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

BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
AND
SHRI. T.S.KAPOOR, ACCOUNTANT MEMBER

I.T.A .No.-385/Del/2014
(ASSESSMENT YEAR-2009-10)

BMW India Pvt. Ltd., 7th Floor, Tower-B, Building No.-8, DLF City, Phase-II, Gurgaon **PAN-AABCB7140C** **(APPELLANT)**	**vs**	ACIT, Range-I, Gurgaon **(RESPONDENT)**

Appellant by:	**Sh. Rahul K. Mitra, CA,** **Sh. Deepak Chopra, Adv. &** **Sh. Harpreet Ajmani, Adv.**
Respondent by:	**Sh.Peeyush Jain, CIT DR &** **Sh. Yogesh K. Verma, CIT DR**

ORDER

PER DIVA SINGH, JM

The present appeal filed by the assessee is arising out of the assessment order u/s 144C/143(3) dated 18.12.2013 passed by the AO in pursuance to the order dated 27.11.2013 by the Dispute Resolution Panel-III, New Delhi. The assessee before us has raised the following grounds:-

> *1. "The Ld. Additional Commissioner of Income-tax (Ld. AO') pursuant to the directions of the Ld Dispute Resolution Panel (DRP'), erred in enhancing the income of the appellant by Rs.78.62crores by holding that the appellant should have received reimbursement for "alleged excessive" Advertising, Marketing and Promotion ('AMP') expenses from its Associated Enterprises CAEs') and in doing so have grossly erred by:*
>
> > *1.1. not controverting or even taking cognizance of the ruling pronounced by the Hon'ble Income-tax Appellate Tribunal ('ITAT'), Delhi Bench in the appellant's own case for AY 2008-09 which was submitted before the Ld. DRP during the hearing on August 23, 2013 and rehearing on November 13, 2013 wherein the appellant had*

received a favourable order deleting the adjustment on account of "alleged excessive" AMP expenses incurred by the appellant; even though the facts of the case has remained unchanged in AY 2009-10 from those in AY 2008-09;

1.2. disregarding the fact that the premium profits earned by the appellant more than compensate the allegedly excessive AMP spends, if any, incurred by it:

1.3. misinterpreting or placing incorrect reliance on the international guidance in relation to the 'marketing intangibles' and 'bright line test' from Organisation for Economic Co-operation and Development ('OECD'), US TP Regulations and Australian Tax Office ('ATO') and relying on several erroneous/factually incorrect and contradictory statements/ observations in the TP order, which are not relevant to the instant case, only in order to justify an otherwise inappropriate and unwarranted TP adjustment;

1.4 incorrectly holding the AMP expenses incurred by the appellant to be "excessive' on the basis of a "bright line limit" arrived at by deriving a ~distorted set of comparables by rejecting Mahindra First Choice Wheels Ltd. from the set originally produced by the appellant in its TP documentation and including AVG Motor Ltd., Competent Automobiles Company Ltd. and Sai Service station Ltd;

1.5 in upholding that the appellant has rendered services to its AEs by incurring the AMP expenses and by holding that a mark-up of 15.27% has to be earned by the appellant in respect of the "alleged excessive" AMP expenses, without any basis for the same whatsoever;

1.6 without prejudice to its above contentions, not excluding certain components of cost from the computation of AMP expenses of the appellant even though such expenses have been directed to be removed from computation of AMP expenses of the appellant by the Ld DRP and thereafter by the Hon'ble ITAT in the appellant's own case in AY 2008-09; and

2. Further, the Ld DRP / AO erred in enhancing the income of the appellant by Rs. 3.12 crores by holding that the transaction pertaining to receipt of Information Technology ('IT') support services does not satisfy the arm's length principle envisaged under the Income-tax Act, 1961 ('the Act') and in doing so grossly erred in:

2.1. rejecting the Transaction Net Margin Method ('TNMM') as the most appropriate method to test the said transaction without appreciating that the transaction is closely linked to the distribution/assembling functions of the appellant and applying Comparable Uncontrolled Price ('CUP') Method in contravention of the provisions of Rule 10B of the Income-tax Rules, 1962 ('the Rules') merely based on presumptions and holding the arm's length value of the transaction as 'NIL';

2.2 disregarding the arm's length price as determined in the TP documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Rules and determining the same as NIL as against

the sum of INR 3.12 crores actually incurred;

2.3 failing to acknowledge the business efficacy of the transaction and the benefits received by the appellant from the same; thereby challenging the commercial wisdom of the appellant in making such payments while passing the order in contrast with the judicial pronouncements in this regard; and

2-4 ignoring that the facts and circumstances of the appellant's case during the year remained unchanged when compared to previous years in which detailed audit and scrutiny was done with regard to the pricing and methodology of this transaction and subsequently no adverse inference drawn.

CORPORATE TAX MATTER

3. The Ld. AO has erred in law and on facts and circumstances of the case, in reclassifying certain assets under the Block of "Plant and Machinery" eligible for depreciation @ 15% which were originally classified by the appellant under the Block of "Computers" eligible for depreciation @ 60%.

4. Without prejudice to the above , the Ld. AO has erred in law and on facts and circumstances of the case, in disallowing an amount of INR 0.48 crores towards the depreciation allowance on individual assets so reclassified by calculating depreciation on the original cost of the assets instead of the Written Down Value ('WDV')and without appreciating that depreciation allowance of only INR 0.17 crores has actually been claimed on such assets in the return of income, where computed on a standalone basis .

5. The Ld. AO also erred in proposing to initiate penalty proceedings under section 271(1)(c) of the Act for concealment of income or furnishing inaccurate particulars of income.

The above grounds of appeal are without prejudice to each other.

The appellant craves leave to alter, amend or withdraw all or any of the Grounds of Objections contained herein or add any further grounds as may be considered necessary either before or during the hearing of the objections."

2. Before we refer to the facts, it is appropriate to first address that the appeal which came up for hearing on 22.07.2014 date had been adjourned on earlier occasions on the ground that whether in view of the orders of co-ordinate Benches in the case of Casio India and PerfettiVan Melle India P Ltdôs the matter was required to be referred to a larger Bench or not. For ready-reference we reproduce the same from the order sheet:-

"28.4.14 Present for assessee: Shri Rahul Mistra.
" " Department: Shri Piyush Jain
The issue in question is decided by I.T.A.T in 2008-09 in favour of the assessee holding that L.G.Electronic Special Bench judgement does not apply to a distributor of high end products. Thus as a matter of record ITAT has decided the issue qua distributor in its faovur. Judicial discipline requires that a judgment rendered in assessee case should be followed.
In new development Delhi ITAT in the case of Perfetti and Casio India has held that L.G.decision is applicable to distributors case also.
Both the parties have filed representation in this behalf which are on record. In essence following issue arise in the context of Special bench constitution in this behalf in this case.

i) Whether following judicial discipline assessee's won ITAT judgement in A.Y.2008-09 should be followed.

ii) Whether a Special Bench of appropriate strength i.e. 5 Member shall be constituted by Hon'ble President to decide the appeal.

Put up before Hon'ble V.P for appropriate action.
Adjd. To 15.05.14.

Sd/- Sd/-
(B.C.Meena) (R.P.Tolani)
Accountant Member Judicial Member

2.1. The record shows that on the next two dates i.e 15.05.2014 and 03.06.2014 time was sought by the Ld. CIT DR which was granted by the Co-ordinate Bench. The appeal thereafter again came up for hearing on 22.07.2014 on which dates considering the arguments of the parties before the Bench it was pointed out that since in the assesseeôs own order the order of the Special Bench has been followed the perception that the said order was not followed presumably based on reporting in the ñheadnotesò in the published orders may not be the appropriate way to conclude that L.G. Electronics case has been bi-passed in the case of the assessee. In view of the apparent conflict/confusion between the conclusion based on publisherôs view of what has been said instead of what has been written in the order we are of the view that reading the order itself should be relied upon. The parties were accordingly required to address the issues and were heard at length. Despite this time was given to the Ld. CIT DR to further supplement his arguments

with written submissions if need be for the sake of completeness and place the same on record after mutually exchanging the same with the rejoinder if any sought to be filed on behalf of the assessee. The specific order sheet entry of the said date is reproduced hereunder:-

22nd July 2014	*Mr. P.Jain, CIT DR and Mr. Rahul Kr. Mitra CA present. The Ld. AR places reliance on assessee's own order for the immediately preceding assessment year and Ld. CIT DR states that in the order of Casio India Co. and Perfetti Van Melle the Co-ordinate Bench has held that the order of the Special Bench In L.G. Electronics case shall prevail. The argument of the Ld. CIT DR to the extent that L.G. Electronics case shall prevail is correct however the presumption that BMW states that L.G. Electronics case shall not apply is misplaced. Merely because the arguments of Ld. AR are recorded does not mean that all arguments from part of the finding. Ld. CIT DR to give a short written submission. Adj. to 31st July 2014. Typed copy to be placed on record. Read out in the Tribunal.*

Sd/- *Sd/-*
(T.S.Kapoor) *(Diva Singh)*
Accountant Member *Judicial member*

2.2. We have already addressed the fact that the observations of the Co-ordiante Bench in Casio India and PerfettiVan Melle India P Ltdôs based probably on the line of arguments advanced by the parties, presumably relying on head notes of the publisher in BMWôs case may not be the appropriate way to conclude what was decided in the decision dated 16.08.2013 in BMW. We are of the view that it would be more appropriate to refer to the said decision itself and see if the decision of the Special Bench in L.G.Electronics case has been bi-passed in BMWôs case. The umbrage expressed in the decision dated 13.12.2013 of the Co-ordinate Bench in Casio India on reflection and consideration would show that it may have been based probably on incorrect pleadings before it based on the head notes as such the observation that there are no prizes for guessing that Special Bench shall prevail probably would not have been made. This aspect has adequately been addressed in order dt. 31.07.2014 in ITA No. 5178/Del/2011 &

