Lg Electronics India (P) Ltd., New Delhi vs Acit, Noida on 18 July, 2018

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA Nos.3612 & 3613/Del/2017
Assessment Years : 2005-06 & 2006-07

LG Electronics India (P) Ltd., A- Wing (3rd Floor), D- 3, District Center Saket, New Delhi.	Vs.	ACIT, Circle- Noida, Noida.
PAN : AAACL1745Q (Appellant)		(Respondent)

Assessee by	:	Shri Ajay Vohra, Sr.Adv. Shri Neeraj Jain, Adv. Shri Aditya Vohra, Adv. Shri Ramit Katyal, Adv.
Department by	:	Shri H. K. Choudhary, CIT-DR
Date of hearing	:	19-04-2018
Date of pronouncement	:	18-07-2018

ORDER

PER R. K. PANDA, AM :

The above two appeals filed by the assessee are directed against the common order dated 31.03.2017 of the CIT(A)- I, Noida, Uttar Pradesh relating to assessment years 2005-06 & 2006-07 respectively. Since common grounds are involved in both the appeals, therefore, these were heard together and are being disposed of by this common order for the sake of convenience.

2. Facts of the case, in brief, are that the assessee is a private limited company engaged in trading, manufacturing, marketing and sale of electronics, home appliances, IT products, supply and installation of WLL systems, terminals and GSM Mobile handsets and maintenance, repair and servicing of CDMA networks, CDMA/GSM terminals and mobile handsets. It filed its return of income on 29.10.2005 declaring total income of Rs.1,52,98,08,547/-. Subsequently, the assessee filed a revised return declaring total income of Rs.1,02,78,01,120/- after claiming the receipt of Rs.57,71,79,709/- from sales tax department as capital receipts. Since the assessee has undertaken certain international transactions with its AEs, the Assessing Officer referred the matter to the TPO u/s 92CA(1) of the I.T. Act. The TPO vide order dated 31.10.2008 suggested upward adjustment of Rs.5,12,44,116/- being the arm's length price of the international transactions of contribution towards World Cup Tournament and an amount of Rs.18,66,31,111/- being the arm's length price of the reimbursement of advertising, marketing and sales promotion expenses. The Assessing Officer

completed the assessment u/s 143(3) on 30.12.2008 determining the total income of the assessee at Rs.3,34,18,55,880/- after allowing deduction of Rs.1,21,50,770/- u/s 80JJAA of the I.T. Act, 1961 as against Rs.2,52,29,510/- claimed by the assessee in the original return of income. The Assessing Officer in the assessment made various additions under different heads.

3. The assessee filed an appeal before the ld. CIT(A) who vide order dated 31.03.2017 not only confirmed the various additions made by the Assessing Officer but also enhanced the income of the assessee by Rs.2,10,22,81,553/- by disallowing expenditure incurred on account of procurement of raw materials from third party vendors u/s 40(a)(ia) of the I.T. Act.

4. Aggrieved with such order of the ld. CIT(A), the assessee is in appeal before the Tribunal.

5. The ground no.1 being general in nature is dismissed.

6. In ground no.2 to 2.11, the assessee has challenged the order of the ld. CIT(A) in enhancing the income of the assessee u/s 251(1)(a) by Rs.241,53,75,866/- by disallowing the expenditure incurred on account of procurement of materials from third party vendors u/s 40(a)(ia) of the I.T. Act.

7. Facts of the case, in brief, are that the Assessing Officer did not make any addition in the assessment proceedings on this account. During the course of appellate proceedings, ld. CIT(A) observed that the assessee has entered into transactions with domestic third parties, LGEK and its related parties for purchase of finished goods without deducting tax at source. He, therefore, issued a show-cause notice dated 15.09.2016 asking the assessee to explain as to why the income should not be enhanced since the provisions of section 40(a)(ia) were not complied with by the assessee. After considering the arguments advanced by the assessee, ld. CIT(A) observed that out of the total purchases of Rs.11,13,06,73,826/-, the assessee furnished relevant certificate prescribed under the second proviso to section 40(a)(ia) read with proviso to section 201(1) of the I.T. Act substantiating that the payees to the extent of Rs.871,52,97,960/- have discharged their tax liability. He, therefore, made the disallowance of the balance amount of Rs.241,53,75,866/- since the assessee was unable to furnish necessary details/certificates demonstrating that the payees had paid tax on the said payments.

8. Aggrieved with such order of the ld. CIT(A), the assessee is in appeal before the Tribunal.

9. Ld. counsel for the assessee strongly objected to the order of the ld. CIT(A) in disallowing the payment of Rs.241,53,75,866/- by enhancing the assessment. Ld. counsel for the assessee at the outset submitted that the powers of enhancement available with the ld. CIT(A) do not extend to discovering new sources of income. Referring to the decisions of the Hon'ble Supreme Court in the case of CIT vs. Shapoorji Pallonji Mistry reported in 44 ITR 891 and in the case of CIT vs. Rai Bahadur Hardutroy Motilal Chamaria reported in 66 ITR 443, he submitted that the Hon'ble Apex Court has categorically held that the ld. CIT(A) has no jurisdiction to travel beyond the subject-matter of assessment and powers of enhancement relate only to that income which has been subjected to assessment and not to new sources of income. Referring to the decision of the Hon'ble Delhi High Court in the case of CIT vs. Sardari Lal and Company reported in 251 ITR 864 and in the

case of CIT vs. Union Tyres reported in 240 ITR 556 and various other decision, he submitted that similar view has been taken in the above decisions. He accordingly submitted that the disallowance of expenditure incurred on purchase of finished goods from third party manufactures on the ground of tax being not deducted at source at the time of making payment, which issue was not raised by the Assessing Officer and was not subject-matter of appeal before the ld. CIT(A), therefore, disallowance in respect of the same was beyond the jurisdiction of the ld. CIT(A) u/s 251(1) of the I.T. Act.

10. In his alternate submission, he submitted that during the relevant assessment year, the assessee purchased finished goods from independent, domestic third party manufactures as well as LGEK and its related entities, which were manufactures as per the specifications and requirements provided by the assessee. The assessee has undertaken transactions for purchase of finished goods, which were manufactured as per specifications of the assessee but not for carrying out any work. He submitted that the agreements with manufactures were also placed on record before the ld. CIT(A) to demonstrate that the transactions were purely in the nature of purchase/sale transactions and, therefore, not subject to deduction of tax at source u/s 194C of the I.T. Act. He submitted that the manufactures were independent entities, who carried on the activity of manufacturing, by independently procuring raw material from vendors on a principal to principal basis, which on production were sold to the assessee under an independent contract of sale entered on principal to principal basis. The manufacturer charges a composite price for the finished goods sold to the assessee after charging applicable excise duty and sales tax, wherever applicable. He referred to section 194C, the CBDT Circular No.681 dated 21.02.1994 and the subsequent CBDT Circular No.13/2006 dated 13.12.2006 and submitted that the goods sold are manufactured according to specifications of the buyer is not relevant in determining whether the contract is a contract of sale or works contract. What is relevant to determine is passing of property/title in the goods from the vendor to the buyer. He submitted that identical issue was raised by the Assessing Officer (TDS) for assessment year 2001-02 and 2002-03 wherein after detailed analysis, the tax demand was deleted by all the appellate forums including the Hon'ble Supreme Court in the case reported as CIT vs. Silver Oak Laboratories P. Ltd. vide SLP No.18012/2009 wherein the assessee was also a respondent. He submitted that the decision of the Hon'ble Supreme Court squarely applies to the year under consideration insofar as agreements entered into by the assessee with third party manufactures during the year under consideration are same as agreements in earlier years which have been held to be contract for sale by the Apex Court and, therefore, the question of applicability of section 194C on payments for purchase of finished goods does not arise. He also relied on the following decisions :-

(i) BDA Ltd. vs. ITO, 281 ITR 89 (Bom.).
(ii) CIT vs. Dabur India Ltd., 283 ITR 197 (Del.).
(iii) Dr. Willmar Sochwade India (P) Ltd., ITA NO.160/2006 (Del. HC).
(iv) CIT vs. Reebok India Co., 306 ITR 124 (Del.).
(v) CIT vs. Glenmark Pharamceuticals Ltd., 324 ITR 199 (Bom.).
(vi) DCIT vs. Samsung India Electronics Ltd. (ITA 3703/D/05).
(vii) Whirpool India Limited vs. JCIT, 109 TTJ 994 (Del.).

(viii) Hero MotoCorp Ltd. vs. ACIT, ITA No.1980/Del/2012 (Del Trib.).

(ix) ITO (OSD) vs. Mahanagar Telephone Nigam Ltd., 166 ITD 631 (Del Trib.).

(x) H.I. Tamboli & Co. vs. ACIT, Satara - [2017] 87 taxmann.com 155 (Pune -

Trib.).

11. He submitted that section 194C was amended by the Finance (No.2) Act, 2009 w.e.f. 01.10.2009 whereby the definition of "work" was enlarged to include contract for manufacturing or supplying of a product according to the requirement or specification of a customer by using material purchased from such customer. The said amendment also provided that contract for carrying out work shall not include contract for manufacturing or supplying of product according to the requirement or specification of a customer by using material purchased from a person other than such customer. Since the in the instant case, the finished goods are manufactured by the supplier as per the prescribed specifications of the assessee and the raw material and other ingredients required for manufacture are specified by the assessee in order to ensure proper quality of the finished products, and since such raw materials are acquired by the vendor on their own account and not on behalf of the assessee, therefore, the right of ownership passes to the assessee only after the goods come into existence on manufacture and are supplied to the assessee as finished goods. Prior thereto, the risk in the goods vests with the vendor/supplier were the supplier to incur any loss such as on account of fire, before passing of title in the goods, the same would be borne by the vendor and not by the assessee. Similarly, if the vendor were to go bad or recovery from him was to become doubtful, said loss was to be borne by the supplier only and not the assessee. All the other terms of the purchase/sale between the vendor and supplier, like payment terms, period of delivery, etc. were agreed independently between the said two parties and the assessee had no say in same. The contract between the assessee and the vendor is for acquisition of ascertained goods, therefore, the contract is thus one of sale and not a contract for carrying out work. He accordingly submitted that the provisions of section 194C are not applicable to the facts of the present case and, therefore, disallowance made u/s 40(a)(ia) is liable to be deleted.

12. In his yet another alternate arguments, he submitted that there was a bona-fide belief on the part of the assessee for non-deduction of tax at source from such payments since in the prior years and subsequent years, no such addition/disallowance was made. Referring to the decision of Hon'ble Bombay High Court in the case CIT vs. Kotak Securities Ltd. reported in 245 CTR 3, he submitted that the Hon'ble High Court in the said decision has held that where both Revenue and assessee were under bona-fide belief for nearly a decade that tax was not deductible at source on payment of transaction charges, no fault could be found with the assessee in not deducting tax at source in assessment year in question and consequently disallowance made by the Assessing Officer u/s 40(a)(ia) in respect of transaction charges could not be sustained. Therefore, the ld. CIT(A) is not justified in making the above addition u/s 40(a)(ia) of the I.T. Act.

13. In yet another alternate argument, ld. counsel for the assessee submitted that the payees have already paid the tax and, therefore, no disallowance u/s 40(a)(ia) is called for. Referring to the decision of the Hon'ble Allahabad High Court in the case of Jagran Prakashan Ltd. vs. DCIT reported in 345 ITR 288, he submitted that the Hon'ble High Court in the said decision has held

that in a case where tax has not been deducted at source, the short deducted tax at source cannot be realized from the deductor and the liability to pay such tax shall continue to be with the assessee direct whose income has to be charged and a person who fails to deduct the tax at source, at best, is liable for interest and penalty only. Since the payee in the instant case has already paid the tax due on its income, therefore, no disallowance u/s 40(a)(ia) is called for. Without prejudice to the above, he submitted that the disallowance, if any, has to be restricted to 30% of the amount of such non-deduction of tax and the entire addition cannot be disallowed u/s 40(a)(ia) of the I.T. Act. For the above proposition, he relied on the decision of the Delhi Bench of the Tribunal in the case of Smt. Kanta Yadav, Prop. M/s Yadav Travels vs. ITO vide ITA No.6312/Del/2016 order dated 12.05.2017 and the decision of the Jaipur Bench of the Tribunal in the case of Shri Rajendra Yadav vs. ITO vide ITA No.895/JP/2012 order dated 29.01.2016 and in the case of Smt. Sonu Khandelwal vs. ITO vide ITA No.597/JP/2013 order dated 13.05.2016.

14. So far as purchase from LGEK and related entities located outside India is concerned, he submitted that the ld. CIT(A) while making disallowance of payments made towards purchase of finished goods from domestic third parties also invoked disallowance u/s 40(a)(ia) r.w.s. 194C of the Act qua payments made to LGEK and related entities located outside India. While holding so, he relied on the terms of para 1, 2, 3 and 5 of Article 5 of the India-Korea DTAA. He submitted that the ld. CIT(A) without affording opportunity of being heard to the assessee proceeded with summarily holding that the overseas group companies were resident in India within the meaning of Article 5 of the India- Korea DTAA by totally misconstruing the factual matrix and the provisions of Article 5 of the DTAA. He submitted that LGEK or other related entities did not have any Permanent Establishment (PE) in India within the meaning of Article 5 of Treaty. He submitted that having PE of a foreign company in India does not make such company a resident in India within the meaning of section 6 of the Act. He submitted that the provisions of section 6 are plain and unambiguous and there is no stipulation for a foreign company to be considered as resident in India, if such foreign company has PE in India. He submitted that the provisions of section 40(a)(ia) r.w.s. 194C are applicable only in relation to sum payable to a resident and not to a non-resident. Therefore, the provisions of section 40(a)(ia) cannot be invoked for disallowance of payment made to such entities for failing to deduct tax at source u/s 194C of the I.T. Act. The Revenue has not demonstrated that the employees of the assessee are actually the employees and nominees of the said overseas entities and are working under the direct control and supervision of the overseas entities. Relying on various decisions, he submitted that no disallowance u/s 40(a)(ia) is called for.

15. The ld. DR on the other hand heavily relied on the order of the ld. CIT(A). He submitted that the powers of the ld. CIT(A) are coterminous with that of the Assessing Officer. He could do what the Assessing Officer has failed to do. He submitted that any allowance/disallowance u/s 40(a)(ia) is not a new source. It is only an interpretation of the existing source of income. Since the disallowance u/s 40(a)(ia) is not new source of income, therefore, various decisions relied on by the ld. counsel for the assessee are not applicable to the facts of the present case. Heavily relying on the order of the ld. CIT(A), he submitted that these purchasers are to be termed as "works contract" and not mere purchase of goods. The assessee has not demonstrated as to how the ld. CIT(A)'s findings are wrong or erroneous. Referring to the provision of section 194C Explanation (iv)(e), he submitted that as per the said provisions "work" shall include manufacturing or supplying a product according to the

requirement or specification of a customer by using material purchased from such customer. Therefore, this provision is clearly applicable to the facts of the present case. 15.1 As regards the arguments by the ld. counsel for the assessee that the assessee was under bona-fide belief for non-deduction of tax at source from such payment is concerned, he submitted that the decision relied on by the ld. counsel for the assessee was rendered under the provisions of section 194J of the I.T. Act. Therefore, the assessee cannot escape from the clutches of the law on account of bona-fide belief. So far as the argument of the ld. counsel for the assessee that payees have paid the tax due on their income is concerned, he submitted that the same is subject to verification.

15.2 The ld. counsel for the assessee, in his rejoinder, submitted that the ld. DR by making a statement of allowance or disallowance is creating a new source by disallowing some expenditure, which is going to increase the taxable income of the assessee. He submitted that such type of argument by the ld. DR is not in accordance with law.

15.3 So far as argument of ld. DR that it is a contract and not a sale is concerned, he submitted that a contract of sale is governed by the Sale of Goods Act. The suppliers in the instant case have paid the sales-tax and excise duty etc. The right in the goods passed to the assessee only after the sale.

16. We have considered the rival arguments made by both the sides and perused the orders of the Assessing Officer and the ld. CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. It is an admitted fact that the Assessing Officer in the body of the assessment order has not discussed anything about the applicability of the provisions of section 40(a)(ia) on account of non-deduction of tax from payments made on account of procurement of material from third party vendors. We find the ld. CIT(A) during the appellate proceedings before him has issued the enhancement notice for such disallowance. It is the submission of the ld. counsel for the assessee that that powers of enhancement available with the ld. CIT(A) do not extend to discovery of new sources of income. As per the provisions of section 251(1) in disposing of appeal, the ld. CIT(A) in an appeal against the order of assessment may confirm/reduce/enhance or annul the assessment. The Hon'ble Delhi High Court in the case of CIT vs. Sardari Lal and Co. (supra) has held as under :-

> "Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 of the Act and section 263 of the Act, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, the decision in Union Tyres' case [1999] 240 ITR 556 of this court expresses the correct view and does not need reconsideration. This reference is accordingly disposed of."

16.1 The Pune Bench of the Tribunal in the case of Ram Infrastructure Ltd. vs. JCIT vide ITA No.746/PN/2013 order dated 30.12.2016 while dealing with an identical issue where the ld. CIT(A) had enhanced the income of the assessee by discovering a new source of income has held such

addition as void ab-initio by observing as under :-

> "12. In ground Nos. 5 and 6 the assessee has assailed the addition of `7,37,68,681/- made u/s. 2(22)(e) of the Act by the Commissioner of Income Tax (Appeals). The Assessing Officer in his order has not touched upon the issue of deemed dividend. The Commissioner of Income Tax (Appeals) has observed that the assessee has violated the provisions of section 42 of the Companies Act. The subsidiary of the company has made investment in the share capital of the assessee (a holding company). The ld. AR of the assessee has made two fold submissions. The first contention of the assessee is that the Commissioner of Income Tax (Appeals) cannot made addition on the basis of new source of income during first appellate proceedings. The Hon'ble Supreme Court of India in the case of Commissioner of Income Tax Vs. Shapoorji Pallonji Mistry (supra) has held that AAC is not competent to enhance assessment in appeal by discovering new source of income not mentioned in return or consider by the Assessing Officer in assessment. The relevant extract of the judgment of Hon'ble Apex Court in the aforesaid case is as under:
>
> "8.....The only question is whether in enhancing the assessment for any year he can travel outside the record, that is to say, the return made by the assessee and the assessment order passed by the Income tax Officer with a view to finding out new sources of income, not disclosed in either. It is contended by the Commissioner of Income tax that the word " assessment "

here means the ultimate amount which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words " enhance the assessment " are not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, it must not be overlooked that there are other provisions like sections 34 and 33B, which enable escaped income from new sources to be brought to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal.

9. The question is whether we should accept the interpretation suggested by the Commissioner in preference to the one, which has held the field for nearly 37 years. In view of the provisions of sections 34 and 33B by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the Appellate Assistant Commissioner to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section. If it were not, one would expect that the legislature would have amended section 31 and specified the other intention in express words. The Income tax Act was amended several times in the last 37 years, but no amendment of section 31(3) was undertaken to nullify the rulings, to which we have referred. In view of this, we do not think that we should interpret section 31 differently from what has been accepted in India as its true import, particularly as that view is also reasonably

possible."

13. The Hon'ble Apex Court thereafter in the case of Commissioner of Income Tax Vs. Rai Bahadur Hardutroy Motilal Chamaria (supra) has reaffirmed its view taken in the case of Commissioner of Income Tax Vs. Shapoorji Pallonji Mistry (supra). The Hon'ble justice V. Ramaswami speaking for the court stated:

> "As we have already stated, it is not open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income tax Officer with a view to find out new sources of income and the power of enhancement under section 31(3) of the Act is restricted to the sources of income which have been the subject matter of consideration by the Income tax Officer from the point of view of taxability. In this context " consideration " does not mean " incidental " or "

collateral " examination of any matter by the Income tax Officer in the process of assessment. There must be something in the assessment order to show that the Income tax Officer applied his mind to the particular subject matter or the particular source of income with a view to its taxability or to its non taxability and not to any incidental connection".

The law laid down by the Hon'ble Apex Court has been reiterated by the full Bench of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs. Sardari Lal & Co. (supra). The Hon'ble Delhi High Court held :

> "Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 of the Act and section 263 of the Act, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority".

Thus, in view of the well settled law laid down by the Hon'ble Apex Court and subsequently followed by the Hon'ble Delhi High Court we hold that the Commissioner of Income Tax (Appeals) has exceeded his jurisdiction in making addition u/s. 2(22)(e) of the Act as there is no reference of such income either in the return of income or in the assessment proceedings. Thus, the addition made u/s. 2(22)(e) by Commissioner of Income Tax (Appeals) is not sustainable and is therefore set aside being void ab-initio. Since, the addition made by the Commissioner of Income Tax (Appeals) u/s. 2(22)(e) of the Act has been held to be void ab-initio, the arguments raised by the ld. AR of the assessee on merits have become academic and are thus, not dealt with. The ground Nos. 5 and 6 raised by the assessee in grounds of appeal are allowed, accordingly."

17. Since in the instant case also, there is no discussion of any such disallowance either in the return of income or in the assessment proceedings, therefore, the disallowance made by the ld. CIT(A) by

discovering a new source of income is not sustainable in law. We, therefore, hold that the disallowance made by the ld. CIT(A) u/s 40(a)(ia) is void ab-initio. Since we are allowing the grounds raised by the assessee on the issue of enhancement of assessment by the ld. CIT(A) by discovering a new source of income, the other alternate arguments made by the ld. counsel for the assessee become academic in nature and therefore are not being adjudicated. The grounds no.2 to 2.11 are accordingly allowed.

18. In ground no.3, the assessee has challenged the order of the ld. CIT(A) in treating the sales-tax subsidy of Rs.57,71,79,709/- as taxable revenue receipt, as against capital receipt treated by the assessee.

19. After hearing both the sides, we find identical issue had come up before the Tribunal in assessee's own case for the preceding assessment year. We find the Tribunal has discussed the issue at para 14 of its order and following the order of the Tribunal in assessee's own case for assessment year 2002-03 has decided the issue against the assessee by observing as under :-

> "14. Ground No. 8 is against the treatment of sales tax subsidy of `61,00,79,579/- as taxable revenue receipt. The facts concerning this ground are that the assessee treated sales tax subsidy as capital receipt, which was held by the AO to be chargeable to tax in the nature of revenue receipt. It is noticed that this issue came up for consideration before the Tribunal in earlier years. For the first time, the tribunal decided it against the assessee for the assessment year 2002-03 and such view has been followed for the subsequent years. In view of the consistent view taken by the Tribunal in deciding sales tax subsidy as revenue receipt, we do not find any reason to interfere with the impugned order on this issue. This ground fails."

20. Respectfully following the decision of the Tribunal in assessee's own case in the immediately preceding assessment year, we decide the ground against the assessee.

21. In ground no.4, the assessee has challenged the order of the ld. CIT(A) in upholding the action of the Assessing Officer in disallowing the provision for service warranty of Rs.10,05,19,000/-.

22. After hearing both the sides, we find identical issue had come up before the Tribunal in assessee's own case for assessment year 2007-08. We find the Tribunal following the order of the Tribunal in assessee's own case for assessment years 2002-03, 2003-04 and 2004-05 has decided the issue in favour of the assessee. Respectfully following the precedent, the ground raised by the assessee on this issue is allowed.

23. In ground no.5, the assessee has challenged the order of the ld. CIT(A) in upholding the action of the Assessing Officer in disallowing royalty amounting to Rs.88,38,75,000/- paid to LG Electronics Inc. Korea holding the same to be capital expenditure.

24. The facts of the case, in brief, are that the assessee during the year made payment on royalty to his holding company M/s LG Electronics, Korea (LGEK) for the right to use technical knowledge,

know-how, process, specifications, lay outs, designs, drawings and quality standard, standard calculation, etc.. Rejecting the various explanations given by the assessee and relying on various decision, the Assessing Officer treated such royalty payment as capital expenditure as against revenue expenditure treated by the assessee. In appeal, the ld. CIT(A) upheld the action of the Assessing Officer for which assessee is in appeal before the Tribunal.

25. We find identical issue had come up before the Tribunal in assessee's own case for assessment year 2007-08. We find the Tribunal decided the issue in favour of the assessee by observing as under :-

> 16.1. We have heard the rival submissions and perused the relevant material on record. In order to decide as to whether the royalty paid by the assessee is of a capital or revenue nature, it is appropriate to see the relevant clauses of the Agreement dated 01.07.2001, pursuant to which such royalty was paid. The preamble part of the Agreement states that the Licensor allows 'use of' Technical Information and Industrial Property Rights for the manufacture, production and sale of the products.

Article 1 of the Agreement defines 'Technical Information' to mean all the technical knowledge, knowhow, process, specification, lay outs, designs, drawings, and qualities standards, standards calculation, data and information developed or otherwise generally used by the licensor pertaining to the manufacture, production, assembly, use and sale of the agreed products. Article 2 of the Agreement states that:

> 'Subject to the terms and conditions set forth in this Agreement, Licensor hereby grants to Licensee an exclusive, nontransferable license, without the right to sub-license, and the right to manufacture, produce, use, sell, or otherwise dispose of the Agreed Products utilizing the Technical Information and/or Industrial Property Rights furnished by Licensor...'. Article 4 of the Agreement dealing with Royalty payment stipulates that: 'In consideration of the use of the Industrial Property Rights, designs, technical know-how, for all types, sizes and models of Colour Televisions that may be manufactured in future ....., Licensee shall pay Licensor a Royalty fee @ 1% .....'. Article 7 with caption 'Use of 'LG' Brand name & trade mark' provides that: 'The Licensor hereby allows the Licensee for the use of its Brand Name and Trade Mark for the licensed products .....'. Article 11 of the Agreement contains a Termination clause. Para 11.4 of the Agreement with marginal note 'Confidentiality' stipulates that: 'The Licensee shall keep secret and confidential, and shall not directly or indirectly disclose, divulge or reveal either during continuance of this agreement or at any time thereafter, the classified information disclosed, communicated or given or granted or otherwise acquired by the Licensee .....'. Para 11.3 stipulates that: 'Upon the termination, all the respective rights and obligation of the parties hereunder, except for obligations having accrued to the date and those of a continuing nature such as confidentiality, shall cease.'. On an overview of the various clauses of the Agreement, it transpires that the Agreement is for allowing the 'use of' the Technical Information and IPRS for the manufacture of

specified products. Such rights have been given exclusively to the assessee. This agreement simply allows the use of Technical Information and IPRS without granting any ownership rights in it to the assessee. Further the grant of license to the assessee is non-transferable with no right of sub-licensing. Apart from that, there is a confidentiality clause which prohibits the assessee from disclosing the information received pursuant to this Agreement, to anyone else either during the continuation of this agreement or at any time thereafter. It is a perpetual agreement without there being any fixed duration of the license. The termination clause provides that upon termination, all the respective rights and obligation of the parties, namely, the use of technical knowhow and IPRS, shall cease. In other words, the assessee will not be entitled to use this technical know-how or IPRS after the termination of the agreement. Now the moot question which arises is as to whether the royalty paid for the use of technical knowhow and IPRS in the given circumstances be held as a capital expenditure as has been held by the AO or revenue expenditure as claimed by the assessee.

16.2. The Hon'ble Supreme Court in CIT Vs Ciba of India Ltd. (1968) 69 ITR 692 (SC) considered a situation in which that assessee was enabled to acquire the right to draw for the purpose of carrying on its business as a manufacturer and dealer of permissible products upon the technical knowledge available from the foreign company for a limited period with stipulation not to divulge the information to third parties and further return such information on the conclusion of agreement with the prohibition of not using the same after termination of the agreement. The payment made for this purpose was eventually held to be an admissible revenue expenditure. In that case the information supplied was to be surrendered on the termination of the agreement and not to be put to use thereafter. In CIT Vs I.A.E.C (Pumps) Ltd. (1998) 232 ITR 316 (SC), the Hon'ble Supreme Court considered a case in which payment was made for use of patents and designs exclusively in India; the agreement was for a duration of 10 years with the parties having option to extend the agreement; there was a clause for non-disclosure to the third parties. In view of these facts, the Hon'ble Apex Court held that the expenditure incurred was only a revenue expenditure because what was obtained by the assessee was only a licence and what was paid by the assessee was only a licence fee and not the price for acquisition of any capital asset. In CIT Vs Indian Oxygen Ltd. (1996) 218 ITR 337 (SC), the assessee entered into agreement for the use of information, processes or invention and was prohibited from disclosing them after termination of agreement and further the agreement was terminable even prior to the period specified therein. The payment so made was held to be of revenue nature. In CIT Vs Wavin (India) Ltd. (1996) 236 ITR 314 (SC), payment made by that assessee was under nonexclusive and non-transferable agreement for the use of technical information, which was held by the Hon'ble Supreme Court as a revenue expenditure.

16.3. In contrast to above decisions holding payment of royalty as a revenue expenditure, there is a line of judgments holding the payment of royalty as a capital expenditure. In Jonas Woodhead &

Sons Ltd. Vs CIT (1997) 224 ITR 342 (SC), the assessee set up a new business and the foreign firm, in addition to supplying technical knowhow, also rendered valuable services in setting up the factory itself and the assessee was allowed to manufacture the products even after the expiry of the agreement. The Hon'ble Supreme Court held that 25% of the royalty was a capital expenditure. In Southern Switchgear Ltd. VS. CIT and Anr. (1998) 232 ITR 359 (SC), the foreign company provided technical knowhow and other services to the assessee company. The technical assistance also contemplated establishment of a factory. On the expiry of agreement after 5 years, the assessee could use method of production, procedure etc. In the backdrop of these facts, the Hon'ble Supreme Court held that the payment was made by the Indian assessee for acquisition of knowledge which was of enduring nature and hence a capital expenditure.

16.4. An analysis of the above judgments rendered by the Hon'ble Summit Court clearly brings out that whereas the payment made for acquisition of technical know- how etc. on ownership basis is a capital expenditure, the payment made for use of such technical know-how is a revenue expenditure. A divider in the capital and revenue expenditure in the circumstances as are presently prevailing can be placed by ascertaining the correct nature of the right vested in the licensee. If licensee is allowed not only the simplictor use of technical know-how, but such use is coupled with the divesting of ownership in favour of the user, then it can be considered as a case of capital expenditure. If on the other hand, the licensee is allowed a simple use without anything else, then it can be only a revenue expenditure. The mere fact that the expenditure is resulting into bestowing a benefit of enduring nature in the shape of user of technical know-how, with whose assistance the assessee is carrying on its main activity of business, cannot be the sole determinative test of the nature of expenditure. The Hon'ble Apex Court in Empire Jute Co. Ltd. VS. CIT (1980) 124 ITR 1 (SC) has held that there may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. Their Lordships emphatically laid down that : 'If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future'. Thus, it follows that if an assessee gets benefit of enduring nature by incurring the expenditure, but such benefit simply facilities the carrying on the business in a more profitable manner without enhancing the fixed capital base, it will be a case of revenue expenditure. If on the other hand, the expenditure results into acquisition of asset as an owner and not as a mere user, which augments the fixed capital base, the payment is a capital expenditure. 16.5. Armed with the above legal position, we need to ascertain if the assessee acquired use as well as ownership of technical know-how etc. or was allowed a simple use devoid of ownership. In order to decide this issue, all the attending facts and circumstances of the case need to be viewed. Some of the factors of relevance in deciding the overall question as to whether the payment is capital or revenue can be, the exclusive or nonexclusive use; fixed or perpetual tenure of the agreement for transfer of the technical knowhow; the availability or otherwise of technical knowhow after the termination of the agreement; pursuant to the surrendering of such technical know-how on the termination of the agreement, the existence or otherwise of right to use technical knowledge which the licensee may have imbibed during the currency of the agreement; the existence or otherwise of confidentiality clause in the agreement debarring the licensee from sharing it with others during the continuance of the agreement or

thereafter. In fact, there can be no single conclusive test for deciding the nature of royalty payment as to whether it is revenue or capital. It is the cumulative effect of all the above discussed factors which helps in ascertaining the true nature of royalty payment.

16.6. When we come back to the facts of the instant case it is observed that the factors which weigh in favour of the assessee are that the license was given on non- transferable basis; there is a confidentiality clause prohibiting the assessee from divulging the relevant information during continuation of the agreement or any time thereafter; on the termination of the agreement, respective rights or obligations under the agreement shall cease; and there is no power with the assessee to sub-license. On the other hand, the factors which weigh against the assessee are that the license is exclusively granted to the assessee; and the license is not for a limited period but perpetual. On considering the cumulative effect of all the factors, both for and against the assessee, we have no hesitation in holding such royalty payment to be of a revenue nature. The reason is ostensible, being the factors pointing towards revenue expenditure predominantly overshadowing the factors pointing against revenue expenditure. The factors which are against the assessee are albeit material, but stand outshined by the factors which are in favour of the assessee. It is a case of royalty payment in lieu of the 'use of' license devoid of conferring any ownership rights in the licenseeassessee.

16.7. The judgment in the case of Ram Kumar Pharmaceutical Works VS. CIT (1979) 119 ITR 33 (All) as relied by the AO is not germane to the issue under consideration. In that case, royalty was paid for acquiring ownership of know-how and was hence held to be an expenditure incurred to obtain a right of an enduring nature. We further find that the Hon'ble jurisdictional High Court in a later case of CIT VS. Prem Heavy Engg. Works (P) Ltd. (2006) 282 ITR 11 (All) has held the payment for acquiring technical know-how for manufacture of plant and not for establishment of factory itself for a period of seven years, as a revenue expenditure. 16.8. We, therefore, sum up our conclusion by holding that that the total royalty payment, as reduced by the transfer pricing adjustment on this score, be treated as a revenue expenditure. This ground is allowed."

26. Respectfully following the decision of the Tribunal in assessee's own case for assessment year 2007-08, we hold that the total royalty payment as reduced by the transfer pricing adjustment on this score be treated as revenue expenditure. The ground raised by the assessee on this issue is accordingly allowed.

27. In ground no.6, the assessee has challenged the order of the ld. CIT(A) in upholding the action of the Assessing Officer in disallowing the export commission of Rs.3,23,54,000/- paid to LG Electronics Inc. Korea holding the same as not genuine business expenditure.

28. The ld. counsel for the assessee at the outset fairly conceded that this issue has been decided against the assessee by the order of the Tribunal in assessee's own case. Therefore, the ground raised by the assessee on this issue is dismissed.

29. In ground no.7, the assessee has challenged the order of the ld. CIT(A) in upholding the action of the Assessing Officer in disallowing the claim of bad debts of Rs.2,13,72,159/-.

30. Facts of the case, in brief, are that the assessee claimed expenditure of Rs.2,13,72,159/- on account of bad debts written off. The Assessing Officer disallowed the same which was upheld by the ld. CIT(A). It is the submission of the ld. counsel for the assessee that the amounts were actually written off by the assessee during the relevant previous year. Relying on the decision of the Hon'ble Supreme Court in the case of TRF Ltd. vs. CIT reported in 323 ITR 397, he submitted that the bad debts written off should be deleted. We find the ld. CIT(A) rejected the claim of the assessee on the ground that the assessee has not made out any case except making a bald claim that it has fulfilled the requirement of section 36(1)(vii) or 36(2) of the I.T. Act. Since the assessee is required to fulfill the twin conditions, therefore, considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to give one more opportunity to the assessee to substantiate the claim of allowability of bad debts. The ground raised by the assessee on this issue is accordingly allowed for statistical purposes.

31. In ground no.8 & 8.1, the assessee has challenged the order of the ld. CIT(A) in upholding the action of the Assessing Officer in disallowing the claim of deduction u/s 80JJAA.

32. The ld. counsel for the assessee at the outset fairly conceded that this issue is decided against the assessee by the Tribunal in assessee's own case in earlier years and in assessment year 2007-08. In view of the above submission of the ld. counsel for the assessee, ground no.8 & 8.1 are dismissed.

33. The ground no.9 & 9.1 was not pressed by the ld. counsel for the assessee on the ground that the Assessing Officer has already passed order u/s 154 and the disallowance was deleted. The above ground was dismissed as not pressed.

34. Ground no.10 being general in nature is dismissed.

35. Ground no.11 is co-related to grounds no.2 to 2.11 wherein the ld. CIT(A) has enhanced the assessment by making disallowance u/s 40(a)(ia). We have already adjudicated this ground. Therefore, this ground is not being adjudicated separately.

36. In ground no.12 to 12.3, the assessee has challenged the Transfer Pricing adjustment on account of international transaction of payment of royalty of Rs.83,96,816/-.

37. Facts of the case, in brief, are that in terms of the technical assistance and royalty agreement the assessee pays royalty for use of technical know-how @ 5%. The assessee benchmarked the aforesaid transaction by applying the Comparable Uncontrolled Price (CUP) Method and selected certain comparables for the purpose of benchmarking analysis. However, the TPO/DRP rejected the same and determined the arm's length royalty rate at 4.50%.

38. The TPO, in the remand report, proposed the transfer pricing adjustment on account of payment of royalty amounting to Rs.26,51,62,726/-.

39. However, the CIT(A), in the impugned order, following the order of AY 2007-08 restricted the arm's length royalty rate to 4.05% and accordingly made an adjustment of Rs.25,19,045/- being the

excess amount paid by the assessee as royalty.

40. After hearing both the sides, we do not find any infirmity in the order of the ld. CIT(A) who has decided the issue by following the order of the Tribunal in assessee's own case for assessment year 2007-08. In absence of any contrary material brought to our notice against the order of the Tribunal, the order of the ld. CIT(A) on this issue is upheld and the ground raised by the assessee is dismissed.

41. In ground no.13 to 13.3, the assessee has challenged the disallowance of payment of export commission of Rs.3,23,53,741/- holding the same to be diversion of profits to LG Electronics Korea ('LGEK').

42. Briefly stated, the facts of the case is that the assessee exports CTVs to LG Group entities in the Middle- East and South Asian countries and to some unrelated distributors outside India. LG Electronics Korea ('LGEK') assists the assessee to increase the export of CTVs through its huge marketing network across the globe. The assessee pays commission @ 4.50% of the exports of CTVs made to various entities in Middle-East and South Asian countries. We find the issue is covered against the assessee by the order of the Tribunal for A.Y. 2007-08 in assessee's own case. Accordingly, these grounds are dismissed.

43. In grounds no.14 to 14.5, the assessee has challenged the order of the ld. CIT(A) in making transfer pricing adjustment of Rs.154,86,06,527/-.

44. Facts of the case, in brief, are that the assessee during the relevant previous year incurred advertisement and sales promotion expenses (AMP) expenses aggregating to Rs.288,97,64,000/- (including Rs.5,53,14,216/- towards contribution in respect of GCC Cricket Sponsorship) for the purpose of it's business.

45. Against the aforesaid adjustment made by the TPO, the assessee filed an appeal before the ld. CIT(A) who sought a report from the TPO for benchmarking the international transaction for assessment year 2005-06 & 2006-07 on the basis of approach adopted by the TPO in assessment year 2007-

08. The TPO vide report dated 16.10.2014 proposed to enhance the adjustment on account of AMP expenses to Rs. 198,50,28,757/- by applying the bright line test by comparing the AMP/Sales ratio of the assessee at 5.73% as against the ratio of 1.39% of the comparable companies. The CIT(A), however, disallowed 50% of the expenditure incurred by the assessee on AMP expenses instead of the expenditure in excess of 1.39% of sales under section 37(1) of the Act on the ground that such expenditure is in respect of benefits accruing to the associated enterprises. Accordingly, the CIT(A) enhanced the disallowance on account of AMP expenses by Rs.112,41,00,189/- by holding as under :-

> "32. As it is not possible exactly to measure the benefit which has accrued and arisen to the parent company of the appellant and conversely the unnecessary expenditure

> incurred by the appellant company for the benefit of its parent company and because of the complete control of the affairs of the appellant by its parent company so much so that the officers of the appellant company are invariably the employees of the parent company of the appellant and have been deputed, deployed and assigned to run and control the appellant for the benefit of the parent company of the appellant; it is held that instead of a factor of 1.39%, the 50% of the expenditure incurred by the appellant on advertisement, marketing and promotion expenses is in respect of benefits accruing to the parent company of the appellant and therefore not necessary for the exigencies of the business of the appellant.
>
> 33. In view of the above the 50% of the expenditure claimed by the appellant for advertisement, marketing and promotional expenses is disallowed and added to the income of the appellant."

46. The ld. counsel for the assessee submitted that the CIT(A) has confirmed/enhanced the adjustment on account of AMP expenses merely on the basis of assumption that 50% of the benefits arising from the AMP expenses incurred by the assessee is in respect of the benefits accruing to the associated enterprise and that the associated enterprise has complete control of the affairs of the assessee.

47. He submitted that the approach of the CIT(A) is not in accordance with law for the following reasons:

> (a) The assessee has exclusive right to manufacture and sell products bearing 'LG' brand in India and the benefit of advertisement and brand promotion expenses incurred in India to the assessee in the form of higher sale and consequently higher profit.
>
> (b) The assessee incurs advertisement expenditure to promote its own sales and thereby the profits of its own business and not for brand-

building of other group entity. The direct advantage from promotion of brands in India was to the assessee and not to owner of the brand since the said expense resulted in increase in sales and consequently profits of the appellant in India.

(c) The advertisement and marketing expenses are required to be incurred to survive in a highly competitive market and have direct nexus with the sales of products in India.

(d) The advertisement and selling expenses have been incurred by the assessee company only on the products manufactured and sold by the assessee in India. The assessee in the advertisements promotes the sale of products and not the brand name of the associated enterprise.

(e) It is a settled proposition of law that no part of any expenditure incurred by the assessee wholly and exclusively for its business can be disallowed even if such expenditure results in any incidental

or indirect benefit to the associated enterprises.

48. In view of the above, he submitted that sales promotion and advertisement expenditure is incurred by the appellant wholly and exclusively in connection with its own business in India and is not at all guided by the alleged motive of promoting the business interest of its overseas group company. Relying on various decisions, he submitted that the ld. CIT(A) is not justified in sustaining the addition. He further submitted that the Tribunal in assessee's own case for the assessment year 2003-04 deleted similar adjustments made by the TPO.

49. The ld. DR on the other hand heavily relied on the order of the ld. CIT(A).

50. After hearing both the sides, we find identical issue had come up before the Tribunal in assessee's own case in the assessment year 2007-08. The Tribunal vide ITA No.5140/Del/2011 order dated 08.12.2014 has decided the issue and restored the same to the file of the Assessing Officer/TPO for deciding the issue afresh in accordance with Special Bench verdict. The relevant observation of the Tribunal at para 4 reads as under :-

> "4. Ground No.3 is against making of addition towards transfer pricing adjustment amounting to ` 1,82,71,11,446/- in relation to the advertisement, marketing and sales promotion (AMP) expenses. Here, it is pertinent to mention that a Special Bench was constituted on this issue in this very appeal. An order dated 23.1.2013 has since been passed by the Special Bench as LG Electronics Pvt. Ltd. Vs ACIT (2013) 140 ITD 41 (Del) (SB). Two questions were referred to the Special Bench. The first question has been answered by holding that the transfer pricing adjustment in relation to the AMP expenses incurred by the assessee for creating or improving the marketing intangibles for and on behalf of its foreign associated enterprises, is permissible. The second question as to whether the assessee should have earned a mark-up from its AE in respect of such AMP expenses incurred for and on behalf of the AE, has also been answered by eventually restoring the matter to the file of TPO for de novo adjudication in the light of certain guidelines outlined in the order. Now, this Division Bench is bound by the Special bench decision and cannot tinker or amend the conclusions so drawn, as was argued by the ld. AR in an attempt to persuade us for re-deciding this issue or sending it back to the AO/TPO for a fresh decision as per law. In fact, the Special bench order, passed in this appeal alone, constitutes an integral part of this order. Respectfully following the view taken by the Special Bench, we send the matter back to the TPO/AO for deciding it in accordance with the Special bench verdict. Accordingly, Ground No. 3 is allowed for statistical purposes."

51. Respectfully following the order of the Tribunal in assessee's own case for assessment year 2007-08 which has been decided earlier i.e. prior to assessment years 2005-06 and 2006-07, we deem it proper to restore the issue to the file of the Assessing Officer/TPO for fresh adjudication of the issue in the light of the decision of the Tribunal for assessment year 2007-08. The grounds raised by the assessee are accordingly allowed for statistical purposes.

52. Ground no.15 by the assessee reads as under :-

> "15. That the CIT(A) erred on facts and in law in confirming the disallowance made by the TPO/AO of Rs.51,244,116 in respect of sponsorship payment made to GCC without adjudicating the same in the order. Further, the disallowance is confirmed ignoring the fact that the same issue has been decided by the Hon'ble ITAT in favour of the Appellant in assessment year 2003-04 & 2004-05."

53. After hearing both the sides, we find this ground was not adjudicated by the ld. CIT(A). We, therefore, restore the issue to the file of the ld. CIT(A) with a direction to adjudicate the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The ground raised by the assessee is allowed for statistical purposes.

54. Ground no.16 does not require any adjudication since the issue has already been restored to the file of the Assessing Officer/TPO.

55. Grounds no.16.1 to 16.3 were not pressed by the ld. counsel for the assessee for which ld. DR has no objection. Accordingly, these grounds are dismissed.

56. Ground no.17 relating to penalty proceedings u/s 271(1)(c) being premature at this juncture is dismissed.

57. Ground no.1 being general in nature is dismissed.

58. In ground no.2 to 2.11, the assessee has challenged the order of the ld. CIT(A) in making disallowance of Rs.210,22,81,553/- u/s 40(a)(ia) by enhancing income u/s 251(1)(a) of the I.T. Act.

59. After hearing both the sides, we find these grounds are identical to grounds no.2 to 2.11 in ITA No.3612/Del/2017. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasoning, the above grounds by the assessee are allowed.

60. Ground no.3 by the assessee relates to sales-tax subsidy of Rs.59,17,48,717/- as taxable revenue receipt as against capital receipt treated by the assessee.

61. After hearing both the sides, we find this ground is identical to ground no.3 in ITA No.3612/Del/2017. We have already decided the issue and the ground has been dismissed. Following similar reasoning this ground by the assessee is dismissed.

62. Ground no.4 relates to disallowance of provision for service warranty amounting to Rs.5,05,62,710/-.

63. After hearing both the sides, we find this ground is identical to ground no.4 in ITA No.3612/Del/2017. We have already decided the issue and the ground raised by the assessee has been allowed. Following similar reasoning this ground raised by the assessee is allowed.

64. Ground no.5 relates to disallowance of royalty amounting to Rs.107,47,71,000/- paid to LG Electronics Inc. Korea treating the same as capital expenditure.

65. After hearing both the sides, we find this ground is identical to ground no.5 in ITA No.3612/Del/2017. We have already decided the issue and the ground raised by the assessee has been allowed. Following similar reasoning this ground raised by the assessee is allowed.

66. Ground no.6 relates to disallowance of export commission of Rs.9,91,57,209/-.

67. After hearing both the sides, we find this ground is identical to ground no.6 in ITA No.3612/Del/2017. We have already decided the issue against the assessee. Following similar reasoning, this ground raised by the assessee is dismissed.

68. Ground no.7 relates to disallowance of claim of deduction u/s 80JJAA amounting to Rs.1,81,57,110/-.

69. After hearing both the sides, we find this ground is identical to ground no.7 in ITA No.3612/Del/2017. We have already decided the issue against the assessee. Following similar reasoning, this ground raised by the assessee is dismissed.

70. Ground no.8 and 9 being general in nature are dismissed.

71. In ground no.10 to 10.3, the assessee has challenged the order of the ld. CIT(A) in holding the arm's length rate for international transaction of payment of royalty at 4.05% as against royalty paid @ 5% by the assessee.

72. After hearing both the sides, we find the above grounds are identical to ground no.12 to 12.3 in ITA No.3612/Del/2017. We have already decided the issue against the assessee. Following similar reasoning, these grounds raised by the assessee are dismissed.

73. In ground no.11 to 11.3, the assessee has challenged the order of the ld. CIT(A) in making transfer pricing adjustment of Rs.9,91,57,209/- in respect of international transaction of payment of export commission holding that such expenditure was not necessary for the business of the assessee.

74. After hearing both the sides, we find this grounds are identical to ground no.13 to 13.3 in ITA No.3612/Del/2017. We have already decided the issue in preceding paragraph and the grounds raised by the assessee has been dismissed. Following similar reasoning, these grounds raised by the assessee are dismissed.

75. In ground no.12 to 12.5, the assessee has challenged the order of the ld. CIT(A) in making transfer pricing adjustment amounting to Rs.157,84,56,692/- in relation to AMP expenses.

76. After hearing both the sides, we find the above grounds are identical to ground no.14 to 14.5 in ITA No.3612/Del/2017. We have already decided the issue and the matter has been restored to the

file of the Assessing Officer with certain directions. Following similar reasoning, these grounds raised by the assessee are allowed for statistical purposes.

77. In ground no.13, the assessee has challenged the order of the ld. CIT(A) in confirming the disallowance of Rs.77,24,028/- in respect of sponsorship payment made to GCC. Since the issue was not adjudicated by ld. CIT(A), therefore, following our observation in ground no.15 in ITA No.3612/Del/2017, we restore this issue to the file of the ld. CIT(A) with a direction to decide the issue after giving due opportunity of being heard to the assessee.

78. Grounds no.14 to 14.3 was not pressed by the ld. counsel for the assessee for which ld. DR has no objection. Accordingly the above grounds are dismissed as not pressed.

79. Ground no.15 relating to penalty proceedings u/s 271(1)(c) being premature at this juncture is dismissed.

80. In the result, both the appeals filed by the assessee are partly allowed for statistical purposes.

Order pronounced in the open Court on this 18th day of July, 2018.

Sd/-	Sd/-
(KULDIP SINGH)	(R. K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 18-07-2018.
Sujeet
Copy of order to: -

1) The Appellant
2) The Respondent
3) The CIT
4) The CIT(A)
5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi