiary of LGK, legally approved as such, by the Government of India;

(b) As per the "Technical Assistance and Royalty Agreement' executed between LGK and LGEIL on 01.07.2001, vide which LGEIL is given a right to use the LG brand-name and trader-mark is owned by LGK [foreign AE].

(c) The LGK has not demanded any brand-royalty during the period relevant to A.Y. under consideration, despite there being such a clause (para second of Article 7) in this agreement.

(d) The A.O. has not, verily, referred alleged transaction to the TPO to be treated as an 'int. transaction' for which ALP adjustment was contemplated.

(e) The A.O. has referred, according to assessee's audit report, the transaction regarding 'contribution towards Global Cricket

Sponsorship, for which LGK has contributed towards the expenditure incurred on the sponsorship of this events, by treating it as part contribution towards brand-promotion to have been undertaken on behalf of the foreign AE.

10. Now it becomes evident that, concomitantly, the TPO by taking a clue from the above part-contribution expenses has inferred that other AMP expenses may also have been utilized for LG brand. Therefore, he has compared AMP expenses incurred by the LGEIL and found them on higher side when seen through the reference of ratio between the AMP expenses incurred and its sales, by comparing it with Videocon Appliances Ltd. and Whirlpool of India Ltd. and by taking their arithmetical means at 1.39% as against 3.85% disclosed by the assessee. The differential amount has been treated as expenses incurred towards brand-promotion, which according to the Revenue 'should have been' compensated by LGK, by applying the 'bright-line-test' and the TPO has treated this compensation valued at Rs. 161,21,99,499/- which, according to him required T.P. Adjustment on account of AMP expenses for brand-building. The DRP has moved a step

farther and has treated them as extra-ordinary expenses for the "promotion and development" of LG brand in India.

11. It would be appropriate to mention here that the other companies/comparables on which assessee had relied, were ignored and have not been compared as per the convenience of the authority. Now, the million dollar question arises as to can these AMP expenses, allegedly incurred towards building / promoting LG Brand in India, be treated as an 'international transaction' on the premise that there exists a discreet or tacit understanding between the AEs, even if no iota of proof evidencing it is found or brought on record in black and white to give an inkling of existence of such an understanding and the Revenue 'discerns' its existence on the basis of 'surrounding circumstances', especially, referring to the general policy of LGK to fiercely penetrate into viable markets aiming at its major market share, obviously, through extensive advertisement of its brand.

12. The evidence sought to be placed for our consideration as 'additional evidence', which was allowed to be produced as such, were not available before either the A.O. or the TPO, or the DRP, as the case may be. None of these authorities had the benefit of these 'evidence' to come to their impugned epilogue. Moreover, there is no provision either in the Act or in the Rules to bring on record of a Special Bench any 'evidence' in the name of 'additional evidence' especially, when the Special Bench is dealing with a specific legal issue. It is open to the Division Bench who has to decide the appeal to decide the question of admission of any 'additional evidence'. Before a Special Bench any document can be submitted when that evidence is treated as helpful in adjudicating any question of law referred to it. In so far as the issue of admission of additional evidence is concerned, the Revenue was allowed to produce those evidence / documents to consider the same not for the purpose of deciding the grounds raised in the appeal of the assessee but to understand the moot issue before the Bench in its correct perspective and thereafter, to reach to a logical conclusion. The correct forum to entertain and admit the additional evidence is the concerned Bench who would hear and

decide the grounds raised in the appeal of the assessee. There are no such provisions in the Act or Rules for admission of additional evidence by a Special Bench, when it is not going to decide the appeal. The admission of this so-called 'additional evidence' was for a limited purpose. Any Special Bench which is not going to decide the appeal and is required to answer specific legal question(s), cannot and should not admit any additional evidence u/r 29 of I.T.A.T. Rules, 1962.

13. During hearing of the appeal of L.G. India P. Ltd by the Division Bench and on the request of the parties, it was treated necessary to refer this issue to Hon'ble President of ITAT to constitute a Special Bench to decide whether the AMP expenses incurred by a Indian MNE being a hundred percent subsidiary of its Principal-AE operating in the foreign jurisdiction can be considered to that extent towards brand-building (owned by its foreign AE) despite the fact that there is not even a whit of proof evidencing any written or oral agreement, understanding or concert of mind between them. The TPO has re-characterized advertisement expenses despite there being no supporting tangible-evidence on record; and if it can be 'presumed'

that some tacit understanding is discernible between AEs for brand-promotion/building, can the AMP expenses apportioned between them under the provisions contained in the Act, and that too, specifically relevant for the A.Y. 2007-08. The ld. Authorized representatives even representing the Interveners, advanced their erudite and well-informed submissions against the controversial issue, which is very maiden as no binding or referable decision is available to provide its straight-jacket answer and that is why it was referred to the special bench. The issue is so entwined and labyrinth that it has acquired a status of economic or financial malaise. That is why while hearing the parties on the 'two questions' referred to the Special Bench, on the other allied issues, nomenclatured as 'propositions' the parties were allowed to make submissions qua them with a view only to understand and adjudicate the main issues. The representatives from both sides were allowed to make their respective submissions on wide spectrum of the issues even at the cost of extending the tentatively fixed days of hearing.

14. There can be no two opinions about the fact that the issue(s) under reference has to be decided with reference to the provisions of our Indian Tax Law. In our Act, chapter X is the relevant chapter which prescribes a special provision to check avoidance of tax. In my humble opinion, once 'a transaction' falls under section 92B, only then income arising therefrom can be computed under Chapter X of the Act. Thereafter, if required, help can be sought from the globally accepted OECD, U.N. or USA guidelines. But, before making any reference to such guidelines, the 'international transaction' must satisfy the conditions of Section 92B of the Act.

15. While analyzing the scheme of the Act pertaining to transfer pricing, contained in sections 92 to 92F of the Act, it is noticed that these provisions cover inter-group cross-border transactions w.e.f. 1.4.2001. These provisions prescribe that income arising from international transactions between associated enterprises [the AEs] should be computed having regard to the arm's length price [ALP]. The allowance for any expense or interest arising from an international transaction has also to be determined having regard to ALP. The Act

defines an 'international transactions', 'associated enterprises' and 'arm's length price'. The Indian tax-authorities, generally, do not believe that domestic transactions will erode Indian tax base because any shifted income is ultimately subjected to tax in India. The Chapter X talks about and aim at checking 'avoidance of tax', which is not considered in the case of domestic transactions.

16. The relationship of AEs is defined by Sec. 92A to cover direct/indirect participation in the management, control or capital of an enterprise by another enterprise. It also covers situations in which the same person directly/indirectly participates in the management, control or capital of both the enterprises. Apart from the above, other specific parameters have been laid down based on which two enterprises would be deemed as AEs. Furthermore, in certain cases, a transaction between an enterprise and a third party may be deemed to be a transaction between AEs if there exists a prior agreement in relation to such transactions between the third party and an AE or if the terms of such transaction are determined in substance between the third party and an AE or if the terms of such transactions are

determined in substance between the third party and an AE. This rule aims at countering any move by taxpayers so as to avoid the transfer pricing regulations by interposing third parties between group entities. The code is complete in this regard. Once the provisions of the Act are found applicable to an international transaction, other global rules or guidelines, be it U.S; OECD or U.N. guidelines, may be looked into for further clarifications, etc.

17. The Hon'ble Supreme Court of Canada, has reiterated this view while deciding the case of Her Majesty The Queen vs. Glaxo Smith kline Inc. indexed as Canada v. Glaxo Smith kline. Inc. Cited as 2012 SCC 52, with docket No. 33874 and judgment dated 18.10.2012 a copy of which was produced before us during hearing, holding that 'transfer-pricing issue are to be decided by the law of the land and not with reference to any other law or guidelines. It is a well known fact that Canada is one of the pioneer promoters of and signatories to the OEEC and OECD and is also instrumental in the creation of these Guidelines. For quick reference, we would like to extract the relevant held portion of the above judgment, which is as under:

"In the courts below and in this Court, there has been reference to the 1979 Guidelines and the 1995 Guidelines ("the Guidelines"). The Guidelines contain commentary and methodology pertaining to the issue of transfer pricing. However, the Guidelines are not controlling as if they were a Canadian statute and the test of any set of transactions or prices ultimately must be determined according to s. 69(2) rather than any particular methodology or commentary set out in the Guidelines."

18. Chapter X of our Act not only defines a 'transaction' but also defines 'international transaction'. Thus, we are not required initially to resort to the internationally accepted 'guidelines' or the provisions of U.S. Tax laws for that purpose. First of all we have to determine if, there exists any such 'transaction' between the AEs. Thereafter, it is to be seen if it is also an 'international transaction'. Only thereafter, the question of TP adjustment would arise. Hence for 'transfer-price adjustments' it is a pre-condition that there must exist 'international transaction' between the assessee and its foreign AE. [between two AEs], as per the provisions of the Act.

19. Let us now analyze the facts of the given case. The assessee-company (MNE) did not verily reported such an 'international transaction' in respect of AMP expenses as per its voluminous documents maintained as per the Rules. The A.O. has also not referred such a question to TPO. The TPO himself has re-characterized the AMP expenses and has 'presumed' that an 'international transaction' is discernible in the alleged non-routine AMP expenses which are incurred on product-plus-brand-promotion advertisement, even if these have been paid to an Indian entity, who is admittedly a non-related third party. According to the TPO, a part of these expenses have to be treated towards building of the LG Brand exclusively owned by and belonging to Assessee's foreign AE who has been so benefited, and to that extent the assessee must be compensated by its AE. The TPO has arrived at the conclusion that the assessee has incurred non-routine AMP expenses with reference to and after making comparison of AMP expenses and sales ratio of Comparables which are to be treated by him as independent/uncontrolled comparable entities. However, this fact has been disproved by the assessee by establishing

that these 'entities' are, in fact, not comparable entities. But the core question to be decided by this Bench is whether, in the given facts and the circumstances of this case, an abstract international-transaction can be presumed between the assessee and its AE or not?

20. In my considered opinion no such liberty has been or can be given to the taxman to treat, his any or every 'subjective conclusion', in the absence of any deeming provision in the Act which may crop up in his mind purely on the basis of his 'presumption'. Such a presumption cannot be taken as proof of the existence of a 'transaction'. A presumption is after all a presumption which cannot take a place of a 'proof' unless it is consciously so deemed to exist by the Act in particular circumstances of a case. It is nobody's case that a 'transaction' cannot be an arrangement, understanding or action in concert, whether formal or informal; whether oral or in writing. True, it is not even required to be enforceable in law. The legislators have consciously referred to a situation where even non-enforceable transactions have been included in the definition of a transaction

contrast to such a condition. Under the Contract Act, its enforceability in law is a condition precedent for a contract.

21. Undeniably, no such written agreement has been found to exist between the AEs. There is no evidence on record to suggest, even remotely that there is any oral agreement between the parties. The question of its enforceability in law is irrelevant under this section. The contention of the Revenue is that AMP expenses, to the extent these are more than what other similar independent entities proportionately incur for advertisement of their products under identical conditions, has resulted into an 'transaction'. And that this presumed transaction between Indian assessee and its foreign AE, has to be treated as a 'international transaction'. As per revenue, there being a brand-building/brand promotion, even if it is incidental, it has to be presumed that there exists a unison or concert of mind between them. According to the revenue, even if this transaction is not disclosed by the assessee, or even if it is not referred by the A.O. to TPO, 'presumption' of existence of a transaction qua differential AMP expenses between the assessee and its AE, by way of tacit –

understanding or unison or concert between them, especially when the assessee is a 100% subsidiary of its foreign AE, becomes visible. Thus, the existence of a 'transaction' between AEs can be gathered from the conduct of the parties if it is exhibited being so 'obvious' that one can easily 'presume' the existence of such a transaction with the help of attending circumstances of a given case.

22. First of all let us understand as to what exactly a 'brand' is all about and what is the meaning of its building, promotion or development? Brand is the name, term, design, symbol or any other feature that identifies one seller's goods or services as distinct from those of other sellers. The word "Brand" has been derived from the word 'brandr' used in the old Scandinavian language (Norwegian language) meaning "to burn", burning their mark (or brand) onto their products. The oldest generic 'Brand', which is in continuous use in India since the Vedic period is known as "Chyawanprash" an herbal paste consumed for its purported health benefits and is attributed to a revered Rishi (Seer) named Chayawan. The Italians were among the first to use 'Brand' in the form of watermarks on paper in the year

1200. The Bars and Company, the British Brevery, claims that their red triangle brand is the world's first trademark. Factories established during the Industrial Revolution introduced mass-produced goods and needed to sell their products to a wider market, to customers previously familiar only with locally produced goods. The products needed to convince the market that the public could trust that the new packaged product is useful, durable and as good as the locally made one. Around 1900, Fames Walter Thompson published a 'house ad' explaining trade-mark advertising. This was an early commercial explanation of what we now know as a 'brand'. The companies adopted slogans, mascots, and Jingles that began to appear on radio and early television. Later, (by 1940s) the manufacturers recognized the way as to how the consumers get socially, psychologically and anthropologically related with their "Brands". This journey has reached a stage when the customers now buy the "Brand" and not exactly the product. They go by the brand-name. But came 1993, the brand-names experienced nose-dive, which questioned the power of "brand-value". What I am trying to suggest is that proper branding can result in higher sales of not only one product but also other products associated with the brand. The brand is the personality that identifies a product, or service, of a company. Brand experience is a brand's action perceived by a person and brand-image is a symbolic construct created within the minds of people consisting of all informations and expectations associated with a product, service or the company(ies) providing them. A branding seeks to develop or align the expectations behind the brand-experience, creating the impression that a brand associated with a product or service has certain specific qualities or characteristics that makes it unique. The brand is the most valuable element in the advertising theme, as it demonstrates what the brand-owner is able to offer in market place. The art of creating and maintaining a brand is called 'brand-management'. The brand orientation is developed in "responsiveness" to market intelligence. **The brand represents the sum of all valuable qualities of a product to the consumers.** A brand which is widely known in the market place acquires brand-recognition what it builds up to a point where brand enjoys a positive sentiment in the market place. Then it is said to have achieved a 'brand-franchise'. Brand recognition is most successful when people can state a brand without being explicitly exposed to the company's name but rather through visual signifiers such as logos, slogans and colours. Consumers may look branding as an aspect of product or service, as it often servers to denote a certain attractive quality or characteristic, which even commands higher price. From the perspective of brand owners brand products or services also command higher prices. People often select the more expensive branded product on the basis of the 'quality' of the brand or 'reputation' of the brand-owner. The brands as stated above are made up of various elements, such as, the 'name', logo, Tagline or Catchprase, graphics, shapes, colours, sounds, scents, tastes, et al. Thus a brand-trust is the intrinsic 'believability' that any entity evokes.

23. This 'brand' is built only and only by the 'product-satisfaction' which a brand-name inspires in the minds of the customers. Once a brand is built-up, the next step is to 'maintain' it. Again, even at this stage, the maintenance of the 'brand' depends on its product-satisfaction. Thus, in my considered opinion, after a brand is built, any expenditure is done on the brand-alone, it is going to increase the sale of assessee's products. The brand-built is not a permanent asset or

permanent ‘marketable intangible’ as it is subject to a day-to-day test with reference to its ‘product satisfaction’. A product satisfaction depends on the utility of the product, durability of the product and its after sales-service, amongst others. Therefore, one can safely state that it is the ‘product’ which defines a brand ultimately but so long as the product is satisfactory, any and every advertisement of the “brand” would promote the sales thereof of the products of that brand and of course, even the brand is also promoted by such advertisement. Thus, ‘Brand-promotion’ and ‘product promotion’ go hand-in-hand as they are tagged together’, each having its bad or good impact on the other. Both of them cannot be quietly segregated. A brand depends on its products and the ‘product’ (product-satisfaction) depends on the brand as its products are supervised by the brand owner to keep intact the reputation of its brand. So, whenever, a product is advertised the brand is also advertised. Undoubtedly, when products are advertised with its brand (logo, etc.) the product-sales improves, the brand-image also gets enhanced. The owner of the brand is definitely benefited. But, in case the sales of the brand products are reduced, the brand-owner also suffers, as the brand-value is reduced. The other important factor which has to be considered is the life of an advertisement. The life of an advertisement is not very long. What is, in fact, the object of advertisement is to make the customers aware about every detail of the product and nature of the after sales-service, before they exercise their option to purchase that brand-product. Thus, one can safely conclude, that in the totality of the above facts and circumstances and the reality of life, the entire expenditure incurred towards AMP (expenses) has to be treated only as 'product-centric'. No expenditure can be said to have been incurred towards brand-building. Even in case a brand is incidentally promoted, the assessee cannot ask for any compensation from its AE, in this regard. Intangible-assets, including brand, goodwill, intellectual property etc. contribute to a company's intrinsic value and are 'internecine' in nature. Let us think in a different way, when by advertisement a brand is demoted/devalued, can its foreign AE ask for any compensation on the same parity. In my opinion, this is a wrong conclusion and incorrect presumption. A marketable intangible can serve as an additional protection of investment.

24. Let us now examine the issue in hand as to whether the so-called extra ordinary expenses incurred on AMP, can be or should be treated as an 'international transaction' between the AEs? Before moving further, I reiterate that only and only if a 'transaction' is found to exist between the Indian Company and its foreign AE, can to be treated as an 'international transaction', and in case its price is found to be not at arm's length, it can be adjusted to bring it at arm's length, with reference to and under the Chapter X of the Income Tax Act, 1961, and not otherwise.

25. The Finance Act, 2001, has substituted the existing section 92 by new section 92 and 92A to 92F. According to the above provisions, income arising from an international transaction between associated enterprises shall be computed having regard to the arm's length price. The term AE has been defined in S. 92A. Section 92B defines an 'international transaction' between two or more AFs. Section 92C provides for the methods to determine the ALP in relation to an international transaction, and the most appropriate method to be followed out of the specified methods. While the primary

responsibility of determining and applying an arm's length price is on the assessee, sub section (3) of Section 92C empowers A.O. to determine ALP and compute the total income of the assessee, subject to the conditions provided therein. Section 92 D provides for certain information and documents, required to be maintained by persons entering into 'international transactions' and section 92E provides for a report of an accountant to be furnished along with the return of income. The Board has prescribed Rules 10A to 10E in the Income Tax Rules, 1962, giving the manner and the circumstances in which different methods would be applied in determining ALP and the factors governing the selection of the most appropriate method. The form of the report of the accountant and the documents and information required to be maintained by the assessee have also been prescribed. The aforesaid provisions have been enacted with a view to provide a statutory frame work which can lead to computation of reasonable, fair and equitable profits and tax in India so that the profits chargeable to tax in India do not get diverted elsewhere by altering the prices charged and paid in intra-group transaction leading to erosion of our tax reserve. However, this is a new legislation. In the initial years, there may be room for different interpretations leading to uncertainties with regards to determination of ALP of an international transaction. While it would be necessary to protect our tax base, there is a need to ensure that tax-payers are not put to hardship in the implementation of these regulations. That is why the Board have decided and issued the following instructions:

(i) the A.O. shall not make any adjustment to the ALP determined by the tax-payer, if such price is upto 5% less or upto 5% cent more than the Alp determined by A.O. In such cases the price declared by the taxpayer may be accepted.

(ii) The provisions of Section 92 and 92A to 92 F came into force w.e.f. 01-04-2002, and are accordingly applicable to the Assessment year 2002-03 and subsequent years.

26. A 'transaction' as per clause (v) of section 92F '<u>includes'</u> – an arrangement, understanding or action in concert; it may be formal or in writing; or it may or may not be intended to be enforceable by legal

proceedings. This definition of ‘transaction’ supplied by the Act seems to be guided by the definition of an ‘agreement’ provided under the Indian Contract Act, 1872 wherein when a offeror [promisor] makes an offer to other person [offeree/promisee] to do or to abstain from doing any act, for a consideration and the promise accept that offer an agreement or a promise is complete. When this agreement/promise is made enforceable in law, it is called a ‘contract’. But the law-makers were conscious of these provisions that is why they have defined ‘transaction’ especially, by including an arrangement, understand or action in concert as stated above, and have also excluded the condition of its enforceability.

27. In the given case, the contention of revenue is that brand-building by the assessee for its foreign AE by way of incurring uncomparable AMP expenses, and to the extent they are more than what other independent entities incur in similar circumstances would incur for advertising of their products, is nothing but a ‘transaction’, for which, albeit, there is no mutual agreement or concert or meeting of minds, but it is an ‘international transaction’. The very foundation

on which the revenue has built its castle of 'brand-building' transaction between the assessee and its foreign AE would fall after the Tribunal has reached to a conclusion that the comparable companies, which are the touch-stones to conclude that extra-ordinary AMP expenses have been incurred by the assessee, are not actually its comparables, and on which the TPO/A.O. has relied are not actually comparables and that the TPO has restricted the comparable cases only to two without discussing as to how other cases cited by the assessee are not comparable [para 19 of the Proposed Order]. In the proposed order a finding of fact has been reached that the 'comparables' are not really 'comparable-companies' with reference to FAR analysis. When we have struck down the very basis of 'comparison', which gave impetus to the TPO to conclude that there exists an 'international transaction' between the AEs, then how a finding that the assessee has incurred more AMP expenses as compared to the 'comparables' can survive? The finding regarding the alleged non-routine expenses would not survive then how it would amount to a 'transaction', much less any 'international transaction'. Accordingly, there cannot exist any 'international transaction' between the AEs and then where is the question of ALP adjustment.

28. Be that as it may, even otherwise, it is an admitted fact that no 'tangible transaction' exists between the AEs but an 'intangible-transaction' has been inferred by TPO/AO having regard to the so called "more than routine" AMP-expenses-incurred with reference to the 'conduct' of the parties (the assessee and its foreign AE). What is that covert 'common objective' of the parties"? It is the brand-building or brand promotion as per the revenue for which the assessee has incurred huge AMP expenses. Fine, but it is an undeniable fact that the assessee has not paid any 'brand-royalty' in this year. What even if the assessee is a wholly owned entity of its foreign AE but in law it has to pay or can pay or can be asked to pay, a 'brand-royalty' for the use of the 'brand-name' by its foreign AE. It cannot be denied that the LG brand is already built internationally and is being used by the assessee who also incurs AMP expenses. It is a fact that there is such a provision of demand of 'royalty' by the AE subject to certain conditions, in their agreement, already discussed by the ld. AM, but I

am on a different angle. Can any entity incur AMP expenses without having even a single 'product' or without offering any such product for sale, or say refuse to sell any such product. Can in that eventuality any brand is bolstered? Would any brand then survive? The answer is an emphatic 'no'. The 'brand' will have a nose-dive and will be reduced to a 'nil' value. In this case the assessee is incurring AMP expenses and is making huge sales. The assessee has offered its income for taxation in our jurisdiction. The AMP expenses have been paid to an unrelated entity in Indian jurisdiction and that third-party has also suffered tax in Indian jurisdiction, only. The Chapter X of the Act prescribes 'Special Provisions Relating to Avoidance of Tax". These transfer pricing provisions aim at checking shifting of income by inflating or deflating 'price' of a transaction, and section 92 prescribes the tools and techniques to 'transfer' that price to Indian jurisdiction having regard to arm's length price. The ALP is arrived at by various methods prescribed under the Rules. According to me, the 'brightline' approach is not applicable in such like cases.

29. The issue of arm's length price of AMP expenses, incurred by an enterprise in India, by way of exploiting the trademarks/brand name or logo owned by the overseas AE has been frequently cropping up while making T.P. assessments. In such cases, the contention of the revenue, invariably, is that AMP expenses results in creation of a marketing intangibles owned by the foreign AE, who in turn, should compensate the Indian entity for such advertisement and brand promotions expenses to that extent. The TPO by applying the Developer-Assister Rule adopting from T.P. Regulation of USA and the 'Brightline Test' laid down by the U.S. Tax Court holding that the AMP expenditure on advertisement and brand-promotion expenses which is found excess average of AMP expenses incurred by comparable companies of the AE is required to be reimbursed by the overseas AE. As I have already touched the issue, the guidelines, be it that of OECD or that U.N., they come into play, only if India has no reservations towards them, and that too, only after a transaction is brought under Chapter –X of the Act. So, to rely on these guideline when the 'transaction' has not been brought under Chapter X is of no moment, and does not subserve any fruitful purpose. Likewise, how the

assessee can be supposed to seek compensation for AMP expenditure which is not consistent with the character of business of the assessee. It may be easy to say that the parent company cannot completely disassociate itself from AMP expenses either in the manner of planning strategy and budgeting of such expenditure and it may also enjoy the benefits arising therefrom, but it is very difficult to translate this philosophy into action to the hilt, to establish that verily some 'marketable intangible' has taken birth and at the cost of the assessee it has flourished although it is owned by its foreign AE. I am not in agreement with the assertion of the Revenue that there is no concept of 'commercial ownership' of a brand which is legally owned by someone else. A commercial ownership is a reality in the modern global business realm and it is as good as a legal ownership in so far as its effects on sale of products in India is concerned. The brand name and its products have a very piquant relationship; when a 'brand' has a high name, its products have higher sales, and if brand earns a bad name, the sale of its products would be adversely effected. A bad-name comes to a 'brand', only because of its products when they don't satisfy customers. So, the brand may be directly and even 'inversely' proportional to sale of its products; but converse is not true. In case, the product of a brand has a higher name, its brand will be emboldened but if the products have bad name the name of that brand in the 'foreign countries' may not be affected. Therefore, any advertisement which is product-centric, and for that matter of even entirely brand-centric, it will only enhance the sales of the products of that brand in India. In no way, the brand owner will be benefited. It is more the reason in case of a wholly owned entity because any benefit derived by the foreign company will directly and proportionately benefit the Indian company. Therefore, this is not a case of brand-building/promotion. Hence, no such 'covert transaction' between the Indian entity and its foreign AE, can be been culled out and presumed or inferred by the TPO/AO in the given facts and the circumstances of this case. Thus, the department has not not been able to discharge its burden which is cast upon it by the precincts of the provisions contained in Chapter X of the Act. The assessee has only incurred expenditure towards advertisement to sell its products. No proof regarding rendering of any service towards brand-building, is brought on record by the Revenue. Therefore, only presumption or assumption at all stages cannot be and should not be approved to replace an 'evidence'.

30. It is the assessee who is the master of its affairs. It has to ascertain as to what is the level of advertisement expenditure which is required in its commercial exigencies. The commercial realities of the transaction, costs incurred by the assessee cannot be los sight of, by the Revenue. The Revenue has no power to re-characterize as routine and non-routine expenditure out of total AMP expenditure incurred by any assessee. Therefore, it not only illegal but also absurd to mechanically and arithmetically assume that such and such cost has been incurred by way of service towards brand-building, because we have found as that comparable, entity are not actually comparable and rejected the comparable in the proposed order.

31. Once a transaction is to be checked whether it is at arms' length or not then such comparables are brought into service. It looks some what strange that for 'arriving at a conclusion' that there is an 'int. transaction' between AEs, first the comparables are tested. This seems

to be not as correct approach. The Act prescribes a diagonically opposite procedure. First a price of an international transaction is compared and then a suitable adjustment is made. During the year under consideration, there is no such law, whereunder, the existence of an international transaction can be inferred, deduced or deemed. Therefore, in my considered opinion, the very approach of the concerned authority[ies] is incorrect, illegal and unjustified.

32. A query was thrown by the Bench to both parties to seek a suggestion as to what is the impact of the judgement of Hon'ble Delhi High Court in the case of Maruti Suziki India Ltd Vs. Addl. CIT / TPO [2010] 328 ITR 210 [Del], especially after the decision of the Hon'ble Apex Court rendered in that very case, reported in [2011] 335 ITR 121 [SC]. In fact, revenue has not relied on this decision of the Hon'ble Jurisdictional High Court, and rightly so. Had it been the case that the main issue [raised vide question No. 1] is covered by the decision of the Hon'ble Jurisdictional High Court, it being a binding decision, how can a Special Bench be constituted in that very issue. When a Special

Bench is constituted it is so done only when there are either contradictory decisions of different Benches of ITAT or some legal issue has a wider effect but that particular upto the level of the Tribunal. No Special Bench can be constituted, in my humble opinion, to supply interpretation of any judgment of a superior forum. If it is so done, it would amount to cocking a snook on the prudence and wisdom of Hon'ble judges of that High Court terminating into dire consequences. Therefore, we can hold that the issue stands before us is covered, therefore, there is no need to decide the very same issue by a Special Bench. We cannot hold that the issue before Special Bench stands covered by Maruti Suzuki's judgments, and at the same time we go one taking our own decision, only referring to the binding judgment. More so when a issue is covered under the judgment of Hon'ble Jurisdictional High Court and still we go on deciding that issue independently it will be against all canons of law. Thus, I am moving with a notion that whatever has been observed by the Hon'ble Delhi High Court does not survive after the decision of the Hon'ble Apex Court. The Divisional Bench comprised of Shri G.D. Agarwal [Hon'ble Vice President] and Shri I.C. Sudhir, Hon'ble J.M., have passed order, dated 9.7.2012, in ITA No. 5140/Del/2011, in the matter of L.G. Electronics Pvt. Ltd Vs. ACIT for A.Y. 2007-08, for the constitution of a Special Bench on two questions, u/s 255(3) of the Act, to Hon'ble President of the ITAT. The judgment in the case of Maruti Suzuki Ltd [supra] of Hon'ble Delhi High Court is dated 01.7.2010; and that of the Hon'ble Apex Court is dated 1.10.2010, and both the above judgments were available on 9.7.201, when reference us/ 255(3) was made by the Division Bench order passed u/s 255(3) of the Act. Advanced either from Revenue's side or from assessee's side. Be that as it may, whatever has been observed by Hon'ble High Court has been set at naught by the Hon'ble Apex Court when it has held in 335 ITR 121 [SC] as under:

> *"On going through the impugned judgment of the High Court dated July 1, 2010, we find that he High Court has not merely set aside the original show-cause notice but it had made certain observations on the merits of the case and has given directions to the Transfer Pricing Officer, which virtually conclude the matter. In the circumstances, on that limited issue, we hereby direct the Transfer Pricing Officer, who, in the meantime, has already issued a show-cause notice on September 16,2010 to*

proceed with the matter uninfluenced by the observations/ directions given by the High Court"

33. Thus, by barely going through the above judgment, whatever I have stated above becomes evident. It would be not apposite to rely on those very observations and direction by this Bench as the Hon'ble Apex Court's judgment is staring at us. It ill-beholves an inferior judicial forum in a judicial hierarchy to show jural arrogance in challenging the wisdom of the Highest court of the country, by giving twists and turns to their judgment. Moreover, the facts of Maruti Suzuki's case are on different footing and are distinguishable. Therefore, we cannot reply on the decision of Maruti, in view of my above discussion.

34. The concern of the law relating to TP is only with the 'price' of a 'transaction', and it is not otherwise. The 'transaction' precedes a 'price' which cannot be used to 'construct' a 'transaction'. Some price is assigned to transaction and if this price is not found to be within arm's length, only then T.P. adjustment can be made.

35. In my considered opinion, the issue of 'jurisdiction' is not referred to us. In any case, in view of my above finding, this issue would not arise for adjudication. This issue can be raised before and can be considered by the regular Division bench when the appeal of the assessee is fixed before that for hearing and decision of grounds raised, therein.

36. Thus, in my firm view, the situs of this 'intangible-asset', is in India, even if its legal ownership vests in the parent company in Korea. The sale or transfer of 'brand' can be considered under Indian law at that juncture, in view of the amended provisions of the law which are incorporated as a sequel to Vodafone's decision by the Hon'ble Apex Court. I am in agreement with ld. Counsel Vohra's submissions that the expatriates may have come to India as employee of the foreign entity, but they have to work under the supervision and control of the Indian entity. Likewise, economic-ownership is a reality and it resides with the entity bearing the economic burden of creation of a marketing intangible and, therefore, that entity is entitled to the

economic returns of economic exploitation of that marketing intangible. Whatever value of the marketing intangible is created, it is created in India and to that extent Indian entity is the economic owner of that 'marketing intangible'. Thus, the AMP expenditure, in the given facts and circumstances of the case, cannot be treated as 'service rendered' to its AE. The economic ownership and service cannot co-exist. Therefore, with the foregoing reasoning, cumulatively, I am of the considered opinion that the idea of 'compensation' to that extent by the foreign AE to assessee is a 'myth' and illogical. After all, the primary beneficiary of the AMP activities is the Indian company but in case its foreign AE derives or may derive some or any benefit, that is only and purely incidental being an unavoidable <u>byproduct</u> of advertisement activities undertaken aggressively by the Indian Company. Even as per OECD guidelines on intra-group service no compensation is required to be paid in such cases of incidental benefits. The transfer pricing of intra-group services is a high risk area for the Indian transfer pricing administration. Accordingly, I answer the first question referred to us in favour of the assessee and against the revenue. Having decided the first question, as above, the second question becomes, simply of academic interest and would not require any answers.

37. In my humble opinion, when we are not required to decide the appeal, we cannot restore any issue for that matter, to the file of the TPO for de novo adjudication. We have only to answer the two questions referred to us u/s 255(3) of the Act. The main appeal has to be decided by the Division Bench. In the given facts and circumstances of the case, an apt argument was advanced from the side of the assessee's that to make any such T.P. adjustment, even in a case an 'international transaction' is found to exist which was not disclosed and not referred to by the A.O.; the TPO cannot assume a valid jurisdiction u/s 92CA falling back from the retrospective amendment made in this section, because a subsequent amendment cannot vest a jurisdiction in nay authority which it did not possess at that relevant point of time. The reasons for the above contention are given as that a law effecting substantial justice will not and cannot have a retrospective effect, and that any defect in the jurisdiction cannot be cured by any subsequent amendment in the law. Support was drawn

from various judicial pronouncements. On the other hand, the argument that the Tribunal has to follow the provisions of the Act and it has got no authority to touch its validity was put forth from the revenue's side. Although the Bench allowed the parties to advance arguments on this allied legal issue, yet in my humble opinion, we are not required to decide it because no such question has been referred to this Special Bench and this issue is to be and cannot be decided by the Division Bench, who will decide the 'appeal' of the L.G. India, in case such a ground is raised therein. The answer to this legal issue is not at all necessary to answer questions before us. This issue is a case specific.

38. The Benchmarking of AMP expenses has to be done, if it is required, within the precincts of Chapter X only. It has been consistent view of the courts in India, including that of the Hon'ble Apex Court that in cases where the assessee derives direct advantage of benefit from AMP expenses incurred by it on advertisement and promotion, no adverse inference is to be drawn even if some indirect or even direct benefit reaches to its foreign AE, i.e. the parent

company owning that trademark/brand/logo, etc. The Hon'ble Delhi Court in the case of Sony India [P] Ltd Vs. Dy. CIT reported in 114 ITD 448 [Delhi] has held as under:

> *"there was no illegality or arbitration in the order of the Assessing Officer in making a reference to the TPO or in adopting the computation of 'ALP' determined by the TPO."*

The Hon'ble Supreme Court in the case of Sassoon J. Davit & Co. Pvt. Ltd. Vs. CIT 118 ITR 261 [SC] has held as under:

> *"The expression 'wholly and exclusively' used in section 10(2)(xv) of the Income-tax Act, 1922 does not mean 'necessarily'. Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assessee can claim deduction u/s 10(2)(xv) of the Act even though there was no compelling necessity to incur such expenditure . 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 deduction u/s 10(2)(xv) of the Act if its satisfies otherwise the tests laid down by law.”

39. When AMP expenses are incurred by a domestic enterprise in the business transaction by the assessee in India and these expenses inures to the domestic enterprise in the form of higher sales and resultant higher profits, but also incidentally benefits its overseas AE, can it be justified to treat this as a marketing service performed for or on behalf of foreign AE, to bolster the foreign brand. In U.S T.P Regulations, as contained in section 482 of the Internal revenue Code [1.482-4] specifically provides for methods to determine taxable income in connection with the transfer of ‘intangible property’ providing for the Developer Assister Rules, dealing with the economic relationship of the relevant parties for the purpose of evaluating the development of intangibles and assigned profits.

40. During and after the hearing in deliberations amongst us, a naive idea surfaced that while taxing an Indian MNC which is 100% subsidiary of its foreign AE it should be presumed that its every action aims at

shifting its ‘income’ as far as possible, and even if it is not possible, its Principal entity residing in a foreign jurisdiction would like to benefit itself anyhow or somehow. It was suggested that while dealing with such cases, this possible angle must always be kept in mind. When this idea was investigated into, hibernated and analyzed by me it was found with certitude that this is simply an unrealistic phenomenon which is in contrast not only to the economic policy of our country but also against the provisions of the Company Law. Why, because any and every MNC is to be incorporated in India under the Company Law of our country. The law permits registration and pursuing its business independently to even an entity which is 100% subsidiary of a foreign entity. The law-makers in their wisdom, aiming at generation of taxable income, establishment of infra-structure facilities, provision of best quality goods and services to its people at a competitive price, and for generation of more employment, inter-alia, have permitted such MNEs to operate from Indian soil. Indian Income Tax Act takes care of all such situations which are created through deliberate transactions to decrease the incidence of tax in India by transferring the same to a foreign jurisdiction. In this regard chapter X of the Act has been enacted which comprehends all possible situations and provides all sorts of tools and techniques to check avoidance of tax payment in India. But one cannot and should not be carried away by any such subjective idea which does not fit in the parameters of this Act. In case we try and approve this 'idea' the very basis of incorporation of such entities under the Companies Act will be negatived. Our Act is capable of dealing with any possible situation where income of an 'international transaction' is involved. Let us assume for a moment that entire AMP expenditure has been incurred towards advertisement for promoting 'LG Brand' alone, and since all these expenses have been paid in India to unrelated Indian-entities, who have also paid tax on their receipt in India, still in that case, in any opinion, this payment in question cannot be treated as an 'international transaction' between the MNE and its AE. This is a transaction simplicitor between MNE and the payee in India, particularly when payment is made to an 'Indian Entity' which is undeniably taxable in India, and is not related to the foreign AE. How can it be said then that the payment of tax has been avoided and its price has been transferred to the foreign parent entity because its brand has been promoted. A ‘Payment’ made to an Indian entity towards [100 per cent] brand-building of a ‘foreign-brand’ by an Indian Company who manufacturers/trades in products of that Brand cannot be treated on presumption basis, as an international transaction, between the AEs. Such a conclusion is likely to defeat the very basic purpose of Chapter X of the Act and would result in its negation and would amount to enlarging the scope of the Act, by adding a new unwritten provision or by reading a provision in the way it is not so written and enacted. We, as a judicial body, cannot approve ‘subjective ideas’ of any authority based on pure presumptions and assumptions. The ‘objective’ of an enactment can never be lost-sight-of, and we are required to satisfy its intent. The ‘subjectivity’ of a quasi judicial or even a judicial authority has got no place in the tax-jurisprudence when it comes to adjudication of a tax-dispute.

41. Let us now examine as to what exactly is the ‘objectivity’ of Chapter X which deals with the Transfer Pricing aspect of an international transaction. I have made a very detailed and in depth analysis of the subject while deciding the case of Iljin Automative Pvt.

Ltd Vs. ACIT order dated 30th November, 2011 in SP No. 67/Mds/2011 and ITA No. 2182/Mds/2010 for A.Y. 2006-07, the relevant portion of which is held as under:

> *"10. The principle of Transfer Pricing is stated in Article 9 of the OECD or the UN Model Double Taxation Convention. It, however, does not specify the methodology, which is done under the domestic laws. The Indian law on the subject is contained in sections 92 to 92F. The concept of Transfer Pricing is applied in the computation of income from international transaction between the AEs having regard to ALP. Thus, the important aspects of the subject are –*
>
> *i) Arm's Length Price (ALP)*
> *ii) International transactions (I.Ts)*
> *iii) Associated Enterprises (AEs)*
>
> *11. An 'international transaction' is a transaction between two or more AEs, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property; or provision of services; or lending or borrowing money; and any other transaction having a bearing on the profits, income, losses or assets of such enterprises. A transaction is the transfer of goods or services, involving a physical product or knowledge or a right to use or exploit an intangible asset. The definition of the word 'transaction' is an inclusive one. It includes an arrangement, understanding or action in concert,*

irrespective whether it is formal or in writing; or whether or not it is intended to be enforceable by legal proceedings.

12. 'Transfer Price' may mean manipulation of prices in relation to international transactions between the parties which are controlled by the same interest, involving two or more countries with differing tax rates and legislation a realizing profits in the country with the most favourable tax regime so that total tax liability is reduced.

13. Such manipulations are difficult to be established because of the problems of off-shore investigations. For that matter, States have, through Legislation, resorted to a hypothesis of ALP i.e what would have been the price if the transactions were between two unrelated parties similarly placed as the related parties. As regards nature of product and conditions and terms of the transactions. Methodology for the purpose of comparability has been formulated, under the respective domestic laws of the countries. The hypothesis presumes that the tax payer's income is incorrectly reported on the ALP standard and permits the Revenue authorities to make a determination of true taxable income. This is apart from incorrect reporting because of fraudulent, colourable or sham transactions. The general theory of transfer pricing is that the Legislation is to treat each of the individual price of commonly controlled group as a separate entity, transactions between which are taxable events to be formed to the economic realities that would obtain between independent entities conducting identical transactions at Arm's Length. To transfer a tangible property, CUP *method, or resale price method or cost plus method are applied. If none of them is applicable, the fourth method known as 'appropriate method' i.e., comparable profit method or profit split method or unspecified method is applied. It is to be seen if the amount charged is arm's length by reference to gross profit margin in comparable transaction. The comparability depends on similarity of the product under CUP method.*

14. Before deciding the impugned issue let us try to understand the need, the necessity and methodology utilized in international taxation. In the year 1991, the Indian economy started opening up. Foreign investment pouring in as a result of economic reform measures was taken by the Government. Industrial licensing policy was considerably liberalized; tax structure simplified and made internationally compatible. In order to have smooth flow of investment and trade, India has made its economic climate conducive to investment and for that purpose, it has entered into agreements with almost all the capital and technology exporting countries with a view to avoid double taxation of income arising in India by virtue of the business connection. Double taxation agreements are established the way for the States to agree at International Level for resolution of the problems arising from the cross-border trading and investments. The Tax Treaty facilitates investments and trade flow by preventing discrimination between taxpayers, adds fiscal certainty to cross-border operation, prevents evasion and avoidance of tax at international level. Apart from facilitating collection of taxes and attainment of national development *goal, the treaty warrants the stability of tax burden, so that its provisions may not be abused by Multi-national Enterprises (MNEs) by fixing prices, terms and conditions of transactions between their controlled enterprises located in different jurisdictions. The treaty requires that such transactions be dealt with as if they are between unrelated parties and even account be re-written if required, so that real profit would be taxed, which is sought to be manipulated. The relevant provisions of the Act are patterned on the OECD Guidelines1995. These provisions are erosion of Indian tax base by multi-nationals through a mechanism of what is known as "transfer pricing" . In a modern democratic set up, the Governments – Local, State or Central – are modified version of 'service corporations' of which all the people in the community are the members and the principle object of the Government is to serve the people, so that we can achieve the goal of establishing egalitarian society as envisaged in the Constitution of India. In India, there is no crown and there is no subject. 'We, the people of India', are the real sovereign and it is the people, who decide to tax the community for the benefit and welfare of the society. The Government collects most of the money it needs from its citizens and the companies by taxing their income according to their capacity to pay, to spend on behalf of the citizen in maintaining law and order, defending from outside attack and providing education, health care, social security etc. So taxation is a means of apportioning the cost of Government amongst those, who benefits from it. Non-payment of tax by any person when it is due increases the burden of those who pay. That is why Government takes measures to curb* *evasion of tax resorting to penalty and prosecution. No Government can afford multinational companies to dictate transactions amongst their affiliates and avoid payments of tax in the 'State' where it is due, causing substantial loss of much needed public revenue in a welfare state. There are two ways of preventing this: (1) -Global Formulary Apportionment and (2) -Arm's Length Principle for transfer pricing adjustment. Where tax rates are different between countries, there is a strong incentive to shift income to a lower tax and deductions to a higher tax country, so that the overall tax effect is minimized. There are two different approaches to deal with shifting of the profits from one jurisdiction to another; either to ignore the independent status of the corporations within the group and consequently also the transactions between them or to treat them independent and make adjustments to their income. The former is know as the Global Formulary Apportionment method and the latter is know as transfer pricing adjustment approach. In first, corporate group is taxed as a whole and the global profits allocated amongst the associated enterprises in different countries on the basis of pre-determined formula. In the other, associated enterprises are taxed as separate entities. The latter is mostly adopted, because corporate laws recognize independent status. To illustrate this, suppose an American manufacturing company 'A' sells goods to its associated enterprises in a low tax rate country 'B' for say $ 100 that enterprise sells it to an unrelated entity in India for $400. Global Formulary Method approach is the transaction between A & B is ignored and the sale between B and the Indian company is treated as if A made it direct and the entire* *sale proceeds of $400 belongs to A and not just $100. In other words, the income of associated enterprise B ($ 300) is attributed to the American company. The Arm's Length transaction adjustment requires that sales price up and consequently, the profit of B increased by $300. In both the case, the conclusion is the same, however, the route is different. Under the transfer pricing approach relationship between the corporations and transactions between them are recognized while under consolidation approach they are ignored. The consolidation approach has many advantages. It prevents transfer pricing by the residents; does away with treaty shopping, which involves re-characterization as well as diversion of income; eliminates the vice of thin capitalization.*

15. The League of Nations to international associations of countries created to maintain peace among the nations of the world in the year 1920 and had its headquarters in Geneva, Switzerland. But this association ceased to function after the Second World war and was finally dissolved in April, 1946, and its place was taken by the United Nations. The League played a pioneering role in developing Model Tax Treaties during the period between 1930s and 1940s, its work being taken over in 1960s by the Organization for European Economic Co-operation (in short OEEC). This OEEC subsequently was substituted by the Organizations for Economic Co-operation and Development (OECD). The OECD is a multilateral organization comprised of mostly Western European countries, the United States, Canada, Japan, Australia and New Zealand. Its headquarters are in Paris (France) and it was *founded in the year 1961 by replacing OEEC. It was established in the year 1948 in connection with the Marshall Plan, and it provides a forum for representatives of industrialized countries to discuss and attempt to co-ordinate economic and social policies. Its primary objectives are: (i) to maintain and stimulate economic growth and (ii) to increase co-operation and promote economic development within and outside of the territories of the Member countries and assist development and growth of world trade. The OECC and OECD played an important and pioneering role in the development of model tax treaties during 1960s to the present day. The OECD's work on taxation is managed by Tax Center for Tax Policy and Administration.*

16. Separate taxation and not the consolidation approach is generally favoured because under the Arm's Length standard, each nation's tax system operates under its own domestic tax rules subject to relatively minor qualifications of arm's length prices in certain international transactions. It facilitates sharing of revenue between two States, unlike under the Consolidation Approach. The Consolidation Approach is based on a 'formulatory apportionment system', which has its own difficulty of operations. The reasons for the above are that one - it relates to defining 'relationship' among corporations as to bring their profits within the formulae, two - to the formulae to be used in the allocation of profits among the jurisdictions and three - to defining world wide tax base used in identifying group of profits. These difficulties are not addressed to in tax treaties. Most of them favoured *separate taxation of associated enterprises and the transfer pricing approach. The OECD Transfer Pricing Guidelines are as follows:*

1) *There are several reasons OECD Member countries and other countries have opted Arm's Length Principle. The major reason for the same is that the Arm's Length principle provides broad parity of tax treatment for MNEs and independent enterprises. Because the Arm's Length Principle puts associated and independent enterprises on a very equal footing for tax purposes and avoids the creation of tax advantageous or dis-advantageous that would otherwise distort the relative competition purposes.*

2) *The Arm's Length Principle has also been found to work effectively in the vast majority of the cases like there are many cases which involve the purchase and sale of commodities and the lending of money, where Arm's Length price may readily be found in the comparable transaction undertaken by the comparable enterprises under comparable circumstances. One of the major flaws in the system is that the Arm's Length Principle dis-regard integral and functional unity of a MNE, which is responsible for greater efficiencies and advantageous competition edge. The function of all its subsidiaries located in various tax jurisdictions cannot be analyzed in isolation of each other; and dealings and transactions within MNEs are treated at par with the dealings and transactions between unrelated parties at Arm's Length Principle. Transfer Pricing Guidelines as contained in the OECD guidelines are largely followed by various countries, but their*

implementation by the tax authorities differ. The focus of tax authorities is on increasing national tax base. In an attempt to achieve that objective they lose the international perspective. The same issues are treated in different ways in different jurisdictions, for example, such as allocation of capital risk, entrepreneur function, local market penetration risks and rewards. There are practical difficulties in applying Arm's Length Principle. The concept of separate taxation is not only confined to the recognition of a corporation as an entity independent of the parent, but also extended to treating a branch of the parent as separate and independent. The Arm's Length Principle is applied both in the context of transfer pricing and attribution of profits to the Permanent Establishment (PE). Commercial transactions between different parts of the multinational groups may not be subject to the same market forces shaping relations between two independent firms. Open market considerations need not necessarily govern transactions between two enterprises under the same or common control. The prices paid for transaction between members of a multinational enterprise may be fixed in order to meet the convenience of the multinational enterprise or a group as a whole and done in a variety of ways. Such fixing would not have been possible. if the parties to the transaction were independent acting at arm's length. A transfer price is defined as a price paid for goods transferred from one economic unit to another, assuming that two units involved are situated in different countries, but belong to the same multinational firm. Transfer price is the price charged in a transaction, which means an actual price charged between the associated enterprises in an *international transaction. Transfer pricing is widely used in multinational organization, which typically involve a parent company domiciled in one country and a number of subsidiary companies operating in other countries. When multinational firms conduct business within their group, the concept of market pricing or arm's length pricing has no relevance. Income or deduction is arbitrarily shifted. Supposing A purchases goods worth Rs.100 and sells them to its associated Company B in another country for Rs.200/-, who in turn sells in the open market for Rs.400/-. If A would have sold it directly, itwould have made a profit of Rs.300/- which has been restricted to Rs.100/- by something it through B. The transaction between A & B is arranged and is not subject to market forces. The profit of Rs.200/- has been, thus, shifted to Country of B. The goods have been transferred on a price (transfer-price) which is arbitrary or dictated being Rs.200/- and not being Rs.400/- which is its market price. Transfer between enterprises under the same control and management, of goods, commodities, merchandise, raw-material, stock or services is made on a price, which is not dictated by the market but controlled by such considerations. Transfer of goods or services as aforesaid is as dictated by the market but it is controlled by the consideration of shifting taxable profits or duties or of arranging the direction of cash flow. The developing countries lay heavy restrictions in regard to remittance of profits, but in their engineers to secure access to foreign technology, expertise technical know-how, capital goods and components for their industrial development. The MNCs have changed their investment and technical collaborations,* *policies and the developing countries unpredictability about political and economic stability of a country may necessitate flight of capital and profit there from. This flight is achieved through the device of transfer pricing.*

17. The reason for fixing a price, which is not an Arm's Length price, whatever be the motive, is the avoidance of the profit from a country where it would have accrued, had the transactions been at Arm's Length. The avoidance or evasion of tax cannot be the purpose or there could be honest difference of opinion about what should be the Arm's Length price, the tax authorities are aware that tax is avoided. Therefore, the question of the tax treatment of the transfer pricing is always considered in association with avoidance or evasion of tax. The net effect of transfer pricing abused is that profits properly attributable to one jurisdiction are shifted to another jurisdiction. In controlled transaction if it is not found at arms length shifting of profit and consequently avoidance of tax is heavily presumed even if it is done inadvertently or with purpose. The arms length principle cannot be applied, if income could not be legally received. MNE group to companies seek to achieve the best tax results not only by manipulating export and import prices, but also by manipulating category of income. World over, different categories of income are dealt with differently and so also the treaties on tax are structured. Income is separate into separate categories and each category has its own role for computation as well as tax rate. Business income is taxed at the normal rates in a given country on a net basis whereas royalty, *interest and dividend are taxed at reduced rates on gross basis. Therefore, a non-resident tax payer being permanent organization of the subsidiary company incorporated in the source country would be encouraged to categorize business income as royalty or technical fee. Because the parent organization and its subsidiary company are treated as independent entities for tax purposes and treaty purposes, the characterisation of income changes the same result as for unrelated tax payers, for example, the non-resident conferring patent right on a resident may transfer a patent in exchange of shares (producing dividend income) or can leave purchase particulars outstanding as a loan (producing interest income) or may license patent in exchange for royalties. Thus, the tax manipulation among the related corporations not only involves the use of arbitrary prices, but also conversion of returns on equity, investment to royalty and interest. Transfer pricing may mean manipulation of prices in relation to international transaction between the parties, which are controlled by the same interest, involving two or more countries with different countries having different tax rates and realising profits in the country, which has the payable tax regime resulting into reduction of payable tax liability. Such manipulations are difficult to be caught and established because the taxman is handicapped to make off-shore investigations. With a view to deal such a situation, so that a legitimate tax to which a State is entitled to, a combined effort has been made through legislation. According to which on hypothetical manner such evasion of tax can be controlled, a term known as an 'arm's length' has been coined. What would have been the price if the transactions were between two* *unrelated parties, similarly placed as the related parties in so far as nature of product, conditions and terms and conditions of the transactions are concerned? For that purpose methodology and modalities to compare the results under perspective domestic laws of a given country have been formulated. According to this hypothesis, it is presumed that tax payer's income has been incorrectly reported on the arms length standard which permits the revenue authorities to determine a correct taxable income. This methodology is different from incorrect reporting by way of fraudulent, colorful or sham transactions. The basic thesis is that transfer pricing legislation is to treat each of the individual members of a commonly controlled group as a separate entity, the transactions between whom are taxable events to be conformed to the economic realities obtaining between independent entities entering into similar and identical transactions, at arm's length. Thus, a transfer pricing is a device to control avoidance of tax in a jurisdiction where it is otherwise due. The right to do business in a most beneficial manner given to a businessman is thus abused causing loss to ex-chequer of a country where the profit is drawn and it is shifted to another country. The law does not permit or sanction abuse of such a right. This abuse can be curbed in the following ways:*

(1) By establishing an arms length transfer price which requires enquiry/investigation as to what unrelated parties, which are not under common control, would do in similar circumstances. So it is an attempt to establish the prices that would prevail in the market place; or apportioning of over all

profit of the enterprises those establishing a fair or proper division of global profits.

(2) By non-deducting of intra firm payment, unless such payments are consistent with normal commercial practices. Therefore, with a view to provide a statutory framework which can lead to computation reasonable, fair and equitable profits and taxing the same in India, in relation to international transactions between two or more associated enterprises, new provisions have been introduced in the Income Tax Act effective from 01.04.2002. These provisions are more or less based on traditional rules outlined in the work of the OECD. For that matter strict conditions have been imposed on the tax payer to maintain and provide documentation of transfer pricing, methodology, non-compliance thereof attracts heavy penalties.

Controlled tax payer means one of the two or more tax payers owned or controlled directly or indirectly by the same interests, and includes the tax payer who owns or controls the other tax payers. Uncontrolled tax payers mean any one of the two or more tax payers not owned or controlled directly or indirectly by the same interest. Likewise control means any kind of control directly or indirectly whether legally or not and however, exerciseable or exercised, including control resulting from the actions of two or more tax payers acting in concert or with a common goal or purpose. Thus, it is the exercise of real control, which is decisive but *in its forum or more of its exercise. A presumption of control arises if income or deductions have been arbitrarily shifted. A 'transaction' means same assignment, lease, loan, advance, contribution or any other transfer of interest in or right to use any property whether tangible or intangible or money. However, such transaction is effected and whether or not the terms of such transaction are formally documented. Such a transaction also includes performance of any services for the benefit of or taxes, other tax payers. In determining the true taxable income of a controlled taxpayer, the standard to be applied in several case is that of a taxpayer dealing at arm's length with an uncontrolled tax payer. Whether a transaction results an arm's length result will to be determined with reference to the results of a comparable under comparable circumstances. Transactions are not ordinarily considered comparable if they are not made in the ordinary course of business or one of the principal purposes of the uncontrolled transaction was to establish an arm's length result with respect to the controlled transaction. Specific methods for that purpose have been provided for determining arm's length results, if the transaction's do not satisfy that standard. Transactions may involve different kinds of transfer such as transfer of property, services, loan or advances and therefore, may require selection of appropriate method for the calculation of arm's length results. No shift method of priority is recommended The best suitable method for determining a most reliable measure of arm's length result has to be given priority. In selecting the best method, two factors to be taken into account* *are:- (i) the degree of comparability and (ii) Completeness and accuracy of the data. Degree of comparability depends on the following factors: (i) Functions identifying and comparing the economical significant activities; (ii) comparing significant contractual terms, (iii) comparing significant reasons (iv) comparing significant economic conditions (v) comparing of property or services and (vi) market strategies, location, savings, etc.*

18. The methods to determine arms length price of tangible property are (i) comparable controlled price (CUP) method (ii) Result Price Method (3) CUP plus method (4) (if none of the above applied) appropriate method is comparable profits method; profits supplied method; unspecified method.

The CUP method is one comparable uncontrolled price method, which is defined as transfer price method that compares the price for property or services transferred in a controlled transaction to the prices charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances. Thus, CUP method is the most direct and reliable method.

The resale price method measures the value of functions performed and is ordinarily used in cases of purchase and resale of tangible property in which the reseller has not added substantial value to the tangible goods by physically altering the goods before resale (packaging, re-packaging, labeling or minor assemble do not constitute *physical alteration). This method is not an ordinarily used where the controlled taxpayer uses in its tangible property to add substantial value to the tangible goods.*

Cost Plus Method is ordinarily used in cases involving the manufacture, assembly, or other production of goods, that are sold to related parties. Comparability under this method is dependent on similarity of functions performed, risks borne and contractual terms, and adjustments to account for the effects of any such differences.

With respect to intangible property, the methods which apply are (i) Comparable uncontrolled transaction method which evaluates whether amount charged for controlled transfer of an intangible property was at arm's length by reference to the amount charged in comparable uncontrolled transactions. This method requires that controlled or the uncontrolled transactions involve either the same intangible property or comparable intangible property. The burden of proof is always on the taxpayer .

Transactional Net Margin Method (TNMM) is applied in a case where the sale its products to its subsidiary and makes no uncontrolled sales in geographic market, but there are other players, who sell similar product to other distributors in that market. The uncontrolled distributors purchase the product from unrelated parties, but there is a difference in that they do not have the brand names. Because reliable assessments cannot be made for the brand name, the CUP method *cannot be used. But when there is a close functional similarity between controlled and uncontrolled function in terms of market in which they occur the volume of the transactions, the marketing activities undertaken by the distributor, inventory levels, fluctuation of currency risks and other relevant functions and risks and reliable adjustments can be made for similar difference in payment terms and inventory levels for same differences in payment term and inventory level, re-sale particulars method just a higher degree of comparability and thus provides a reliable measures on arms length result. It is preferred over TNMM. TNMM is preferred to costly price method but costless method is preferred to TNMM.*

TNMM is another method which provides a practical solution to otherwise insolvable transfer pricing problem. This method is used where net margins are determined from the uncontrolled transaction of the same taxpayer in comparable circumstances, or comparable transactions of two independent enterprises with the material differences affecting price between the associated and independent enterprises having been adjusted. If not adjusted, the method is not to be used. This method requires comparison between income derived from the operations of the uncontrolled parties and income derived by an associated enterprise from similar operations. The TNMM is a modified, cost +/- resale price method. Price guidelines defined it as the method, which examined the net profit margin relating to an appropriate base (for e.g. costs, sales, assets) that taxpayer realizes from a controlled transaction. This method is used where CUP or resale *or cost plus method cannot be applied. In this method focus is on transactions rather than business line or the operating income of the company. As regards comparability, the focus is on comparability in the transaction and enterprises rather than on the same level of comparability in product and function has required in traditional method. This is based on net profit margin relative to anappropriate base – costs, sales, assets- which the taxpayer makes from a controlled transaction. This method has been aptly described in Rule-10(B)(1)(e) of the Income Tax Rule as under:-*

(*e*) transactional net margin method, by which,—

(*i*) the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(*ii*) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(*iii*) the net profit margin referred to in sub-clause (*ii*) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(*iv*) the net profit margin realised by the enterprise and referred to in sub-clause (*i*) is established to be the same as the net profit margin referred to in sub-clause (*iii*);

(*v*) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction.

And I think that my above observations still holds good, even in the given facts and circumstances of the case.

42. So, by now it has become clear that, under the Act what is required to be 'adjusted' is the 'price' of an International Transaction. One cannot first presume that there exists an international transaction and then by assigning some price to it and by arriving at a conclusion that its price is not at arm's length make adjustment under Section 92 of the Act. This Idea is against the very 'spirit' of international-taxation. The objective of the Chapter X or for that matter is to 'make adjustments' to the price of an international transaction, which the entities may have shifted from one jurisdiction to another jurisdiction. When no 'price' is shifted to a different jurisdiction, how can it be dealt with under Chapter X and how an 'assumed price' can be taken for ALP adjustments. It is not permissible under the Act. What

transfer pricing adjustment can be made in India are circumscribed by Section 92 of the Act.

43. The Act does not speak about intangible and abstract transaction. What the department is trying to bring home to us is that there exists an 'intangible-transaction' between the parties as canvassed, inferring unwritten agreement via unwritten understanding between the wholly owned assessee and its foreign parent AE to create an 'intangible asset' (marketing intangible). Chapter X is a complete and self-contained code which contains all relevant provisions of transfer pricing provisions apart from those set out in the Rules. A transfer pricing adjustment is to be made within the four-corners of Chapter X. This chapter provides for substitution of an arm's length price for a contract-price in an international transaction. This is the only TP adjustment which is authorized and permitted under the Act. Chapter X deals with the price part of a contract and does not deal with the 'quantity part of goods or services.

44. "The assessee should have been compensated to the extent non-routine AMP expenses" is the main plank of the revenue which cannot be equated with an 'international transaction' much more than a 'transaction'. This phrase 'should have been compensated' refers only to a subjective approach of the taxman in the given facts and the circumstances of a case.

45. Let us think in a different way by treating 'the entire expenses incurred on AMP towards 'brand-building, maintaining, brand -promoting and brand-strengthening, and the conclusion that 'product-promotion' is only incidental. This can be impressive argument in the given facts of the case particularly when the assessee is 100% subsidiary of its foreign AE. When 'product-promotion' is incidental then by applying the same analogy as is being applied, incidental benefit arising to it would not require incurring of any AMP expenditure and therefore, entire expenses are to be treated as 'brand-promotion' expenses. Fine, this is another way of drawing inference from the given facts of a case. In case of LG as it was demonstrated with the help of slide-show that the whole

advertisement is for brand-building. Then the entire expenses must be compensated by the AE, or else entire expenses can be treated as MNE's income, if one further enlarges one's presumption. According to me, the stand taken by the Revenue is not staid and firm, it is only dilly-dallying. They are treating the "should have been compensated" statement as an "International transaction" with reference to the alleged non-routine expenditure incurred towards AMP expenses, as found, after comparing with similar, not-so similar or not similar entities who are also incurring such expenses. But would it be a correct method to arrive at the existence of an international transaction in this way as has been done by the revenue. According to me, no, not at all. This procedure is not laid down in our law.

46. In my view what revenue could have done in such a case is that 'such and such portion' of AMP expenditure should be treated towards 'brand royalty', as it is so accepted in such like or alike cases. In that view of the matter, it could be presumed that an unwritten understanding exists between the parties because for user of brand something is required to be paid to its owner. But, a question would

then arise that the 'Brand-royalty' is paid to its legal owner only when they allow the use of its brand by any third party. When one thinks that whatever is earned by a MNE who is 100% subsidiary of its AE, then by enlarging this theory, it can be safely said that even the existence of the assessee benefits its AE. Thus, whatever is earned as income by it pertains to its AE, then why it is being taxed in India. In that case, the entire income needs to be taxed in foreign jurisdiction. In this way, we would reach at a ridiculous conclusion. The MNE exist in India under the authority of law and treated as separate legal entities. Whatever is permitted by law cannot be allowed to be treated illegal. The assessee is doing business in India and is also paying taxes on its income. The assessee has a right to derive as much is legally possible. It is the duty of the 'tax-man' to check any illegal pilferage of tax but such shifting of benefit but by remaining within the four-corners of the law of the land, otherwise the policy of the Government, who wants foreign investment in India towards establishment of infrastructure creation of more jobs for its youths and strengthen economy, would utterly be defeated.

47. The Revenue has taken the stand that the T.P. Regulations proceed on the assumption that separate legal entity in a multinational group does not have economic independence to take vital policy decisions. That AMP expenses are incurred as part of global strategy to promote the brand and/or capture markets or to sustain the market share. That AMP expenditure is an 'international transaction' within the meaning of Section 92B. That under the amended provisions, TPO has the necessary powers to examine under certain circumstances an international transaction even if there is no specific reference of such a transaction from the A.O. that the burden to demonstrate that the price of an international transaction is at arm's length is on the tax-payer under the India TP Regulations. That AMP expenses go to build the brand owned by the parent company. That Indian entity incurs the expenditure for building the brand for and on behalf of AE. That the provisions of Section 37(1) and those of Chapter X operate in different fields and one does not militate (hinder) against the other. That the parent company cannot completely disassociate itself from AMP expenses either in the manner of planning, strategy and budgeting of such expenditure nor can it

assets that it does not enjoy the fruits of such expenditure. That the 'Brightline' has been adopted by the TPO only as a tool to arrive at the direct cost of expenses attributable to the brand promotion. That adjustments have been made as per the method prescribed under the Act. That that TP regulation stipulate arm's length price of a transaction and application of TNMM to benchmark one set of transactions by itself cannot be a sanction for non-determination of ALP of a different transaction. That it would be unwarranted and impractical for the Revenue to define the manner or mode for incurring the expenditure and to characterize or re-charactage them into one or the other kind. That the degree and extent of risk borne by the Indian entity may be factor of comparability but the arm's length price for the cost of service provided to the Associated Enterprises and fee for services would still need to be determined.

48. The oppugned submissions on behalf of the taxpayers are that the issue of 'AMP' expenses incurred in relation to unrelated third parties in India, does not tantamount to a 'transaction' much less an 'international transaction' and is not governed by Section 92 and 92B,

as there is no written / oral, agreement, understanding or concert between the AE and the Indian Company, so it is not a 'international transaction'. The AMP expenses depended on local needs, capacity etc. That there is no such direction from the Parent Company, to incurred expenditure. That neither the assessee referred such a transaction nor such reference was made by the A.O. or TPO . That the AMP expenses incurred by the assessee have not resulted into any benefit and has not created any intangible for its foreign AE. That expenses on AMP is an allowable revenue deduction even if it results in some indirect benefit to a third party i.e., the AE. That adjustment not made based on any of the methods prescribed in Transfer Price Regulations is not sustainable. That when the assessee is using royalty free trade mark it would not be a case of TP adjustment. That if the AMP expenditure created economic ownership for the Indian entity, it cannot be regarded as service to AE as an expenditure cannot create ownership in favour of one entity and at the same time also be regarded as service to another entity. That economic ownership and service are mutually exclusive. That when AMP expenses are subserving assessee's objective and if any benefit to overseas entity has occurred it can be only incidental. That the classification of routine and non-routine may vary from assessee to assessee; from market to market; from time to time; depending upon the product cycle. That due attention needs to be given to assessee's business profile, competitive landscape and broader industry trends. Because the AMP for Pharma, auto, consumer goods, consumer electronics and luxury goods are going to be governed by different consideration. That determination of provision of services should be subject to a vigorous FAR analysis and benchmarking of the same for determination of ALP should be subject to the standard comparability criteria. Such like host of arguments were advanced for and against this issue by both sides.

49. The word 'transaction' takes its legal colour from the definition of the term "agreement" given is section 2 of the Indian Contact Act. Accordingly to which there must be 'promisor' and 'promisee', and at the desire of the promisor, the promisee either does or abstains from doing it. Thus a transaction cannot be a unilateral act and it involves more than one person (or entity).The definition of 'transaction' has been provided in clause (v) of Sec. 92F, which is inclusive one. This

definition opens with ‘transaction’ includes, meaning thereby, whatever definition is assigned to an agreement it is further enlarged and under this Act any arrangement, understanding or action in concert, are also included, apart from what is ordinarily and genuinely it is understood to mean. This ‘inclusion’ is further qualified by assertions that the above these’ inclusives may be ‘formal’ / informal or may be in writing / or oral. These may be intended to be enforceable in law or may not be so enforceable’ so the definition of ‘transaction’ ordinarily ‘understood’ has been further enlarged.

50. In my considered opinion, the burden to prove “that incurring of AMP expenses to the extent of more than what other independent entities proportionately incur towards advertisement of their products, in a similar situation, has resulted into a transaction and that these expenses are incurred for brand building on behalf of the foreign parent entity which is so manifestly inferred from the conduct of the parties that there exists an arrangement /understanding / action between the assessee and its foreign AE, which has resulted

into an international transaction for which ALP, adjustment is required under the Act", is on the Revenue.

51. It was argued from assessee's side that the burden to establish this alleged international transaction is on the Revenue. In the opinion of the department this 'AMP expenditure' tantamount to an international transaction, within the meaning of Section 92B of the Act. That under the amended provision, TPO has the necessary powers to examine, under certain circumstances, any international transaction even if there is no specific reference of such a transaction to him from the A.O, and that the burden to demonstrate that a particular international transaction is at arm's length is on the tax payer under Indian TP regulations. That when AMP expenses go to build the brand owned by the parent company, the Indian entity has incurred this expenditure for building brand for and on behalf of the AE, which should be compensated to that extent, can be inferred from the facts / circumstances of a given case and the conduct of the parties.

52. It cannot be denied, rather it is the law of the land that under the transfer pricing regulations the burden to prove that, 'a transaction is not at arm's length' always remains on the Revenue. As per Rule 10D the onus to maintain the requisite records and documents is on the assessee. Thus, in terms of Section 92C, the burden to prove that the computation of ALP by the assessee in relation to an int. transaction is not appropriate and requires adjustment is always on the Revenue. Section 92 (2), 92B(1) r.w.s. 92(F)(v), when read conjointly, clearly suggest that an allocation or apportionment or adjustment is contemplated only under expressly defined conditions as specified there-under. Undeniably, there is no deeming fiction in Chapter X and the corresponding Rules to assume/presume that every transaction or action done by the Indian entity which is wholly owned company of its foreign AE, is influenced by its foreign master or principal, and whatever is whispered even clandestinely by the Indian Company would translate into an int. transaction. There is no such presumption in law, or even under chapter X of the Act. The Revenue cannot deduce whatever it wants to from the given facts and the circumstances of a case. The inference which is permitted, even under

Section 92F(v), has to be based on some material; it cannot be entirely 'subjective' in any case. The subjective inference based on objective material like any candid arrangement / understanding etc., has to be established and objectively demonstrated, wherefrom, it can be safely deducted that there exists an int. transaction between the AEs. The AMP expenses vis-a-vis its impact on brand if is not found palpable it cannot be treated as an international transaction. The intention of the law is not to treat every international transaction as not at arm's length. And similarly, it would be over-reaching and blowing out of proportion if every 100% subsidiary entity of a foreign AE in India, is treated as a creation for manipulation for the benefit of its foreign AE. No one can deny that any foreign entity – a multinational entity come here to do business for a profit and not for charity. They want to make profit to the fullest possible and at the same time it is not only the right but even duty of a 'taxman' to ferret out such a transaction to bring under Chapter X of the Act. But it cannot be illogical and purely based on guess work and sheer assumption and presumption derived from one action which is not found as 'avoidance of tax'.

53. By no stretch of imagination a philosophy of 'Blue Ocean Strategy' [BOS], which may have been adopted by L.G. Group, globally to create new market space or a blue ocean, thereby making the competition irrelevant, can help the revenue to infer any such international transaction, as they have done. The reason for my above epilogue is that the LG brand is already well established in the context of India. The vigorous campaign throughout the length and breadth of our country, of LG Brand will only help the sale of LG Brand products and in no way it can be treated as an effort to bolster the 'brand'. The brand in vacuum has zilch value. When the Brand 'LG' is heard and seen on TV or read in print media, anybody and everybody would make out a picture in their minds of one or the other 'product' of LG brand. Nobody cares and remembers as to how the brand 'LG' looks; what colours are used therein etc. The simple glimpse of the 'brand-name' is bound to create a 'picture' of its products only.

54. As per section 101 of the Indian Evidence Act, 1872, whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that

these facts exist. In this case therefore, the burden to prove, that the alleged AMP expenses are a result of a tacit understanding between the Indian companies and its foreign AE to built/promote LG brand, is on the revenue. The revenue has not been able to discharge this burden, in my opinion. When it has been held in the proposed order that actual comparables have not been considered then in that eventuality, how one can arrive at proportionately higher AMP expenses having been incurred in this case. That so-called non-routine or more that required expenses theory, has to tumble down and thus, the very basis of presumption of 'Revenue' vanishes, resulting into absence of any such international transaction between the AEs.

55. I would go to the extent in saying that after products of LG have been amply advertised and thereafter only the brand name is advertised, which is admittedly India specific, it will only and only enhance the sale of LG products, in India, and it cannot be treated even partly towards brand-building.

56. It is true and cannot be denied that when the brand LG is promoted and its value stays put, it can be sold or otherwise used and

its benefits can be taken by its owner only. Fine, but when the Indian entity is its foreign owner's wholly owned entity, in that case, benefit will definitely accrue or arise to it also, may be indirectly, and that 'indirect-benefit' when transferred then it can be taxed in India, in view of the amended provisions of the Act. So, where is the question of 'avoidance of tax'. The assessee has made huge-profits which has been subjected tax in India. Other items which are treated as international transaction have been dealt with by the 'taxman' by making requisite adjustments under Chapter X of the Act. The entire AMP expenses, were paid to third party in India, to which we are concerned have also suffered tax in Indian jurisdiction, which is admittedly not related to the assessee or its AE. So, where the question of applying provisions of Chapter X of the Act, in the way it has been done arises in this case. When the department alleges that 'brand' promotion of foreign AE's brand has taken place, it has to be proved and simply by inference, no such conclusion can be drawn under the Act. Therefore, before invoking transfer price provisions, the TPO has to first prove that there exists an international transaction in this regard, and thereafter by showing that its price is not within Arm's Length he can make necessary adjustments as per law.

57. There should be some proof of creation of marketable intangible, before any further step can be taken in that direction. Admittedly, the advertisement expenses are of Revenue in nature. The expenditure incurred in one year on advertisement may not travel to even next year as the memory of consumers is very short. The following decisions support my above conclusion :-

1. In CIT Vs. Berger Paints [India] Ltd 254 ITR 503 (206) wherein it has been held that advertisement expenditure is generally of revenue in nature since the memory of purchasing market is short and the advertisement is required to be done from year to year.

2. In CIT Vs. Jai Parabolic Springs Ltd. 306 ITR 42 (Del) it has been held that there was no prohibition on the powers of the Tribunal to entertain an additional ground which according to

the Tribunal arose in the matter and for the just decision of the case. There was no infirmity in the order of the Tribunal.

3. In CIT Vs. Brilliant Tutorials P. Ltd 292 ITR 399 (Mad) it has been held that as regards advertisement it was not denied that the expenditure incurred was for the purpose of business and the possible benefit in future did not militate against the claim for expenditure in the present. Hence, considering the scope of section 37, the Tribunal correctly held that the assessee was entitled to the deduction sought for.

58. As I have already touched the issue, the guidelines, be it that of OECD or that U.N., they come into play, only if India has no reservations towards them, and that too, only after a transaction is brought under Chapter –X of the Act. So, to rely on these guideline when the 'transaction' has not been brought under Chapter X is of no moment, and does not subserve any fruitful purpose. Likewise, how the assessee can be supposed to seek compensation for AMP expenditure which is not consistent with the character of business of

the assessee. It may be easy to say that the parent company cannot completely disassociate itself from AMP expenses either in the manner of planning strategy and budgeting of such expenditure and it may also enjoy the benefits arising therefrom, but it is very difficult to translate this philosophy into action to the hilt, to establish that verily some 'marketable intangible' has taken birth and at the cost of the assessee it has flourished although it is owned by its foreign AE. I am not in agreement with the assertion of the Revenue that there is no concept of 'commercial ownership' of a brand which is legally owned by someone else. A commercial ownership is a reality in the modern global business realm and it is as good as a legal ownership in so far as its effects on sale of products in India is concerned. The brand name and its products have a very piquant relationship; when a 'brand' has a high name, its products have higher sales, and if brand earns a bad name, the sale of its products would be adversely effected. A bad-name comes to a 'brand', only because of its products when they don't satisfy customers. So, the brand may be directly and even 'inversely' proportional to sale of its products; but converse is not true. In case, the product of a brand has a higher name, its brand will be emboldened but if the products have bad name the name of that brand in the 'foreign countries' may not be affected. Therefore, any advertisement which is product-centric, and for that matter of even entirely brand-centric, it will only enhance the sales of the products of that brand in India. In no way, the brand owner will be benefited. It is more the reason in case of a wholly owned entity because any benefit derived by the foreign company will directly and proportionately benefit the Indian company. Therefore, this is not a case of brand-building/promotion. Hence, no such 'covert transaction' between the Indian entity and its foreign AE, can be been culled out and presumed or inferred by the TPO/AO in the given facts and the circumstances of this case. Thus, the department has not been able to discharge its burden which is cast upon it by the precincts of the provisions contained in Chapter X of the Act. The assessee has only incurred expenditure towards advertisement to sell its products. No proof regarding rendering of any service towards brand-building, is brought on record by the Revenue. Therefore, only presumption or assumption at all stages cannot be and should not be approved to replace an 'evidence'.

59. For the purposes of section 92, 92B, 92C, 92D and 92E, 'international transaction' means a transaction between two or more AEs [one of whom should be a non-resident]. What is the nature of this transaction? It is either –

(i) a purchase, sale; or

(ii) lease of intangible or intangible property; or

(iii) provision of services; or

(iv) lending/borrowing of money; or

(v) any other transaction having a bearing on the profits, income, losses or assets of such enterprises

<u>It also includes :-</u> ['It' refers to a 'transaction']

(i) a mutual agreement or arrangement between them for the allocation or apportionment of, or any contribution to –

Any cost or
expense,
incurred or to be incurred in connection with such service, benefit or facility provided or to be provided to any one or more such enterprises

60. Sub-section (3) of section 92 envisages a situation wherein computation of income arising from an international transaction having regard to the arm's length price [or allowance for any expenses or interest arising from an international transaction] has the effect of reducing the income chargeable to tax or increasing the loss when computed on the basis of the entries made in the books of account in respect of the previous year in which the international transaction was entered into. In that eventuality, provisions of section 92 shall not apply. What this provision signifies and resembles a situation when the computation of income of a particular assessment year, on the basis of books of account of previous year, goes below disclosed income. The declared income has to be accepted and the computation taking the income below the declared one has to be ignored. To further simplify, the purport of 92 (3) is that the computation of income from an international transaction having regard to ALP should not be allowed to fall below the income disclosed from this 'international transaction' by the in its books of

account. The term ‘international transaction’ is singular and not plural. It is not ‘international transactions’.

61. In no way it signifies that section 92 prescribes different methods of computation of income from different ‘international transactions’ provided under the Act and Rules. In my opinion, these provisions don’t speak of fixing higher ALP, in whatever manner and b applying any of the methods provided under Rule 10B. Rule 10B. These provisions don't speak about any set-off and nobody can infer such a course from Section 92(1) + 92(3) or otherwise. No forum or authority or court has a vested right or duty to compute income from an international transaction by applying any Method not prescribed in the Act or the Rules, at least in the assessment year 2007-08. For one international transaction for the purposes of sub-section (1) of section 92C, the most appropriate method (of the methods provided under Rule 10B) which is best suited to the facts and the circumstances of that particular international transaction, which is most reliable one, shall be applied. And, if the application of that most appropriate method reduces

income or increases loss arising from that international transaction which can be computed as per the books of accounts, that computation has to be ignored and the book result has to be accepted.

62. The definition of any word or term, expression or phrase, which is in the form of a noun, is its denotation or signification of a term [word etc.] may be made specific by either including something in or by excluding something from it. It does not mean that the definition can either be 'inclusive or 'exclusive'. It can add [include] something to, or / and exclude [substract] something from the general definition provided when an expression 'means and includes' is used to define a word, it is only enlargement of its normal meaning by adding such 'inclusive[s]", to make it comprehensive. The definition of a word etc., is always exhaustive; even if it is included in or extracted from it, specifically. Thus, a definition of a term etc, is its exhaustive definition with or without there being 'inclusives' or 'exclusives'. So, in my opinion, the definition of an 'international transaction' as per section 92B is not classic as has been canvassed by the ld. D.R. Sub-

section (2) of section 92B deems a transaction between 'other person' and the AE as an international transaction.

63. In my considered view, the impugned transaction does not fit in any part of the definition of an 'international transaction'. It is not at all a 'provision of service'. The assessee has not provided any such service - directly or indirectly to its AE, as has been alleged. The assessee has been pursuing its business activities in the manner which in its opinion increases or would increase its turnover of the year. The assessee in my opinion has not created, improved or maintained the marketing intangible for its foreign AE. So, no question of any sort of compensation arises in this case. The ld. D.R., and for that matter, the ld. TPO/A.O. is reading too much between the lines. If one goes by the canvassed definition of an 'international transaction', as has been done in this case, anything and everything can be brought under the definition of the term 'bearing on the profits, income, losses or assets' of the assessee or its AE. If this contention is accepted, then anything and everything done or not done by the assessee can be brought to tax as an income from an 'international transaction'. For

example, if the assessee reduces sale-price to compete in the market which increases volume of income but it may have a bearing on the profit as the net-profit is bound to decrease, or the net profit rate is bound to fall, then, in that case, particularly in the case of this assessee who is a hundred per cent subsidiary of its AE, who is benefitted with increase in income, the 'reduced-sale-price' cumulatively, has to be treated as an 'international transaction'. In my view, it would amount to far fetching the meaning of the term 'international transaction'. This is not at all the case where the assessee has claimed expenses relating to its AE. The ld. D.R. has been fair enough to accept that the payment to third-party or parties [who are Indian assessees], has not been treated as an 'international transaction'. The payment made to third-party for advertisement in the Indian territory, for the purpose of enhancing its sale, and by drawing benefit of the foreign trade-mark/brand/logo, also cannot and should not be read in a different manner.

64. The explanation appended to section 92B, which was inserted vide the Finance Act, 2012, w.r.e.f 1.4.2002 [i.e. from the very

inception of section 92B] does not enlarge the scope of section 92B and does not, in fact, widen the 'exhaustive' definition of the term 'international transaction'. This explanation only 'explains' the words, terms, etc. used in the main section, as enumerated above. Explanation (i)(a) clarifies as to what is the 'tangible-property', used in section 92B(1) and to be very specific, building …..etc. have to be named. By (i)(b), this Explanation clarifies by naming specific 'intangible properties'. Likewise, other sub-clauses (c) to (e) have clarified capital financing; provision of services and a transaction of business. Through Explanation (ii), it has further clarified the expression "intangible property' to include :

> (a) *marketing related intangible assets, such as, trademarks, trade names, brand names, logos;*
>
> (b) *technology related intangible assets, such as, process patents, patent applications, technical documentation such as laboratory notebooks, technical know-how;*
>
> (c) *artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps, engravings;*
>
> (d) *data processing related intangible assets, such as, proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters;*
>
> (e) *engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schema-tics, blueprints, proprietary documentation;*

(f) *customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders;*

(g) *contract related intangible assets, such as, favourable supplier, contracts, licence agreements, franchise agreements, non-compete agreements;*

(h) *human capital related intangible assets, such as, trained and organised work force, employment agreements, union contracts;*

(i) *location related intangible assets, such as, leasehold interest, mineral exploitation rights, easements, air rights, water rights;*

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

(k) *methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data;*

(l) *any other similar item that derives its value from its intellectual content rather than its physical attributes.*]

65. This explanation has tried and clarified the 'terms' used in section 92B(1). The 'provision of services' – as per clause (d) of Explanation (i) include provision of market research, market development, marketing management, administration, technical service, repairs, designs, consultation, agency scientific research, legal or accounting service. Admittedly, the assessee is engaged in the business of manufacturing and selling of electronic goods etc. and not in rendering services of advertisement or brand-promotion. As per

section 92B with its explanation, only if the assessee is consciously involved in providing services as its business, only then it can fall under the definition. The 'provision of service' refers to Explanation (i)(d) – and includes provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service . If one looks towards the tenor of the above 'services' all of them refer to specific 'provision of these services'. Whereas, in the given case, no such service has been provided by the assessee to its AE. The 'factum' of rendition of any one of such services is not existent in the case in hand. The service should consciously emanate from the act and conduct of the assessee. Therefore, the source of service is also a relevant factor. By incurring AMP expenses for the benefit of increasing its sale of 'products' would in case amount to 'provision of service' even if it is concluded that the LG brand is also promoted, may be incidental. The definition of provision of service is given entirely in different and distinct meaning which cannot be in a 'presumptive' manner at all.

66. Explanation (ii) further clarifies the meaning of the expression 'intangible property'. We are not concerned with this portion of the explanation because in section 92B(1) the definition of 'international transaction' is given as meaning of 'purchase, sale or lease of intangible property. This is not the case wherein any such sale, purchase or lease of an 'intangible property' is involved. The inclusive definition of the term 'provision of services' does not speak about any 'intangible or tangible property" [emphasis supplied]. As stated above qua tangible and intangible property, their purchase, sale or lease are only relevant and not 'provision of services'. Therefore, there is no point in reading section 92B Explanation (i)(d) and 92B Explanation (ii)(a). Nobody has denied that a 'trademark, a trade-name, brand-name or logos are 'intangible property'. But, in case of such property only sale/purchase or lease is relevant and if that exists that will amount to an 'international transaction'.

67. In view of the above position of law, Section 92CA of the Act cannot be treated as verbose bombastic, turgid or flowery. This section alongwith all its sub-sections viz., 1, 2, 2A, 2B, 2C, 3, 3A, 4, 5,

6, and 7 has to be read harmoniously. None of its sub-sections can be treated as irrelevant, overlapping the other or in contravention of the other sub-section. All sub-sections of section 92CA are to be read in continuation, in furtherance and in achieving its main objective and intent. Section 92CA deals with the requirement of reference to TPO of an international transaction entered into, in any previous year, when the A.O. considers it necessary and expedient to do so, and after obtaining previous approval of the Commissioner, for the computation of the ALP in relation to that international transaction. Thus, it becomes manifest that it is in the domain of the concerned A.O. to make reference of any an international transaction which has been entered into by the assessee. Meaning thereby, that whatever international transaction has been reported by the assessee in the terms of the relevant provisions of the Act and of Rules, the A.O., if desires to do, may refer it to the TPO for the computation of its ALP but after taking previous approval of the Commissioner. Thus, u/s 92CA, three conditions are laid down before such a reference can be made, and these pre-conditions are:

(1) There should be accepted and reported international transaction which has been entered into by the assessee during the previous year.

(2) The A.O. must find it necessary or expedient so to do. This is A.O.'s sole discretion.

(3) The A.O. must obtain previous approval of the Commissioner, before making this reference.

(4) The sub-section (2) of this section 92CA prescribes the procedure to be adopted by the TPO, once he receives such valid reference. He has to serve a notice to the assessee to require him to prove that the 'price' computed by it in relation to that international transaction is within arm's length.

68. Sub-section (2A) of section 92CA(2) enlarges the scope of its sub-section (1) and (2) which talks about reported international transaction. According to this sub-section, which is brought on the statute vide the Finance Act, 2011 w.e.f. 1.6.2011, if other international transaction, other than reported [covered u/s 92CA(1)], the TPO can still proceed to compute its ALP, as if it was referred to him under sub-section (1) of section 92CA. What does it imply? It

implies that the conditions of (i) that the A.O. considers it necessary or expedient to refer an international transaction to TPO and (ii) prior approval of the Commissioner, are foregone, in that eventuality. The only requisite is that during the course of proceedings before him, other international transactions, other than referred to him u/ss (1) of section 92CA, comes to his notice. Hence, in such an eventuality, the preconditions laid, for making reference to the TPO, on the A.O. have been relaxed.

69. The sub-section 2B, which was inserted by the Finance Act, 2012, w.r.e.f 1.6.2002 and is given retrospective effect, is in controversy. According to the assessee, it will not apply to cases before 1.6.2012 in so far as jurisdictional issue is concerned. In my opinion, this sub-section is entirely different and distinct from the provision operates, as it exists as on today, only in cases of international transaction which has not been reported u/s 92E but it comes to the notice of the TPO.

70. This sub-section applies in cases other than covered by sub-section 2A and sub-section (1). There may be cases where no report

u/s 92E is furnished but the transactions comes to the notice of the TPO.

71. What is that report which is required to be furnished u/s 92E, it is the report from an Accountant which is to be furnished by persons entering into international transaction or specified domestic transaction. If these all sub-sections are conjointly construed, it will become manifest that all these operate in different spheres and for different objectives. u/ss (1) it is discretion of the A.O. subject to few conditions to refer to the international transaction to the TPO, in respect of international transactions which are entered into and reported to him by the assessee. Then, comes in the role of the TPO who can examine other international transaction, as per rule, which comes to his notice from the records available before him. Sub-section 2B talks about international transaction regarding which accountants report, which is mandatory as per the provisions of section 92E, has not been furnished by the assessee to the A.O.

72. In my anxious opinion, this provision applies to such cases, in which the assessee has disclosed and reported an international transaction entered into by the assessee during the previous year but for that requisite accountant's report [u/s 92E has not been furnished, yet the A.O. has not considered it necessary or expedient to refer it to the TPO u/ss (1) of section 92CA. In that case, the TPO has power to deal with it in the similar manner as he can deal with u/ss 2A. Sub-section 2A has not been 'reported' by the assessee and consequentially not referred by the A.O. to the TPO. But sub-section 2B deals with such situations in which the assessee has 'reported' an international transaction but has not furnished accountant's report in respect thereof but still the A.O. has not found it necessary to refer the same to the TPO and at that stage, the TPO notices that requisite report of the accountant has not been furnished, and in that eventuality, the TPO can proceed further, as prescribed in sub-section 2B. Had the legislators intended to give section 2B an overriding effect, even to bulldoze sub-section 2A, they could have deleted sub-section 2A, but it is not the case. Hence, to that extent, I have found the contentions of the ld. Authorized representative to be correct as per the Act. The

case of LGI is not covered u/ss 2B, in that view of the matter because the assessee has not treated this impugned alleged transaction as an international transaction and has not reported the same and has not obtained and furnished accountant's report. The remaining sub-sections of section 92CA are not relevant for our instant purpose. Accordingly, I have to answer question No. (1) against the revenue, in the given facts and circumstances of this case. [LGI] obtaining in A.Y. 2007-08. But I would like to add here that the aspect of assumption of jurisdiction to charge an income is substantive in nature and the law obtaining at that particular point of time is only relevant and it cannot be altered by any retrospective amendment or insertion of any provision. It is the ratio-decidendi of a judgment which matters and not the provisions under which it is rendered. Anyway, my above answer to Question No. 1, also supplies answer to Question No. (2) relating to charging of mark-up. In view of my above finding the answer to Question No. (2) is also against the revenue.

Sd/-

[HARI OM MARATHA]
JUDICIAL MEMBER

Dated : 15th January 2012.

SPECIAL BENCH, NEW DELHI

PRONOUNCEMENT

List of order pronounced under sub-rule (4) of Rule 34 of Income-tax (Appellate Tribunal) Rules, 1963.

Combination : Shri G.D.Agrawal, Vice President, Shri R.S.Syal, Accountant Member and Shri Hari Om Maratha, Judicial Member.

Sr.No.	Appeal No.	Name of the assessee	Bench	Date of hearing	Decision
1.	ITA No. 5140/Del/2011	M/s L.G.Electronics India Private Limited Vs. ACIT.	Special Bench	08.11.2012	(i) As per majority view, the adjustment in relation to AMP expenses and also earning a mark-up from associated enterprise is permissible. However, on the facts of the case, the matters have been restored to the file of the TPO for *de novo* adjudication in the light of guidelines given in the order. *(ii) In the dissenting* order, the learned Judicial Member has answered both the questions against the Revenue.

(Hari Om Maratha)
Judicial Member

(R.S.Syal)
Accountant Member

(G.D.Agrawal)
Vice President

Date : 23rd January, 2013