263/Del/2013 in M/s Bose Corporation India Pvt. Ltd. vs ACIT case. For ready-reference we extract the relevant portion from the said order:-

> *"3.1. The needless controversy appears to have arisen apparently due to certain observations made in order dated 13.12.2013 in ITA No.-6135 & 5611/Del/2011 in ACIT vs M/s Casio India Company wherein in para 5 and 6, the Co-ordinate Bench appears to be guided by the arguments addressed by the Ld. AR in that case who, relying upon the order in the case of BMW India Pvt. Ltd., advanced arguments apparently on the basis of headnotes of the order in BMW India Pvt. Ltd instead of reading the complete order and submitted that BMW India Pvt. Ltd. be followed in preference to the Special Bench in L.G. Electronics. The observations in para 5 and 6 of the order appears to completely overlook the fact that the material finding in BMW India Pvt. Ltd. actually considered and followed wherever applicable the principles laid down by the Special bench in L.G. Electronics. Hence the surprising observation in para 6 that "there is no prize for guessing that Special Bench order has more force and binding effect over the Division Bench order on the same issue. This contention raised by the Ld. AR, therefore, fails" appears to be the result of the mistaken submissions which could not have been based on reading the entire order and appears to be based only on a reading of the headnotes. The fact that headnotes can at times be misleading is a well known fact as they are only the reporting done for the convenience of the professionals and it is imperative therefore to read the entire order. Be it as it may, we would not be out of place to sound a caution that hasty conclusions based on arguments advanced on the basis of the headnotes in the reporting of the orders may not be advisable and it may lead to misleading conclusions. Reference may be made to the decision rendered by the Apex Court in Nahar Industrial Enterprises Ltd. US. Hongkong and Shanghai Banking Corporation (2009) 12 SCR 54 the Hon'ble Court wherein their Lordships held in paras 94 and 95:-*
>
> ***"94……..***
>
> ***It must in this context be noted that Headnotes by the editors of a Reports are not a conclusive guide to the text of the judgement reported. They are made only for the convenience of the readers as a short summary to the text and for easy reference and at times they are misleading.***
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> ***95. The United States Supreme Court in United States vs. Detroit Timber and Lumber Co., 200U.S.321, 337.***
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> ***"In the first place, the headnote is not the work of the court, nor does it state its decision. ……It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports."***
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> *3.2. The advancing of arguments that a distributor remuneration model is separate and distinct is accepted in L.G. Electronics case also as would be borne out from parameter one of para 17.4 of L.G. Electronics. Accordingly taking cognizance of this decision rendered in BMW India Pvt. Ltd. does not run contrary to the decision of L.G. Electronics case. The fact that in L.G. Electronics case there was no occasion to analyze, consider in detail and consequently adjudicate only on a distributor's case is self evident since all possible manner of business models were considered together for*

which purposes acknowledging its humane limitations the Special Bench was constrained and candid to admit the obvious fact that it is not possible to have a straight jacket formula for all eventualities. The fact remains that in parameter one of para 17.4 the distinction in business models of distributorship and licensed manufacturer was considered to be a necessary factor requiring examination. In BMW India Pvt. Ltd. this examination qua the assessee was done the decision is fact specific and it is a well accepted fact that the decisions in transfer pricing are fact strewn and fact specific. The view taken in BMW India Pvt. Ltd. was that a distributor remuneration model is distinct and peculiar. Thus the view taken was in conformity with the decision of the Special bench and concurring with the view taken, we hold that this view does not override the Special Bench. The fact that the distributor remuneration model is distinct is a well accepted fact for which no authority need be cited, however for the sake of addressing lingering doubts if any we refer to the order dated 30.08.2013 in ITA No-6283/Del/2012 in Nokia India Pvt. Ltd., though not in the context of AMP expenses but in the context of allowable expenses of a distributor. In the facts of that case on consideration it was again recognized that a distributor's model of remuneration has peculiar and unique characteristics which are distinct and separate from the remuneration model of a licensed manufacturer. The assessee therein was engaged in providing services in the industry of installation, commissioning and erection of tele-communication equipment, selling (trading) of mobile phones networks and accessories, research & development services to the Nokia Group of company whose claim of expenses based on price protection to its dealers was denied. In the facts of that case the dealers were offered apart from discounts based on the incentives to the distributor on goods sold but also promotional schemes for achieving sales target. Over and above this price protection was also offered for the handsets which were not sold. The assessee sought to justify its claim for price protection on the ground that the assessee was operating in a highly competitive and price sensitive market which was dependent on the prices and varieties of handsets launched by its competitors. The price protection policy, as per the arguments was necessitated to ensure that Nokia's distributors do not suffer loss on account of stock lying with them as the distributors, at times, are required to sell the handsets at a price lower than the cost at which the same were purchased from the assessee. Considering the ground in Nokia India Pvt. Ltd. the following conclusion was drawn:-

> ***"4.8. "We have heard the rival submission and perused the material available on record. On a consideration of the issues,*** *we are of the view that the evidence filed before the DRP should be sent back to the AO for considering the same. The arguments advanced on behalf of the assessee that the confirmations filed in similar format are the result of guidance given to the distributors/dealers by the assessee to show how the confirmation should be filed. This fact does not necessarily lead to the conclusion that the statements in the confirmations are not true. However the correctness/genuineness of the same needs to be enquired into. We also hold that the fresh evidences which the assessee is now seeking to file should be admitted as the arguments that they could not be filed before the DRP in the absence of any fact on record cannot be*

disbelieved especially since the evidences filed before the DRP itself were filed during the fag end of the proceedings. However while doing so, we are inclined to agree with the arguments advanced on behalf of the Ld. CIT DR that the evidences sought to be placed on record are not sufficient and complete to justify the claim of expenditure wholly and exclusively for business purposes as justification for the book entry by way of Price Protection policy of the assessee by way of agreements with the distributors/dealers accepting liability for the said purposes by the assessee needs to be filed. The amounts claimed qua the distributors/dealers need to be supported by details of dates/period and models for which price protection is calculated which needs to demonstrated by some internal audit of stocks lying unsold whose prices have dropped due to competition. The necessary evidences need to be made available to justify the claim especially since discounts and commissions are anyway stated to be made available and paid to the distributors/dealers. Accordingly while admitting fresh evidences filed before us the AO is directed to consider them alongwith the evidence which had been filed before the DRP. We further direct the assessee to place necessary and relevant evidences as brought out above and also find mentioned in the assessment order to justify its claim. Liberty to file fresh evidences before the AO is granted and the AO shall be duty-bound to consider the same before the passing of his order. Needless to say that a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard shall be passed by the AO."

3.3. Hence though it may appear to be intellectually sound to precede or follow up ones main argument with judicial decisions that purport to support or explain the main arguments one needs always to keep in mind the well recognized and accepted proposition that a judgement should be read as a whole and practice of picking stray sentences and words should be avoided as the language used in a decision cannot be treated with the same level of rigorous interpretation as is given to the words in a statue. In support of the above, we rely on order dated 30.08.2014 in ITA No.-6410/Del/2012 in Sony Mobile Communication India Pvt. Ltd. as under:-

6.5. *"While considering the language used in a judgement/decision, it is necessary to be borne in mind that it is to be interpreted plainly and unambiguously and artificial construction is to be avoided. The importance of reading the entire judgement/decision can never be over-emphasized especially if there is a doubt cast by any of the parties about the precedent laid down in the judgement. The approach to refer to a stray sentence or a casual remark has frequently been frowned upon by Courts and a word or a sentence by itself cannot be treated as a binding precedent.* ***A case is a precedent for what it actually decides and nothing more. It is equally well-settled that for considering the applicability of rules of interpretation to the words used in the judgements and decisions vis-à-vis the Acts of Parliament, the words***

used by the Judges are not to be read as if they are words used in an Act of the Parliament. Statutes lay down rules "in fixed verbal form" precedents do not. It has to be borne in mind that the particular words are not necessarily used by precedent Courts after weighting the pros and cons of all conceivable situations that may arise. They constitute just the reasoning of the judges in the particular case, tailored to a given set of facts and circumstances, and only the proposition of law which constitutes ratio decidendi is binding on the same set of facts. The words used in the Acts of Parliament as is well known on the other hand on account of the careful drafting-presumably with reference to analogous statutes; the multiple readings to which it is subjected in the legislature and the discussions which go behind the making of a statute inject a degree of sanctity and defiteness to the meaning of the words used by the Legislature. The same cannot necessarily be always said of a decision which deals with a certain given set of facts for answering the specific question posed to the Judges. *The Judges while deciding the same may dwell on various possibilities without the benefit of the facts in those cases and consequently arguments thereon which they may deliberate and at times without the benefit of specific arguments on those facts. The observations which may have been made in passing in these deliberations do not form the ratio decidendi of the decision. It would be too much to ascribe and read precise meaning to words in a decision which the judges who wrote them may not have had in mind.* ***In support of the above legal position, we may make specific reference to CWT vs Dr. Karan Singh and Others. (1993) 200 ITR 614 (SC); CIT vs K. Ramakrishnan (1993) 202 ITR 997 (Kerala) and KTMTM Adbul Kayoom & another vs. CIT (1962) 44 ITR 689. The observations of the Hon'ble Apex Court in the case of CIT vs. Sun Engineering Works Pvt. Ltd. (1992) 198 ITR 297 (SC) specifically observed that it is neither desirable nor permissible to pick out a word or a sentence from the judgement of the Hon'ble Supreme Court divorced from the context of the question under consideration and treat it to be the complete law declared."***

(Emphasis provided herein)

3.4. Accordingly reverting to the controversy on the issue at hand we hold that there is no conflict between the decision in BMW India Pvt. Ltd. with L.G. Electronics. Hence in view of the above the parties were directed to address the issues on the basis of facts available on record keeping in mind that there is no divergence of views on the principles to be applied while deciding the issues, as the principles laid down in L.G. Electronics (Special Bench) have been applied in BMW India Pvt. Ltd."

2.3. Reference to the above is being made as herein also the Ld. CIT DR stated that in the order dated 13.12.2013 in ITA No.-6135 & 5611/Del/2011 in ACIT vs

M/s Casio India Company the Co-ordinate Bench has held that the order of the Special Bench in the L.G. Electronics case shall prevail over BMWôs case. Since there is no contradiction in the ratio decidendi of L.G. Electronics case and order dated 16.08.2013 in ITA No.-5354/Del/2012 in the case of BMW India Pvt. Ltd. vs. ACIT, the presumption that there is a contradiction is misplaced.

3. Having addressed the background of the proceeding before the Tribunal, we now revert to the facts of the case. The relevant facts of the case are that the assessee declared a loss of Rs.38,29,56,167/- by way of filing its return on 29.09.2008 which was selected for scrutiny through CASS after issuance of notice u/s 143(2) of the Income Tax Act. The AO made a reference to the TPO. The facts as emanating from the TPOôs order u/s 92CA(3) dated 18.01.2013 are that the assessee has been described in para-2 as having global operations in three segments namely Automobiles, Motorcycles and Financial Services. The parent company of the Groups is BMW AG, which is headquartered in Munich, Germany and is primarily engaged in the manufacturing of automobiles and motorcycles. The major car brands stated to be manufactured by BMW AG are BMW, Mini and Rolls-Royce.

3.1. The following international transactions were disclosed by the assessee:-

Nature of Transaction	*Value*
Purchase of raw materials (CKDs)	*4,199,174,364*
Purchase of traded vehicles (CBUs)	*1,608,305,178*
Purchase of spare parts	*270,019,003*
Reimbursement of interest paid on delayed payments to group companies	*24,226,895*
Purchase of fixed assets	*7,618,137*
Commission received	*3,298,861*
Receipt of IT support service charges	*31,155,033*
Reimbursement of expenses to group companies	*206,515,033*
Purchase of fixed assets	*7,618,137*
Commission received	*3,298,861*
Receipt of IT support service charges	*31,155,807*

Reimbursement of expenses to group companies	*206,515,033*
Provision of procurement services	*57,269,763*
Provision of training services	*7,122,574*
Interest on External Commercial Borrowings	*48,151,177*
Reimbursement of expenses by group companies	*40,990,036*

4. A perusal of the TPOôs order shows that the TPO, considering the Transfer Pricing study of the assessee, wherein the assessee described its activities as that of a distributor; and considering the Importation Agreement entered into by the assessee with the parent company, i.e. BMW w.e.f 01.01.2006 which assigned the duties of the assessee with regard to marketing and promotion of the products of the parent company, came to the following conclusions:-

> *4.2. "It is evident from the TP study of the assessee that its job is to promise the "BMW" brand in India and it had incurred huge expenditure under the heads of advertisement, marketing and promotional expenditure[AMP] in the year under consideration. The details of expenditure incurred by the assessee for trade mark promotion and development of marketing intangibles are as under:-*
>
> | | |
> |---|---|
> | *Expenditure on AMP* | *922230438* |
> | *Value of Gross Sales* | *10867616561* |
> | *AMP/Sales of the assessee* | *8.49%* |
>
> *4.3. It is evident from above discussion that the assessee has incurred a cost in connection with a benefit and services provided to the AE under a mutual agreement. Accordingly, the AMP expenditure of Rs.92.22 Crores was an international transactions u/s 92B(1) read with clause (v) of section 92F."*

4.1. The reply of the assessee has been incorporated in para 5.1 of the said order. A perusal of the same shows that it was submitted that the AMP expenses include expenses of certain items like after sales support costs incurred for company dealers and salesman bonus and it was urged that these should not form part of AMP expenses. A perusal of para 5.3 shows that it was submitted that as a percentage the amount spent on such activities when considered for 5 years including the year under consideration it has actually come down and in the year

under consideration the argument that this was the first full year of operation the expenditure consequently was higher was not accepted by the TPO. The fact that it was not disclosed as an international transaction u/s 92B(1) read with clause (v) of section 92F was also a point noted by the TPO.

4.2. The TPO accordingly after show-causing the assessee and after considering the assesseeôs reply proceeded to propose the adjustment of Rs.68,20,56,112/- and applying the mark-up of 15.27% proposed the adjustment of Rs.78,62,06,080/- holding as under:-

> ***10.5 "Response of the assessee:*** *The assessee, vide its reply dated 14,12.2012, has raised objections regarding inclusion on sales discount after the sales support and salesman bonus for the purpose of calculation of AMP expenses. Discussion in regarding inclusion of these expenses has given in earlier part of this order. It may further be mentioned on the basis tenancy of transfer pricing is to ensure similarity of adjustment to be made for the comparables also. The Annual Reports of the comparables have been perused and it is seen that the details of the aforementioned line items is not available in them. Therefore to ensure consistency in calculation of AMP expenditure, the aforesaid line items are not being excluded for the purpose of calculation of AMP expenditure of assessee.*
> *In the Distribution segment the assessee has used 5 comparables for benchmarking. The comparables chosen by the assessee have been used for the purpose of comparison of AMP expenditure, with the exception of Mahindra First choice Wheels Ltd. which promotes Mahindra brand is not acceptable, The remaining comparables chosen by the assessee and their relevant AM P data is reproduced hereunder:*

S.No.	*Name of the Company*	*Advertising, Marketing and Promotional Expense/Sales (A/B) (%)*
3.	*Eastman Industries Ltd.*	*0.94*
4.	*Lucas India Services Ltd.*	*0.94*
5.	*MGF Automobiles Ltd.*	*4.77*
6.	*Machino Techno Sales Ltd.*	*5.15*
7.	*Popular Vehicles & Services Ltd.*	*4.46*
8.	*Sri Ramadas Motor Transport Ltd.*	*2.18*

> *Further examination of the details of comparables used last year for AMP analysis revealed that the following comparables have not been considered by the assessee. These are also being considered as comparable as there has been no change in the operating circumstances of either the assessee or of the comparables.*

S.No.	Name of the Company	Advertising, Marketing and Promotional Expense/Sales (A/B) (%)
1.	AVG Motors Ltd.	0.74
2.	Competent Automobiles CO. Ltd.	0.14
9.	Sai Services Station Ltd.	0.55

10.6. The final comparables therefore for AMP analysis are as under:-

S.No.	Name of the Company	Advertising, Marketing and Promotional Expense/Sales (A/B) (%)
1.	AVG Motors Ltd.	0.74
2.	Competent Automobiles CO. LTd.	0.14
3.	Eastman Industries Ltd.	0.94
4.	Lucas India Services Ltd.	0.94
5.	MGF Automobiles Ltd.	4.77
6.	Machino Techno Sales Ltd.	5.15
7.	Popular Vehicles & Services Ltd.	4.46
8.	Sri Ramadas Motor Transport Ltd.	2.18
9.	Sai Service Station Ltd.	0.55
AVG		2.21

The mean of the "expenditure incurred on AMP/sales" of such routine distributors 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, The amount which represents the bright line and the amount that should have been compensated to the assessee company are computed hereunder:

Value of Gross Sales	*10867616561*
AMP/Sales of the Com parables	*2.21*
Amount that represent bright line	*240,174,326*
Expenditure on AMP by assessee	*922230438*
Expenditure in excess of bright line	*68,20,56,1l2*

10.7 It is evident from above comparability analysis that the assessee has performed advertisement, marketing and sale promotion activities (marketing or AMP expenditure) which exceed the activities performed by comparable independent enterprises as selected by the assessee. The extent to which the marketing or AMP activities has exceeded as compared to uncontrolled comparable is expected to benefit the owner of trade mark of

"BMW" and manufacturer of the BMW products i e., the AEs of the assessee and has actually benefited these AEs as discussed in this order. Now the issue is whether the assessee has been compensated for its non-routine AMP expenditure? In this case the assessee has not been reimbursed for such non routine AMP activities and no return was provided to the assessee for carrying out these additional significant marketing functions for its AE The assessee through its non routine marketing (AMP) activities has not only enhanced the brand value of the AE in India but has also developed marketing intangible for the BMW products of its AE which resulted in enhanced sale and profit to the AEs. Since legal ownership of brand is with the AE the assessee would not be entitled to share in any return attributable to the increase in the value of the brand. This clearly prove that the assessee have assumed significantly greater risk than the arm's length price. Accordingly, in my considered view that the assessee is not only entitled for reimbursement of non-routine AMP expenditure but also a normal return on such AMP activities provided for the benefited of the AEs My view get supported by OECD transfer pricing guidelines at 7.33 'which stipulate that "in an arm's length transaction, an independent enterprise normally would seek to charge for services in such a way as to generate profit than providing the services merely at cost" It is pertinent to mention here that these services are not covered by situations in which markup is not necessary as discussed in preceding paragraph of this order. The next issue is about quantum of markup which the assessee must charge at arm's length price. In the show cause notice, it was proposed to use PLR+2.5% which equals to a markup of 15.27%.

The assessee has objected to use of PLR for computing the minimum return expected to be earned on amount of AMP expenses. However, I am not inclined to accept the submission of the assessee that PLR cannot be considered for computing the mark-up non routine AMP expenditure incurred by the Assessee. If the assessee would have invested the money spent on AMP expenses over and above the bright line limit (non- routine AMP), assessee would have earned a return which is at least equivalent to PLR. Further, assessee should earn some markup on the value of services rendered, time and effort spent on incurring non-routine AMP expenditure to build the brand of the AE Accordingly, assessee should have been reimbursed for the non-routine AMP expenses with a markup of PLR+2.5% i.e. 15.27%. The assessee has also stated that since PLR is being used the monthly expenditure should have been taken for the purpose of this markup. However, the assessee has not furnished any details of .the monthly expenses and therefore the markup of Rs 104149968 will be charged.

10.8 ***Determination of arm's length price of receipt of subsidy:*** *The computation of arm's length price of the international transaction of receipt of special purpose subsidy is done as under:*

Value of Gross Sales	*10867616561*
AMP/Sales of the Comparables	*2.21*

Amount that represent bright line *240,174,326*
Expenditure on AMP by assessee , *922230438*
Expenditure in excess of bright line *682,056,112*

Particulars	*Formula*	*Amount in Rs.*
Total Revenue of the assessee	*A*	*10867616561*
Arm's length % of AMP Expenditure	*B*	*2.21%*
Arm's length AMP Expenditure	*C=(A*B)*	*240,174,326*
Expenditure incurred by the assessee on AMP	*D*	*922230438*
Expenditure incurred for developing the intangibles	*E=D-C*	*682,056,112*
Add Markup @@ 15.27%	*F*	*104,149968*
Arm's length return for AMP expenditure	*G=E+F*	*786206080*
Reimbursement received from the AE	*H*	*NIL*
Amount by which income is to be enhanced	*I=G-H*	*786206080*

An upward adjustment of Rs.786206080 is to be made to the income of the assessee, i.e. the Assessing Officer shall enhance the income of the assessee by an amount of Rs.78,62,06,080 while computing its total income."

4.3. Aggrieved by the proposed adjustment in the draft assessment order the assessee filed objections before the Dispute Resolution Panel who rejected the same resulting in the passing of the impugned order. Aggrieved by this the assessee is in appeal before the Tribunal.

5. At the time of hearing Ld. AR placed reliance on assesseeôs own order for the immediately preceding assessment year and also his synopsis already on record. On the basis of which it was his submission that following the earlier order of the Tribunal in assesseeôs own case the issues may be decided in assesseeôs favour. Carrying us through the issues arising in the present proceedings qua the grounds raised and the jurisprudence available specific submissions were made issue wise which we shall address shortly.

6. The Ld. CIT DR apart from relying upon the orders of the authorities below submitted that the issue may be restored to the TPO to decide the same applying the ratio of the Special Bench in the case of L.G. Electronics case. Ld. CIT DR was also heard in response to issue wise discussion addresses by the ld. AR and was also directed to place on record his written submission addressing the departmental concerns for which purposes the hearing was adjourned directing the parties to place their respective positions on the issues on record after mutually exchanging the same amongst themselves first. On the next date of hearing the Ld. CIT DR filed the following written submissions dated 30.07.2014 which for the sake of completeness are reproduced here under:-

May It Please Your Honours

Sub-In the case of M/s BMW India P Ltd., AY 2009-10, ITA No. 385/DeI/2014,

Date of Hearing 31/07/2014

1.lt is prayed that the matter relating to Transfer Pricing adjustments in respect of AMP expenses be adjudicated in light of Delhi Special Bench decision in the case of LG Electronics India P Ltd v ACIT -2013,152 TTJ Del SB 273. The Hon'ble DRP has been pleased to do so.

2. It is most humbly pointed out that in the assessee's own case for AY 2008-09, vide order dated 16/08/2013, the TP adjustments on account of AMP expenses were deleted and the matter was decided in favour of assessee.

3. However in the two subsequent orders of two other co-ordinate benches of Hon'ble ITAT Delhi, in the case of Casio India Co P Ltd, order dated 13/12/2013, and in the case of PerfettiVan Melle India P Ltd. , order dated 15/04/2014, a different view has been taken. This fact has also been brought forth by the assessee in its later dated 28/04/2014 filed before the Hon'ble ITAT, wherein the assessee has fairly admitted so . Please refer to first three paragraphs of this letter, as extracted below-

1.The primary issue involved in the present appeal, in the context of the appellant, being predominantly a distributor of motor cars and also carrying out assembly functions in some cases; relates to *the transfer pricing adjustment on account of marketing intangibles.*

2.In the immediately preceding assessment year(AY), i.e. AY 200B-09, the division bench of the Hon'ble Delhi Tribunal had decided the matter in respect of an absolutely similar issue in favour of the appellant by expressly distinguishing the principles enunciated by the Special Bench of the Hon'ble Delhi Tribunal (Hon'ble Special Bench) rendered in the case of LG Electronics India P Ltd. [2013 29 *taxmann.com(DeL) SB] (LG*

Electronics), by stating that the said ruling, which was rendered in the context of an entrepreneurial licensed manufacturer, did not apply to *the facts of a distributor of high-end products like that of the appellant, .*

3. *We fairly state that two other coordinate benches, being division benches, of the Hon'ble Delhi Tribunal, in the cases of Casio India Co. Pvt. Ltd.[TS-340-ITAT-2013(Del)- TP) and Perfetti Van Melle India Pvt. Ltd.[TS-119-ITAT-2014(Del)-TP), have taken a different view, namely that principles enunciated by the Hon'ble Special Bench in the case of LG also apply to the facts of the distributors.*

4. It is further pointed out that in para 21.10 of the order of LG Special Bench as referred above (as reproduced by the assessee in its paper book for the subject year AY2009-10, on pages 468 and 469, being reproduction of departmental counter submissions in AY 2008-09, pages 465 till 470 of paper book) it has been held -

> *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 to her 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.*

4.It is therefore pointed out that specific figures of costs, specific figures of percentage of mark- up, specific figures of Arms Length Margin, or specific figures of Arms Length Price were required for workability of an applicable method of determination of ALP. The assessee needs to provide these figures.

5.As per established Transfer Pricing jurisprudence in India, the onus probandi is on the assessee, to establish that its international transactions are at Arms Length. The assessee needed to have brought on record,

specific agreement with specific/express set of figures, backed by appropriate declaration before customs authorities. Did the assessee specifically declare before the customs authorities that it was being undercharged by its AE in lieu of supposedly providing services of brand building etc, for which the assessee had incurred AMP expenses benefitting its AE ?

6. Without prejudice, even if it is to be accepted that remuneration has already been factored in the pricing as per Importation Agreement, then also the assessee needs to provide separate and specific figures, as to exactly how much was being given to the assessee by its AE for the services relating to Brand Building etc. and if this fact of goods being undercharged was specifically brought to the knowledge of Indian Customs Authorities?

Petitioner
Sd/-
Peeyush Jain, CIT-DR, ITAT, New Delhi

In the case of M/s. BMW India (P) Ltd.
ITA No. 5354/D/2012, (A.Y. 2008-091
DEPARTMENTAL COUNTER SUBMISSIONS

These counter points are merely a brief summing up of the comprehensive arguments made orally on 25-04-2013 (Friday).
It is revenue's view that the issue is covered by the Special Bench ruling in the case of M/s. LG Electronics.
The counterpoints given hereinafter are to be juxtaposed with assessee's synopsis, which is not being reproduced hereinafter.

Counters [1]

In Para 17.3 and 17.4 the Special Bench has duly considered that the cases of interveners are distinguishable from each other. After considering various scenario they have laid down guidelines applicable to various scenario(s). These guidelines are not exhaustive. The principles(s) have been duly laid down. The assessee's case, among others, is covered by point nos. 1,2,3,4,9,10,14 etc, of para 17.4. Paras 17.5 and 17.6 have further elaboration of the matter.

[2]

In Para 17.3 and 17.4 the Special Bench has duly considered that the cases of interveners are distinguishable from each other. After considering various scenario they have laid down guidelines applicable to various scenario(s). These guidelines are not exhaustive. The principles(s) have been duly laid down. The assessee's case, among others is covered by point nos. 1,2,3,4,9,10,14 etc, of para 17.4. Paras 17.5 and 17.6 have further elaboration of the matter.

[3]

The assessee has pointed point that some of the intervening entities in LG case were similar to the assessee. Since there facts have been duly

considered, the assessee's case is covered.

[4,5,6]

In paras 21.5 till 21.8 it has been held that each international transaction has to be separately bench marked. There cannot be any cross subsidisation. The assessee has failed to disclose the transaction of Brand Building etc, by incurring AMP expenses, as a separate transaction. Therefore the assessee has not carried out the benchmarking exercise at all.

[7]

The assessee has given a viewpoint. The viewpoint is not supported by judicial or legislativative elaboration, or even by an empirical analysis.

Paras 17.2 till 17.6 of LG order lay down the framework of comparability.

[8,9,10]

In paras 21.5 till 21.8 it has been held that each international transaction has to be separately bench marked. There cannot be any cross subsidisation. The assessee has failed to disclose the transaction of Brand Building etc. by incurring AMP expenses, as a separate transaction. Therefore the assessee has not carried out the benchmarking exercise at all.

Para 9.12 (last 10 lines on page 45) of LG's order permits recharacterisation. Para 14.21 of LG's order holds that transaction of brand building is an international transaction.

[11]

The subsidy received has to be specific.

The plea of revenue is that the issue regarding AMP expense etc. are covered by the LG decision of ITAT (in ITA No. 5140/0/2011). The elaboration hereinafter is for treatment of subsidy only.

If there is an element of Subsidy given by the AE to the Indian Entity, (by any name such as credit notes or subvention or anything similar), then it has to be established by the assessee that the subsidy was specifically towards AMP expenses (or towards brand building or for creating or feeding intangibles or for any similar purpose).

This is for the reason that law mandates that each international transaction has to be separately bench marked. (Please refer to para 15.1 of the order in the case of M/s. LG Electronics India Pvt. ltd. A.Y. 2007-08, ITA No. 5140/D/2011). The whole para is relevant, and the first 5 lines are indicative of the discussion in this paragraph, -

"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 on associated enterprise has been defined in sections 92B and 92A respectively. "

The need for specific attribution of subsidy towards a specific international transaction can be understood by the following example,-

S.No.	*Natures of Transaction*	*Book Price (Rs.)*	*Arms Length Price (Rs.) as determined by TPO.*	*Remarks*
1.	*Import of TV tubes (Price paid)*	*1,00,000*	*60,000*	*The Assessee has paid excess price to the extent of Rs.40,000/-*
2.	*AMP Expenditure towards Brand building (that should have been received from AE), (a)Transaction not reported by assessee).*	*Nil*	*20,000*	*The Assessee has not received Rs.20,000/- from the AE, though it should have received the same.*
3.	*Subsidy received*		*30,000*	*It has not been specified, as to the purpose for which subsidy has been received.*

According to the assessee, the subsidy is to be applied to AMP expenditure. If such is the situation then ALP of AMP expenditure, according to the assessee, would be Rs.(-)10,000/-, (Rs. 20,000 being ALP of AMP expenditure less Rs.30,000 being subsidy). This is an absurd result.

Revenue's contention is that since the AMP expenditure towards Brand Building (or creation or feeding of Intangibles etc.) has not been reported as an international transaction, at all, how can subsidy be attributed to AMP (or Brand Building or creation of Intangibles etc). This is too far-fetched a proposition and an afterthought.

Subsidy could not have been given for a transaction which the assessee claims is not an international transaction.

Even the Hon'ble ITAT, in the case of M/s. LG Electronics (as referred above), has held, on pages 101 & 102, point nos. 9 & 10, as follows-

" 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:-

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?"

An analysis of item no. 9 above shows that the compensation by the AE has to be specifically for promotion of brand. This compensation, though, may be in the form of cash subsidy, or in the form of free advertising material, or free marketing assistance, or credit notes, or in any other form. Thus the first condition is that the compensation has to be only for the promotion of brand.

Further, item no. 10 above qualifies such subsidy for purposes of adequacy or sufficiency or quantification.

This supports the contention of Revenue that the subsidy has to be specifically received for promotion of brand, for the benefit of same to be considered for purposes of determination of ALP. Though the subsidy may take any form.

Moreover para 21.10 of LG order further elaborates this issue. Para 12.1 is reproduced as hereunder:-

"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 Indio 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 rote. 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 India 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".*

[12,13]

The assessee has sought comparison at Gross level. The transaction of brand building has to be bench marked using TNMM (Transactional Net Margin Method). In TNMM there is no provision of Gross Profit. It has to be net margin.

The assessee has failed to report the transaction. of Brand Building as an international transaction.

As held in the order of LG (Para 21.B) each international transaction has to be separately benchmarked. The assessee is showing gross profit at entity level which in itself is not acceptable.

[14,15,16]

As submitted in counter No. 11, subsidy needs to be specifically attributed and detailed Para 21.10 of LG order further elaborates this issue.

[17]

The DRP has considered and demolished the arguments of reasoning which otherwise might have looked convincing.

[18,19,20,21]

OECD guidelines, other countries legislation and other countries Jurisprudence cannot override our own legislation and jurisprudence. (Para 9.12, page 46 and para 15.4 of LG order). Moreover, this is the view of Hon'ble Delhi High Court in the case of Mentor Graphics P. Ltd, dated 13-04- 2013.

[22,23,24,25,26)

Indian Legislation stipulates only legal ownership (Para 10.1 and 10.2 of LG's case).

The situation of termination of Distribution Rights has been duly considered by the Special Bench [Middle portion of Para 10.2 on page 48). With regard to lower import price, the submission on subsidy (above) and para 21.10 of LG order may please be perused.

Para 15.6 till 15.11 of LG order speaks of segregation of expenses.

[27]

Para 18.6 of LG order has elaboration.

Sd/-
(PEEYUSH JAIN)
Commissioner of Income Tax (DR)(TP)
ITAT, New Delhi"

7. Since the parties were directed to exchange these written submissions before they were filed. The LD. ARôs rejoinder to the written submissions of the Ld. DR were filed on 31.07.2014 in the Court, the same is also reproduced hereunder:-

BMW India Private Limited vs ACIT
ITA No *385/ Del/ 2014*
Assessment Year 2009-10

Rejoinder to the written submissions of the learned DR filed before the Tribunal on 30th July, 2014

1. *Paragraph (1) relates to the prayer of the learned DR to adjudicate "the matter in light of the Special Bench ruling in the case of LG Electronics. It is submitted that -*

a. *While deciding the matter in favour of the appellant for AY 2008-09, the Hon'ble Tribunal had considered all the aspects of the Special Bench*

ruling in the case of LG Electronics; and was pleased to distinguish the same with reference to the unique facts of the appellant, after taking into consideration all the oral and written submissions filed by the appellant and the learned DR.

b. *Copies of the written submissions filed by the appellant before the Hon'ble Tribunal for A Y 2008-09 on 18th February, 2013, 26th April, 2013 and 3rd May, 2013 have been submitted before the Hon'ble Tribunal during the course of the present appeal, as part of Paper book No II on 24th April 2014. Incidentally, the latest of the submissions filed by the appellant before the Hon'ble Tribunal for AY 2008-09, namely the one filed on 3rd May, 2013 (pages 451 to 459 of Paper Book No II), had elaborately dealt with all the objections raised by the learned DR vide his written submission filed before the Hon'ble Tribunal on 25th April, 2013 (pages 465 to 470 of Paper Book No II).*

c. *As stated above, the Hon'ble Tribunal had considered all the said submissions before deciding the matter in favour of the appellant, as has been acknowledged by the learned DR at paragraph (2) of his written submission tiled for the current appeal.*

2. *At paragraph (3) of the written submission, the learned DR has drawn reference to the letter filed by the appellant dated 28th April, 2014, wherein the appellant had interalia submitted that there were contrary rulings by Division Benches of the Hon'ble Tribunal on the issue of marketing intangibles in the context of distributors. The appellant submits that irrespective of any possible conflicting views ill this regard, <u>given the fact that the case of the appellant is squarely covered in its favour by the ruling of the Hon'bIe Delhi Tribunal in its own case for AY 2008-09. the said ruling may be applied in the case of the appellant for AY 2009-10 as well. since the facts of the case in the current year are absolutely identical to the ones involved in the appellant's case for AY 2008-09,</u> as had been highlighted in the synopsis filed by the appellant before the Hon'ble Tribunal in the context of the present appeal on 22nJ July, 2014.*

3. *At paragraphs (4) and (5) of his written submissions, the learned DR has referred to some observations of the Special Bench ruling in the case of LG Electronics, which he had relied upon in his earlier written submissions filed before the Hon'ble Tribunal for A Y 2008-09 (pages 465 to 470 of Paper Book No II, the operative portion being at page 469). The appellant submits that the relevant objections of the learned DR were duly countered by the appellant vide the rejoinder filed with the Hon'ble Tribunal for AY 2008-09 on 3rd May, 2013 (pages 451 to 459 of Paper Book No II, the operative portion being at pages 455 and 456), <u>wherein it was made amply clear that the relevant observations of the Special Bench in the case of LG were not applicable to the case of the appellant, given its unique facts</u>.*

4. *At paragraphs (6) and (7) of his written submission, the learned DR has raised a question namely whether the appellant has declared any under-invoicing of products by its foreign Associated Enterprise (AE), i.e. BMW AG, before the Customs Authorities. In this regard, the appellant submits that there has been no under invoicing of products by its foreign AE. It is also submitted that-*

a.As has been explained in detail before the Hon'ble Tribunal both in the submissions filed by the appellant on 3rd May, 2013 relating to A Y 2008-09 (page 451 to 459 of Paper Book No II); and in the synopsis filed for the current year on 22nd July, 2014, there was no question of the appellant having lowered its import price of CKDs/ CBUs from its foreign AE, i.e. BMW AG, on account of advertisement, marketing and promotional (AMP) or brand building expenses.

b.It has been explained in detail in the said submissions that the appellant, while carrying out the functions of a distributor, received an adequate remuneration from its foreign principal, namely BMW AG, for a host of activities, namely (a) buy and sell of products; (b) storing them in warehouses; (c) creating distribution and dealership network and channels; and (d) carrying out necessary marketing and advertising of products, which together constituted one single and indivisible cohesive whole of distributions function carried out by the appellant under the importation agreement entered into with BMW AG; and all the said functions were inextricably subsumed within the distribution activities, for which the appellant received adequate and proper remuneration in the form of a gross margin, vis-a-vis the comparable companies, duly commensurate with differences with respect to intensity of functions.

c. BMW AG's pricing of products to the appellant has always been in compliance with the arm's length principle and no adjustment for AMP expenses of the appellant has ever been made, being not required, for the reasons explained in sub-paragraph (b) above. The appellant's remuneration was always adequate and thus, there was no occasion or requirement on the part of the appellant to lower or adjust the import price of the goods on account of AMP or brand building expenses.

d.The relevant figures with reference to gross margins and intensities of distribution functions, both of the appellant and the comparable companies, which incidentally have been accepted by the transfer pricing officer, have been clearly brought out in the synopsis filed by the appellant before the Hon'ble Tribunal on 22nd July, 2014 as duly linked with the relevant pages of the Paper Book."

8. Apart from the written submissions the Ld. CIT DR also submitted that the assessee who is placing reliance upon the order of the Tribunal in its own case may

be directed to place its calculations and substantiate its claim by way of actual figures before the TPO.

9. The Ld. AR on the other hand submitted that he has all along claimed that the assessee is a normal risk taking distributor performing host of other functions like warehousing/storage, transport etc which functions are sub-sumed while performing the functions of a distributor for which no separate international transaction is required to be considered accordingly his argument has been that the AMP expenses are also a function which are encompassed in what are routine functions of a distributor. Accordingly it was his submission that no doubt the assessee is bound by the decision rendered by the Tribunal in its own case wherein the assesseeôs stand is that it is distinguishable on facts from the order of the Special Bench which has been the stand of the assessee in the preceding year also and if this stand has not been accepted the fact remains that the issue is covered in its favour by the Tribunalôs order in assesseeôs own case. It was also his submission by way of abundant caution that the assessee had only submitted that if the Bench was of the view that the decision in assesseeôs case was not to be followed relying on the observations in Perfetti Van Melle India Pvt. Ltd. and Casio India Co. Pvt. Ltd. Ltd. in such an eventuality the issue may be referred to the Special Bench. Taking note of the observations of the Bench that the issue is to be decided in terms of assesseeôs own case as there was no contradiction with L.G. Electronics case he maintained his stand that the Grounds raised by the assessee accordingly have to be allowed in terms of the order of the Tribunal in assesseeôs own case.

10. Both the parties accordingly addressing the grounds concluded that whereas the grounds addressing AMP issue have to be restored to the TPO however qua the grounds addressing the adjustments claimed and denied on facts has to be restored to the TPO with the direction as per the Ld. CIT DR that the assessee has to

substantiate its claim and demonstrate the same qua the comparables allegedly incorrectly considered to be so before the TPO. The issue pertaining to inclusion of selling expenses in the AMP basket of expenses which were directed to be excluded by the Tribunal in assesseeôs own case in the immediately preceding assessment year which direction has been given following the Special Bench in LG Electronics case is also restored to the TPO over ruling the directions of the DRP which are in direct conflict with the order of the Tribunal in assesseeôs case including order of the Special Bench. The issue of mark-up accordingly which is claimed to not arise in the present proceedings is also restored to the TPO.

11. In terms of the above submissions, we hold on perusing the material available on record that the assesseeôs ground assailing the DRP order for not referring to the order of the Tribunal in assesseeôs own case as academic not requiring any adjudication. The reason for coming to the said conclusion is based on the assesseeôs submissions that the order was brought to the notice of the DRP on 13.11.2013 , it is seen that the DRPôs order is dated 13.11.2013. It is also seen that as per the assesseeôs submission it was also brought to the notice of the DRP on 23.08.2013 however, in the face of no reference to the order of the Tribunal by the DRP having been made leads to a prima facie conclusion that it probably was not brought to the notice in August 2013 and may have been referred to only on 13.11.2013 on which date the DRPôs order stood passed. Since nothing much turns upon it the said issue is academic and requires no adjudication.

11.1 Considering the arguments advanced qua the grievance posed in Ground No-1.2, we are of the view on considering the arguments of the respective parties that it is appropriate to accept the departmental stand and direct the assessee to demonstrate its claim before the TPO as such the same is restored.

11.2 Considering the grievance raised in Ground No-1.3, it is seen that no specific arguments were advanced by the parties apart from the fact that the Ld. CIT DR placed reliance upon the orders of the authorities below and the Ld. AR relied upon the past history of the assesseeôs own case. Since the issue would be dealt with Ground No-1.2, 1.4 to 1.6 for the purposes of completeness, the said issue is also restored to the TPO with the direction to decide the same following the past history of the assessee in assesseeôs own case wherein the issue has been decided by the ITAT.

11.3 Ground No.-1.4 addresses the grievance of the assessee in considering the comparables and it was a common stand of the parties that in terms of selecting the comparables the Special Bench had specifically directed in para 17.5 and 17.6 that the factors relevant for picking out the same are also crucial as in the absence of the same the whole exercise becomes meaningless. For ready-reference, we reproduce para 17.2 to para 17.6 from the order of the Special bench as under:-

> *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."

11.4 Accordingly in the view of the above Ground No-1.4 is restored back to the TPO with the direction to carry out fresh selection of comparables in order to decide the bright-line applicable. It goes without saying that the applicability of bright-line test following the principles laid down in by the Special Bench has been upheld in assesseeôs own case.

11.5 Ground No-1.5 although this issue on facts in the immediately preceding assessment year has been decided in assesseeôs favour. The fact remains that the applicability of the same principally has to be upheld whether on facts adjustment on this is warranted or not is a fact to be demonstrated by the assessee before the TPO. Similarly on the applicability of rate if so warranted is also restored to the TPO with the direction to pass a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard.

11.6 Addressing the grievance raised in Ground No-1.6 we direct the TPO to exclude the expenses pertaining to after sales support costs incurred for company dealers and salesman bonus etc. from the AMP bundle of expenses following the precedent in assesseeôs own case in 2008-09 assessment year decided by Tribunal which direction is further fortified by the precedent laid down by the Special Bench in the case of L.G. Electronics case and similar directions following the Special Bench have been given in:-

S.No.	Judicial Precedents	ITA No.	Pronouncement Date
1.	L.G. Electronics India Pvt. Ltd.	5140/Del/2011	15.01.2012
2.	Glaxo Smithkline Consumer Healthcare Ltd. vs. ACIT	1148/Chd/2011	02.04.2013
3.	Haier Appliances India (P.) Ltd. vs DCIT	4680/Del/2010	24.05.2013
4.	Canon India Pvt. Ltd. vs DCIT	4602/Del/2010, 5593/Del/2011 & 6086/Del/2012	03.05.2013
5.	Panasonic Sales & Services India Pvt. Ltd. vs ACIT	1911/Mds/2011	03.06.2013
6.	Diageo India Private Limited vs DCIT	7932/Mum/2011	19.07.2013
7.	Ford India Pvt. Ltd. vs DCIT	2089/Mds/2011	04.06.2013
8.	Reebok India Co. vs ACIT	5857/Del/2012	14.06.2013
9.	Rayban Sun Optics India Ltd. vs DCIT	5933/Del/2012	28.02.2013
10.	Sony India Pvt. Ltd. vs ACIT	4978/Del/2011 & 6381/Del/2012	07.06.2013

12. The fact relatable to Ground No-2 raised by the assessee are found addressed at pages 34-58 of the TPOôs order. A perusal of the same shows that the TPO show-caused the assessee to explain the following:-

11. "Intra Group Services

2. Intra group Services:

1. Please furnish all the agreements entered in to by the assessee company, related to the intra Group Services obtained by the assessee company from the AEs during the year.

2. Please identify each of the services actually received by the assessee company.

3. Please specify the amount of payment made for each of such services.

4. Please submit the contemporaneous documentary evidence to show that these services have actually been received by the assessee company.

5. Please justify the need for the receipt of such services for which payment has been made.

6. Please state with documentary evidence as to when and how these services were requisitioned from the AEs.

7. Please state as to how the rate or payment for IGS has been determined at the time of entering in to the agreement? Please also furnish the basis thereof.

8. *Please stated as to whether any cost benefit analysis was done while entering into the agreement and while requisitioning the services for payment of IGS?*

a If so the details of such cost benefit analysis should be furnished The cost benefit analysis should include the expected benefit from the IGS vis a vis the payment made for the same.

b Please specifically state as to whether any benchmarking analysis was done at the time of entering into the agreement so as to compare the payment of IGS to the AE vis a vis an independent party under similar circumstances If so, the details thereof.

9. Please show with evidence as to what tangible and direct benefit has been derived by the assessee company from the use of such IGS.

10. Whether the services availed from AEs, have also been performed by the assessee company itself or also availed from independent parties? If yes,

a The details of such expenditure for each of the services should be furnished

b Please state as to why a separate payment has been made for such services to the AE.

11. Please furnish details and documentary evidence of cost incurred by the AE for rendering each type of services purportedly received by the assessee company and the mark up applied, if any by the AE. Please also state as to whether the cost incurred by the AE is audited.

12. Whether AE is rendering such services to any other AEs/independent parties also. If yes the details thereof including the rates/amount charged from such AEs along with mark up if any.

13. If the AE has rendered services to more than one entity including the assessee company, then the basis of allocation amongst various entities may be furnished. Please also furnish the basis of choosing a particular allocation key.

14. If the above information is not furnished, complete in all respects, along with contemporaneous documentary evidences, the arm's length payment for these intra group services would be treated as Nil by applying CUP method."

12.1 In response to the same the assessee gave its reply dated 14.12.2012 which is extracted in the TPOôs order and is reproduced hereunder for ready-reference:-

11.1. "The assessee submitted its reply vide its letter dated 14.12.2012 submitted as under:-

21 With respect to the IT related needs of the Company, BMW Group supports BMW India by providing online troubleshooting services for its various hardware/software related problems and helps maintaining the IT infrastructure used by BMW India. In lieu of this support, as part of Class I transactions, BMW India paid certain IT support service charges to BMW Group during the year. The services availed by the Company in this regard, are detailed below.

** Active Directory Operations*

Group Policy is a set of rules which control the working environment of user accounts and computer accounts. Group Policy provides the centralized management and configuration of operating systems, applications and users' settings in an Active Directory environment In other words, Group Policy in part controls what users can and cannot do on a *computer system.*

• Site (OU) Management

In computing, an Organizational Unit [OU] provides a *way of classifying objects located in directories, or names in* a *digital certificate hierarchy, typically used either to differentiate between objects with the same name or to parcel out authority to create and manage objects.*

- *Domain Controller Configuration*

On Windows Server Systems, a domain controller (DC) is a server that responds to security authentication requests (logging in, checking permissions, etc) within the Windows Server domain. A domain is a concept introduced in Windows NT whereby a user may be granted access to a number of computer resources with the use of a single user name and password combination.

Desktop & Office Service (E-Client & G-Client): BMW Enterprise Client (E-Client) and BMW Group Client (G-Client) are desktop/ notebook operating system packages needed for BMW business users. This service includes necessary infrastructure for both clients:

- *Installation and support of desktop hardware in close adaptation to BMW purchase and rental model.*
- *Code server (installation, user profile, logon 'script, replication)*
- *Provisioning and maintenance of E-Clients/G-Clients based on Microsoft Enterprise Agreement (‘MSEA* ').
- *Provisioning of BMW standard office applications (e.g. MS Office, Internet Explorer, Palm Desktop, Calendaring, WinZip etc] and optional office applications (e.g MS Project, Visio,etc.]*
- *Automated software distribution (e.g. SUS patch management, hot fixes, etc)*
- *Physical Inventory/Asset management (subject to separate contracts for support centre services which only applicable to on-site support local model)*
- *Provisioning user data storage (U drive allocations, quota subject to local file server disk space limitations. U drive storage space capacity management* is *task of service receiver, DIVA)*
- *Provisioning of* a *Client-end Email interface {MS Outlook client installations, Mail address settings, Web access interfaces).*
- *Access to the BMW group-wide calendaring infrastructure*
- *Access to the BMW Intranet*
- *Anti Virus (File definition update, configuration management)*
- *Systems Management (SMS2003, Software Self Service)*

Email Services

- *Mailing List Management*

ǒ a *Antivirus / AntiSpam*
ǒ *Mail on demand (MOD)*
ǒ *Non-MOD Support*
ǒ ***Group Importer System operations:*** *GIS (Group Importer System) is an integrated software solution mainly based on SAP R/3 and SAP Automotive to cover the following business processes of BMW India:*

- *Vehicle processing*
- *Warranty processing*
- *Parts processing*

ǒ *Financial accounting*
ǒ *Controlling*
ǒ *Local purchasing*
ǒ *Online Dealer Access*

Provision / operation of a SAP system *and/or the components that comprise a SAP system.*

- *Basic operation of Windows and Unix servers, operation of hardware, operating system, antivirus client, monitoring agent, volume manager and clusters as a framework, monitoring, resolution of incidents,*

implementation of changes, patches.

- *Upon request by authorized application owner or the server owner, operation will also provide support for the problem .*

  ***Internet Access** is the service that describes the operation of Internet access infrastructure. This includes:*
- *A secure network access point (NAP)*
- *A secure Demilitarised Zone (DMZ) with proxy services (e.g. for HTTP, HTTPS, FTP)*
- *A high-available connection to the Internet*
- *Provisioning of secure user access and data transfer to and from the Corporate Network .*
- ***International Secure Access System (ISAS),** also known as ZKSWIN, is the system that manages different employee access terminals and card readers. ISAS maintains an interface into ELAN ("ELektronisches Antraqswesen"] where security access requests can be processed .*

  LAN Management:
- *Operation management of the Service Receiver's local active network infrastructure (LAN)*
- *Provision of statistics and monitoring of the operated infrastructure."*

12.2 Considering the same the TPO was of the view that the assessee has not identified the services actually availed of and has only given a general response. The contemporaneous evidence to show that the services have actually been received it was held was not made available and the assessee had merely submitted sub-inter company invoices, description of the service which was ostensibly to be rendered by the AE. Considering these he was of the view that they did not prove the fact that it was actually made available and received. He further perused that the payments were also on cost to cost basis without any profit margin/mark-up built in and there was no basis of actual cost allocation. Considering the explanation he was further of the view that there was no evidence to show that there was any designated person rendering the services as same persons were found to be on the payroll of AE and major portion of work it was presumed would have been carried out by them for the AE and only ancillary services if any would be provided to the assessee company. Considering the OECD Guidelines, the TPO

was of the view that it was necessary to see whether the activities undertaken by one group member are not merely duplicated. Accordingly he was of the view that the following essential information was required to be considered:-

1. *"Whether the AE has received intra group services?*
2. *What are the economic and commercial benefits derived by the recipient of intra group services?*
3. *In order to identify the charges relating to services, there should be a mechanism in place which can identify (i) the cost incurred by the AE in providing the intra group services and (ii) the basis of allocation of cost to various AEs.*
4. *Whether a comparable independent enterprise would have paid for the services in comparable circumstances?"*

12.3 Considering the various judicial precedents he further culled out in para 11.7 at page 52 that the following crucial issues need a mention. These are extracted for ready-reference:-

11.7. "It may be mentioned that as already stated above the following are crucial issues to be seen in such related party transactions:-

a. The taxpayer's agreement with the associated enterprises related to intra group services is to be examined to see as to what kind of services were to be provided by the AE to the taxpayer. As normally such agreements refer to a large number of services which could be rendered by the AE, the taxpayer has to specify the service[s] which is actually received by it for which the payment is made.

b. Whether the taxpayer really needed such services or not. IF so, what direct or tangible benefit it has derived.

c. Contemporaneous information on the basis of which rate or payment for the service is determined. This includes the cost benefit analysis done by the taxpayer at the time of entering into agreement. Whether any benchmarking analysis was done by the taxpayer so as to compare the amount which he would have paid to an independent person under similar circumstances.

d. Whether an independent person would have paid such amount in comparable circumstances.

e. Whether the expected benefit commensurate with the payment.

f. Whether the taxpayer has separately incurred any expenditure on similar services and if so the necessity of making further payment to the AE for the same activity or it is a duplicate payment.

g. Whether the payment is in the nature of shareholder's activity or largely for the benefit of the AE.

h. Whether the AE is rendering such services to to her AEs or independent parties and if so the rate/amount charged from such persons.

i. The cost incurred by the AE for providing such services and the basis of allocation key.

j. IF the AE has charged any markup on such payments the arm's length margin is also examined."

12.4 In the light of the above it was held that the documentary evidence in support of the claim was missing. Accordingly he proposed an adjustment of Rs.3,11,55,807/- holding as under:-

11.8.4 "In view of the foregoing, the discussion already made above is summed up as follows:

- *In this case, the assessee has failed to substantiate that services have actually been rendered to it and benefit has actually been derived by it on the basis of documentary evidence. In support of its contention, the assessee has merely furnished copies of certain mails exchanged between the personnel of the Group. None of the above reproduced e- mail exchanges between the employees establish the requirement/specific need of the assessee for their services, the benefit which has accrued to the assessee, or that an independent party would have been willing to pay another independent party for the services purported to be received by the assessee.*
- *The services received are incidental being in nature of long association.*
- *It is evident from facts stated above that the assessee did not file any evidence to support a claim that these services were actually provided to the assessee at its request to meet the specific need of the assessee and that certain tangible and concrete benefits have actually accrued to the assessee.*
- *Under uncontrolled circumstances any independent enterprise having skilled and sufficiently trained manpower would not have been willing to pay any third party to do so. In my opinion, services which are incidental or mere duplicity do not fall in the category of intra group services,*
- *However, without prejudice to the above discussion, it may not be impossible, however, for a group member to benefit incidentally from services being provided to one or more fellow affiliates. For example in this case, the assessee might be benefited from services rendered by AE in general to its other AEs, However, such incidental benefits do not give rise to Intra Group Services and cannot be regarded as giving rise to arrangement subject to arm's length pricing as stipulated in OECD TP guidelines paragraph 7.13 under Chapter VII. These findings lead to an irresistible conclusion that payments for liaison services allegedly provided by the AEs are not at arm's length price.*

- *Moreover, it is seen from the details contained in the transfer pricing report of the assessee submitted under Rule 10D that the assessee had not conducted FAR analysis in regards to these alleged services and had failed to justify the functions performed by the AE for these payments. This is probably a reason that the receipt of alleged services have not been bench marked under any of the five method prescribed under the Act in the Transfer Pricing report.*
- *Furthermore, the assessee has at the time of requisitioning the so-called services, not carried out any cost- benefit analysis at its end. No independent party would agree to incur expenditure without independently ascertaining the value of the goods/services intended to be availed, in the market and that too at the best negotiated prices No such effort has been demonstrated to be made at the end of the assessee, which weighs heavily against the normal practices of business prudence.*

In view of above findings, I am of the considered opinion that the assessee had made payments of Rs. 31155807/- to its AE for intra-group services which are not found to exist in this case. The arm's length price of these alleged services is held to be nil on application of CUP method as no uncontrolled enterprise would have paid any amount for services which do not tantamount to intra group services with demonstrable benefits. The assessing officer shall consequently increase the taxable income of the assessee by an amount of Rs. 31155807 /-. "

13. Aggrieved by this the assessee filed objections before the DRP. The DRP considering the same summed up the issue in the following manner so as to confirm the action of the TPO holding as under:-

"In Ground No.3, 3.1, 3.2, 3.3 and 3.4, the assessee has objected to the determination of the ALP of the Intra Group Service Charges as NIL by using CUP method.
During the year the assessee had made payments of Rs.3,11,55,807/- to its AE for intra-group services. The TPO has found that intra-group service did not exist in the instant case. Accordingly, the TPO has determined the ALP of intra-group services as NIL on application of CUP method as no independent enterprise would have paid any amount to an unrelated party for such services which did not give any benefit. We have examined this issue. We find that the assessee has not maintained contemporaneous documentations regarding intra-group services. In the case of GEMPLUS India Pvt. Ltd. vs. ACIT in ITA No.352/Bang/2009 A.Y. 2003-04, the Hon'ble ITAT, Banglore has held that "the TPO has made a clear findings that there are no details available on record in respect of the nature of services rendered by Singapore affiliate to the assessee company. Therefore, we are of the considered view that the TPO is justified in holding that the assessee has not proved any commensurate benefits

against the payments of service charges to the Singapore affiliate. Therefore, the TPO is justified in making the adjustment of ALP under sec.92CA of the Income Tax Act 1961.' In the case of Knorr-Bremse India Pvt. Ltd. vs. ACIT [2012] 27 taxmann.com 16 (Delhi) the Hon'ble ITAT, Delhi has held that "The perusal of emails and other contemporaneous record only goes to reveal that incidental and passive association benefit has been provided by the associate enterprise. In this view of the matter there could neither be any cost contribution or cost reimbursement nor payment for such services to the AE. The TPO, therefore, has rightly adopted Nil value for benchmarking the arm's length price in respect of both these services. We, therefore, do not find any reason to interfere with the well reasoned conclusion reached by the AO on this count. The grounds raised in appeal in this respect, therefore, stand rejected." The decision of the Hon'ble ITAT, Delhi in the case of Knorr-Bremse India Pvt. Ltd. (supra) and also the decision of the Hon'ble ITAT, Banglore in the case of Gemplus India Pvt. Ltd. (supra) are squarely applicable to the facts of the present case. Accordingly we hold that the TPO has rightly benchmarked the ALP of the intra-group services from AEs as NIL. In view of it, the proposed TP adjustment of Rs.3,11,55,807/- in respect to intra-group services from AEs is upheld. These grounds of objections are dismissed."

14. Aggrieved by this the assessee is in appeal before the Tribunal. In the synopsis filed by the assessee at the time of hearing following submissions are found to have been made, these are reproduced for ready reference:-

4. "Receipt of IT support Services (Refer pages 113 to 119 of Appeal set)

4.1. In the TP documentation maintained by the Appellant it is clearly specified that, apart from the transactions of purchase of CKDs, purchase of CBUs, etc., the Appellant also entered into transactions such as receipt of IT support services, which are intrinsically and closely linked to each other, in terms of the range of functions performed, assets utilized and risks assumed by BMW India as a distributor, also performing low value added assembly of automobiles.

4.2. Accordingly, it was considered appropriate to aggregate these transactions and then analyze them. However, since these transactions would not get covered under gross margin analysis, it was considered appropriate to assess their impact at the operating level, along with the transactions of purchase of transactions of purchase of CKDs, purchase of CBUs, etc.

4.3. However, disregarding all of the above the Ld. TPO applied CUP as the most appropriate method for the said transaction merely based on presumption, that the arm's length value of the transaction is 'NIL'.

4.4. With respect to the IT related needs of the Appellant, BMW group supports BMW India by providing online troubleshooting services for its various hardware/software related problems and helps maintaining the IT infrastructure used by BMW India. For receipt of these services, the Appellant

made a payment of INR 31,155,807 to BMW Group. (Refer pages 114 to 116 of Appeal set)

4.5. The IT support is an integral part for the overall functioning of BMW India. They are essential operating tools for the Appellant that are required by it to communicate within the Company, BMW Group and externally, and carry out its day-to-day operations. Complete disallowance of the payment/expenditure by the Ld. TPO is unwarranted as the Ld. TPO is bound to determine the ALP of a transaction and not disallow a payment/expense completely. In this regard, the Appellant placed reliance on the following cases (Refer pages 116 to 117 of Appeal set):-

** AWB India Pvt. Ltd. {TS-67-ITAT-2013 (DEL)-TP}-The Tribunal held that a general observation by the ld. TPO that no independent party would have made such payment in uncontrolled circumstances, is expected to examine the international transactions and make a suitable adjustment, but a wholesale disallowance of the expenditure, particularly on extraneous grounds, is neither contemplated, nor authorized.*

** Ericson India Pvt. Ltd. vs DCIT (TS-319-ITAT-2012 (DEL))-The Tribunal held that it would be wrong to hold that the expenditure should be disallowed only on the ground that these expenses were not required to be incurred by the assessee.*

**McCann Erickson India Pvt. Ltd. vs Addl. CIT [TS-391-ITAT-2012(Del)]-The Tribunal has held that the value of these services should not be evaluated in isolation or individually.*

4.6. It is pertinent to mention that during previous years' detailed audit and scrutiny was done with regard to the pricing and methodology of this transaction and subsequently no adverse inference was drawn from it. (Refer pages 117 to 119 of Appeal set)"

15. However at the time of hearing the Ld. AR whose attention remained largely focused on Ground No-1 merely contended qua Ground No-2 that no addition on this count is warranted as considering the identical agreements, facts and circumstances no addition was made in the immediately preceding assessment year on these very facts. However on query contemporaneous evidence in support of its claim it was conceded have not been placed on record. In these circumstances, the request was made that the assessee may be provided an opportunity to explain the payments made as guided by the past history the assessee may not have placed necessary evidence. The Ld. CIT DR placed reliance upon the orders below.

16. We have heard the rival submissions and perused the material available on record. On a consideration thereof, we are of the view that in the peculiar facts and circumstances of the case as the argument that on similar facts no adjustment was made by the TPO in the immediately preceding assessment year appears to be a plausible belief that contemporaneous documentation may not be required to be demonstrated. Accordingly in the interests of natural justice, it would be appropriate to restore this issue back to the file to the TPO with the direction to decide the same in accordance with law after giving the assessee a reasonable opportunity of being heard. While doing so, we direct the assessee to place necessary evidence in support of its claim before the TPO and utilize the opportunity so provided in good faith and not squander it. The grounds raised is accordingly allowed for statistical purposes.

17. Qua Ground No-3 & 4, the Ld. AR invited attention to unnumbered page-384 of the assessment order dated 18.1202013 so as to submit that Serial No-27 Cisco Switch totaling 3 in number are found to be mentioned at Serial No.27 and Serial No-30 refers to Cisco Switch 4 in number valued at Rs.2,17,425/- & 2,57,599/- respectively. It was his submission that the claim qua Serial No-30 has been allowed. In the circumstances it was his request that a direction may be given that on identical reasoning higher depreciation for Cisco Switch mentioned at Serial No.27 totaling 3 in number may also be allowed. This fact it was submitted is found demonstrated from page 154-155 of the appeal set wherein depreciation @ 15% has been allowed for 33 items out of which the claim qua the issue is referred to at serial No-25. Addressing the other assets on which higher depreciation at 60% should have been allowed, attention was invited to Serial No-10 which refers to 3 Panasonic Projectors valued at Rs.1,18,125/- and Serial No-26 & 27 page no-155 of the appeal set which refers to Touch Screen thin client X29 and Touch

screen thin X12 totaling 3 & 4 in number respectively valued at Rs.19,55,934 and Rs.8,09,352/-. It was submitted that higher depreciation qua these assets should have been granted as they can be used only with computer and in terms of the judicial precedents, the same deserves to be allowed.

18. Whereas the Ld. CIT DR though had no objection to the grant of higher depreciation on account of 3 Cisco Switches on the same reasoning for which higher depreciation was allowed by the AO himself the only request was that the AO may verify the allowability of the claim. However qua the claim of higher depreciation for the items mentioned at Serial No.25, 26 and 27 which were specifically argued by the Ld. AR the Revenue vehemently opposed the claim relying upon the judicial precedent considered by the AO. Specific reference was made to DCIT vs. Data Craft Indian Ltd. 133 TTJ 377 and ACIT vs Cincom Systems India Ltd. (ITA No-1534/Del/2008) and the reasoning of the AO namely that equipment which is exclusively tele-communication equipment cannot be said to be ñcomputerò or computer peripherals. Considering the existing case laws it was submitted the claim cannot be allowed as none of the decisions have held that telephone and exclusively communication devices like blackberry, fax machines, camera, home theatre, woofer and CCTV can be considered applicable for higher depreciation like computers.

19. We have heard the rival submissions and perused the material available on record. On a consideration of the same we are of the view that in the circumstances it would be appropriate to restore the issue qua the claim of higher depreciation for 3 Cisco Switches to the AO. The AO is directed to verify and allow the same on the same reasoning higher depreciation for 4 Cisco Switches has been granted by him. Considering the remaining claim of higher depreciation which were only argued for Serial No. 25, 26 & 27 appeal set pages 155, we on

consideration find no infirmity with the view taken by the Revenue. The judicial precedent on the issue it is seen is against the assessee. In view of the same the grounds No.3 & 4 which were argued together in terms of the above are partly allowed.

19.1. Ground No-5 is premature as such requires no adjudication.

20. In the result the appeal of the assessee is partly allowed for statistical purposes.

The order is pronounced in the open court on 21st of October 2014.

Sd/-	**Sd/-**
(T.S.KAPOOR)	**(DIVA SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 21/10/2014
**Amit Kumar/Subodh Kumar*

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI