Lg Electronics India Pvt. Ltd., Uttar ... vs Acit, Noida on 16 September, 2022

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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI YOGESH KUMAR, JUDICIAL MEMBER

ITA No. 755/DEL/2015 [A.Y 2010-11]

L.G. Electronics India Pvt. Ltd A Wing, Third Floor, D-3 District Center, Saket New Delhi	Vs.	The A.C.I.T Circle -2 Noida
PAN : AAACL 1745 Q		
(Applicant)		(Respondent)

Appellant by	Shri Ajay Vohra, Sr. Advocate Shri Ramit Katiyal, CA Shri Neeraj Jain, Advocate
Respondent by	Shri Mahesh Shah, CIT- DR

Date of Hearing	:	28.07.2022
Date of Pronouncement	:	16.08.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 12.01.2015 framed u/s 144C r.w.s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. The representatives of both the sides were heard at length, the case records carefully perused alongwith the written submissions filed by the assessee and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules.

3. Ground Nos. 1 to 3 are general in nature and, therefore, need no adjudication.

4. Ground No. 4 with all its sub-grounds relates to Transfer Pricing adjustment amounting to Rs. 10,44,88,67,112/- in relation to Advertisement, Marketing and Sales Promotion Expenses [AMP] incurred by the assessee.

5. Briefly stated, the facts of the case are that the assessee is engaged in the trading, manufacturing, marketing and sale of electronic home appliances and I.T. products. It is also engaged in the import of finished goods i.e. Colour Television, Air Conditioners and Refrigerators from its holding company and associated group companies and selling the same in the local market.

6. In its telecommunication division, the assessee is engaged in the provision of after sales support services for Code Division Multiple Access [CDMA] technology based mobiles sold by LG Electronics Inc. Korea to Reliance in India. The international transactions undertaken by the assessee and the method applied to benchmark them are reproduced hereinbelow:

SI. No.	Nature of Transaction	Value of international transaction (INR)	Method
	Appliance and media division -Assembly segment		
1.	Import of raw material and components	22,158,285,520/-	TNMM
2.	Export of finished goods	12,608,941,573	
3.	Export of service spares	17,103,394/-	
4.	Import of capital goods	231,422,020/-	
5.	Service warranty charges paid	1,492,806/-	
6.	import of samples	239,954/-	
7.	Import of service spares	1,588,672/-	

Appliance and media division- Distribution segment

8. Import of finished goods 7,683,389,952/- TNMM

9. 245,563,307/- No Service warranty charges received benchmarking Appliance and media division-Common transaction/-

10. Sales commission paid 88,608,280/- TNMM Import of service spares 134,439,658/-

11.

12. Royalty paid 1,775,606,674/-

13. 434,650,6 HZ-

Design and development fee paid

14. Payment of management fee 294,869,099/-

15. Payment of consultancy fee 6,864,355/-

16. Import of software services 11,563,842/-

17. Amount written off 19,341,427/-

18.	Payment of licensee fee	844,220/-

Reimbursement of advertising and other 169,946,209/-

19. expenses to LGE1L Reimbursement of advertising and other 3,953,460/-

20. expenses to AEs Warranty services for CDMA Handsets division

21. Import of service spares 457,179,046/- TNMM Provision of warranty services 48,624,777/- No

22. Benchmarking

23. 287,792,110/-

Reimbursement of in-warranty expenses to LGEIL	No Benchmarking

7. The assessee, during the year under consideration, has incurred the following expenditure on AMP expenses:

PARTICULARS	AMOUNT [RS.]	AMOUNT [RS.]
Advertisement expenses		316,18,06,996
Sales promotion expenses		3,427,627,784
Other discounts and rebates		26,407,076,462
Total		26,996,511,242
Less :		
Institutional discount	22,813,379	
Canteen and Store department discount	4,553,768	
Price protection	634,258,416	
Shop sales executive remuneration	1,039,579,964	
Trade discount on invoices	14,109,383,261	15,810,688,788

Total	11,185,822,454/-

8. The TPO undertook benchmarking analysis of AMP expenses applying Bright Line Test [BLT] as was done by him in earlier years following the decision of the Special bench of this Tribunal and at page 14 of his order, the TPO has categorically mentioned that there is no change in the nature of transaction in the year under consideration and, therefore, the stand taken by the department in earlier years followed.

9. The TPO was of the firm belief that the assessee company has incurred expenses for creating and improving marketing intangibles on behalf of its foreign Associated Enterprises [AE]. As the AE is non- resident and such transactions are in the nature of services, it is considered to be as an international transaction under which the assessee incurred AMP expenses towards promotion of brand/ marketing intangibles owned by the non-resident AE.

10. Thereafter, the TPO referred to the BLT and determination of cost/value of the transaction drawing full support from the decision of the Special Bench of this Tribunal. The TPO, for applying BLT, accordingly compared AMP expenditure incurred by the assessee as percentage of total turnover at 10.48% with average AMP expenditure of 1.82% of the following comparable companies:

Name of the Company	AMP/sales
Allied Photographics India Ltd	0.02%
HCL Info Systems Ltd	0.81%
Infinite Retail Ltd	2.88%
Vivek Ltd	3,59%
Arithmetic Mean	1.82%

11. In light of the above, the TPO held that since AMP expenses incurred by the assessee as percentage of sales was more than similar percentage for comparable companies, the assessee had incurred such AMP expenditure on brand promotion and development of marketing intangibles for the AE. After charging mark-up of 14.88%, the TPO proposed adjustment of Rs. 10,44,88,67,112/- on account of the alleged brand building activity undertaken by the assessee for the AE. The computation is as under:

COMPUTATION OF TP ADJUSTMENT	Rs.
Value of sales	106,726,728,417
AMP / Sales of the comparables	1.82%
	1,942,426,457

Amount that represents bright line Expenditure on AMP by assessee	11,185,822,454
Expenditure in excess of bright line	9,243,395,997
Mark-up at 14.88%	1,375,417,324
Reimbursement that assessee should have received.	10,618,813,321
Reimbursement actually received	16,994,629,209
Adjustment to assessee's income	10,448,867,112

12. At the very outset, the ld. counsel for the assessee vehemently stated that the impugned issue has been decided by this Tribunal in assessee's own case in Assessment Years 2008-09 and 2009-10 and as no new facts have been brought on record, the decision of this Tribunal should be followed.

13. The ld. DR vehemently stated that the amount received by way of reimbursement towards advertisement expenditure from L.G. Korea has been reported as an international transaction by the assessee. Referring to Article 20 of the Technical License Agreement for incurring AMP expenses and basis Article 20, the assessee has incurred AMP expenditure which is akin to an 'Action in Concert" with the AE L.G. Korea and is, therefore, an international transaction.

14. Referring to the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson 374 ITR 118, the ld. DR pointed out that in that case also, the assessee admitted the existence of international transaction. Referring to the decision of this Tribunal in assessee's own case, in Assessment Years 2008-09 and 2009-10, the ld. DR pointed out that this Tribunal has referred to the decision of the Hon'ble High Court of Delhi in the case of Maruti Suzuki India Ltd 381 ITR 117 and pointed out that the facts are clearly distinguishable which have not been appreciated by this Tribunal, in as much as, by the time Suzuki Motor Corporation acquired controlling interest in Maruti Suziki, Maruti brand had already built a huge reputation.

15. Again pointing to the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of Whirlpool of India Ltd, the ld. DR stated that while delivering the judgment in earlier Assessment Years, this Tribunal has followed the decision of the Hon'ble Delhi High Court in the case of Whirlpool of India and pointed out that there is a tangible material in the form of Article 20 of the license agreement to demonstrate the existence of international transaction.

16. Referring to the Transfer Pricing study of the assessee, the ld. DR stated that the assessee has undertaken combined bench marking analysis by aggregating several international transactions whereby ALP determination of several international transactions have not been undertaken.

17. The ld. DR further stated that operating margin of the assessee is 3.70% as against 4.70% of the comparable companies which means that the profit margin of the assessee was lower than that of the comparable companies and, therefore, international transactions were not at arm's length price. It is the say of the ld. DR that the transaction by transaction benchmarking analysis is to be undertaken as opposed to aggregation approach adopted by the assessee.

18. The ld. DR concluded by saying that since the Tribunal in the preceding years has upheld the bench marking of AMP expenses by applying TNMM, the same may be applied in the year under consideration also but after making comparability adjustment on account of AMP expenses.

19. Strong reliance was placed by the ld. DR on the decision of the Hon'ble Punjab and Haryana High Court in the case of Knorr Bremse India Pvt. Ltd 380 ITR 307

20. We have given thoughtful consideration to the orders of the authorities below and have carefully perused the decisions relied upon by both the representatives. At the very outset, we have to state that this Tribunal in ITA No. 6253/DEL/2012 for Assessment Year 2008-09 and ITA No. 953/DEL/2014 in Assessment Year 2009-10 had the occasion to consider an identical quarrel and had the benefit of the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India Pvt Ltd 374 ITR 118 and referring to various judicial decisions, the Tribunal held as under:

"21. In our understanding of the facts and law, mere agreement or arrangement for allowing use of their brand name by the AE on products does not lead to an inference that there is an "action in concert" or the parties were acting together to incur higher expenditure on AMP in order to render a service of brand building. Such inference would be in the realm of assumption/surmise. In our considered opinion, for assumption of jurisdiction u/s 92 of the Act, the condition precedent is an international transaction has to exist in the first place. The TPO is not permitted to embark upon the bench marking analysis of allocating AMP expenses as attributed to the AE without there being an 'agreement' or 'arrangement' for incurring such AMP expenses. XXXXX

30. The assessee being a full-fledged manufacturer, entire AMP expenditure is incurred at its own discretion and for its own benefit for sale of LG products in India. In the case of the appellant, the advertisements are aimed at promoting the sales of the product sold under trademark 'LG' manufactured by the assessee and not towards promoting the brand name of the AE. In such circumstances, the alleged excess AMP expenditure does not result in an international transaction and the assessee cannot be expected to seek compensation for such expenses unilaterally incurred by it from the AE."

21. As mentioned elsewhere, the TPO at page 14 of his order has himself categorically mentioned that there is no change in the nature of transaction in the year under consideration and, therefore, the stand taken in earlier years is followed.

22. In our considered opinion, it is not open to the Tribunal to deviate from the findings recorded in earlier years in the absence of change in facts or position in law. In other words, this Tribunal is

bound by earlier decisions.

23. We draw full support from the decision of the Hon'ble Madras High Court in the case L.G. Ramamurthi 110 ITR 453 wherein the Hon'ble Madras High Court held that unless new facts are brought on record, the Tribunal shall not take a view which is different from the view taken by another bench for the earlier years. The relevant findings read as under:

> "19. ..... Even assuming that this court "on the earlier occasion had not given any finding with regard to the nature of the gift, whether it was real or sham, and merely went on to consider the question of law embedded in the question actually referred, to this court, still we are of the opinion that no Tribunal of fact has any right or jurisdiction to come to a conclusion entirely contrary to the one reached by another Bench of the same Tribunal on the identical facts. It may be that the members who constituted the Tribunal and decided on the earlier occasion are different from the members who decided the case on the present occasion. But what is relevant is not the personality of officers presiding over the Tribunal or participating in the hearing, but the Tribunal as an institution. If it is to be conceded that simply because of the change in the personnel of the officers who manned the Tribunal, it is open to the new officers to come to a conclusion totally contradictory to the conclusion which had been, reached by the earlier officers manning the same Tribunal on the same set of facts, it will not only shake the confidence of the public in judicial procedure as such, but it will also totally destroy such confidence. The result of this will be conclusions based on arbitrariness and whims and fancies of the individuals presiding over the courts or the Tribunals and not reached objectively on the basis of the facts placed before the authorities.
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> XXXXX
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> 28. It is worthwhile emphasizing that if a Bench of a Tribunal on the identical facts is allowed to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on an earlier occasion, that will be destructive of the institutional integrity itself. That is the reason why in a High Court, if a single judge takes a view different from the one taken by another judge on a question of law, he does not finally pronounce his view and the matter is referred to a Division Bench. Similarly, if a Division Bench differs from the view taken by another Division Bench, it does not express disagreement and pronounce its different views, but has the matter posted before a Fuller Bench for considering the question. If that is the position even with regard to a question of law, the position will be a fortiori with regard to a question of fact. If the Tribunal in the present case wanted to take an opinion different from the one taken by the earlier Bench, it should have placed the matter before the President of the Tribunal so that he could have referred the case to a Full Bench of the Tribunal, consisting of three or more members for which there is provision in the Act itself.

> 29. Under these circumstances, we are clearly of the opinion that the Tribunal completely erred in coming to the conclusion it did, at variance with and opposed to the conclusion of the Tribunal on the earlier occasion, namely, that the gifts in the present cases constituted real gifts and not sham ones."

24. In light of the above, and respectfully following the findings of the co-ordinate bench [supra] we direct the Assessing Officer /TPO to delete the impugned adjustment of Rs. 10,448,867,112/-. Accordingly, Ground No. 4 with all its sub-grounds is allowed.

25. For the sake of completeness, we would like to address to the specific issues raised by the ld. DR.

26. Firstly, the ld. DR has referred to Article 20 of Technical License Agreement which reads as under:

> "The licensee agrees to provide and make arrangements for advertisement, marketing and sales promotion in the licese territory for L.G. products manufactured by the licensor and those by the licensee at their cost."

27. In our understanding of the afore-stated Article, we are of the considered view that it only emphasizes that the advertisement, marketing and sales promotion expenses in relation to the products manufactured and/or distributed by the assessee would have to be incurred by the assessee as licensee and it would not be the responsibility of the L.G. Korea to incur such expenses.

28. We are of the considered view that in terms of technical licensee agreement, the assessee is the exclusive licensee for the Indian territory and it is no one's case that LG Korea is directly selling products in the Indian market.

29. From the above Article, we cannot infer, nor it can be inferred, that excessive AMP expenses have been incurred by the assessee so as to benefit AE nor the said Article provided for minimum expenses on account of AMP to be incurred by the assessee.

30. The only logical inference that can be drawn from the said Article 20 is that, being an independent manufacturer/distributer, the assessee in its ordinary course of business, had incurred expenditure including AMP at its own cost for selling products for which it is dealing in.

31. In similar circumstances, the Hon'ble Delhi High Court in the case of Whirlpool 381 ITR 154 dealing with similar clause in the Trademark License Agreement wherein the Revenue submitted as under:

> "28. Analysing the trademark and trade name license agreement ('TLA') Mr. Srivastava submits that clause 3.2 thereof indicates that the Assessee has no rights in the trade name and that "the manner of the use of the trademark has to be approved" by Whirlpool USA; Clauses 6.1, 6.2 and 6.3 indicate that the contents of the advertisements for brand promotion also needs to be approved."

32. And the Hon'ble High Court observed as under:

> "38. The clauses of the TLA which had been referred to in extenso by Mr. Srivastava go to show that Whirlpool USA was protective of its brand. However, it is not discernible from the clauses of the said TLA that WOIL was under any obligation to incur an extent of AMP expense for building the brand or mark of Whirlpool USA. The Revenue has been unable to explain why there should a presumption that as a result of the TLA, there must have been an understanding between Whirlpool LISA and WOIL and that WOIL will spend 'excessively' on AMP in order to promote the 'Whirlpool' brand in India. In other words, it is not clear why a presumption should be drawn that since an incidental benefit might enure to the brand of Whirlpool USA, a proportion of the AMP expenses incurred must be attributed to it."

33. Nothing has been brought on record by the Revenue to demonstrate that there is a direction from LG Korea to incur certain minimum level expenditure on AMP. Therefore, we are of the considered view that the said Article in TLA does not provide for or result in rendering of any service in relation to AMP expenses incurred by the assessee as an independent full risk-bearing manufacturer/ distributor of the products manufactured/distributed in the Indian market.

34. Another point raised by the ld. DR relates to reimbursement of certain advertisement expenses by LG Korea.

35. As mentioned elsewhere, in terms of Article 20, LG Korea did not have any obligation whatsoever to indicate or reimburse advertisement expenditure in relation to sale of products by the assessee in India. It appears that the said reimbursement of AMP expenses have been made by LG Korea voluntarily and without any legal binding and by way of support the assessee. We find that similar reimbursement has been received by the assessee in earlier years and as mentioned elsewhere, this quarrel has been decided by this Tribunal in earlier Assessment Years in favour of the assessee and against the Revenue.

36. In so far as bench marking of AMP expense on aggregation basis applying TNMM is concerned, this Tribunal in assessee's own case, in Assessment Years 2008-09 and 2009-10 upheld the proposition that as long as operating margins of the assessee are higher than those of comparable companies, no adjustment on account of AMP expenses is warranted. The relevant findings of this Tribunal read as under:

> "33. Considering the aforementioned findings of the Hon'ble Jurisdictional High Court of Delhi In the case in hand, the operating profit margin of the assessee is at 5.01% in the manufacturing segment and 4.52% in the distribution segment and the same is higher than that of the comparable companies at 4.04% in the manufacturing segment and 4.46% in the distribution segment. TNMM has undisputedly been satisfied. Since the operating margins of the assessee are in excess of the selected comparable companies, no adjustment on account of AMP expenses is warranted."

37. The Hon'ble Delhi High Court in the case of Sony Ericsson [supra] laid down the law in this regard as follows:

> "82. There is considerable tax literature and text that CUP Method, i.e. Comparable Uncontrolled Price Method, RP Method, i.e. Resale Price Method and CP Method, i.e. Cost Plus Method can be applied to a transaction or closely linked, or continuous transactions. Profits Split Method and TNM Method grouped as □transactional profit methods', can be equally effective and reliable when applied to closely linked or continuous transactions. Thus, it would be inappropriate to proceed with the arm's length computation methods, with a pre-conceived suppositions on singularity as a statutory mandate. Clubbing of closely linked, which would include continuous transactions, may be permissible and not ostracized. Aggregation of closely linked transactions or segregation by the assessed should be tested by the Assessing Officer/TPO on the benchmark and the exemplar; whether such aggregation/ segregation by the assessed should be interfered in terms of the four clauses stipulated in Section 92C(3) of the Act, read with the Rules. It would, among other aspects, refer to the method adopted and whether reliability and authenticity of the arm's length determination is affected or corrupted. XXXXX
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> 101. However, once the Assessing Officer/TPO accepts and adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would as noticed above, lead to unusual and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the inter- linked transaction. This would be also in consonance with Rule 10B(1)(e), which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the assumption that functions, assets and risk being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible."

38. It would be pertinent to mention here that the TPO did not dispute the combined benchmarking analysis undertaken by the assessee in its Transfer Pricing study in respect of all international transactions and, in fact, accepted the same to be at arm's length. The TPO has proceeded on the premise that an international transaction in respect of AMP expenses is to be bench marked separately applying BLT.

39. Similar contention was raised in Assessment Year 2008-09 and this Tribunal observed as under:

> "31. The Revenue has strongly objected for the aggregated bench marking analysis for the AMP. According to the Revenue, the assessee company has not been able to

demonstrate that there is any logic or rationale for aggregation or that the transactions of advertisement expenditure and the other transactions in the distribution activity are inter-dependent, the clubbing of transactions cannot be allowed. According to the Revenue, bench marking of AMP transaction is to be carried out using segregated approach and for determination of ALP of such transactions, Bright Line is used as the tool.

32. This contention of the Revenue is no more good as BLT has been discarded by the Hon'ble High Court of Delhi as mentioned elsewhere. The Hon'ble High Court of Delhi in the case of Sony Ericsson Mobile Communications India Pvt Ltd in Tax Appeal NO. 16 of 2014 has held that if the Indian entity has satisfied Transactional Net Margin Method (TNMM), i.e., as long as the operating margins of the Indian enterprise are higher than the operating margins of comparable companies, no further separate compensation for AMP expenses is warranted. The Hon'ble Court held as under:

"101. However, once the Assessing Officer/TPO accepts and adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would as noticed above, lead to unusual and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the inter-linked transaction. This would be also in consonance with Rule 10B(1)(e), which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the assumption that functions, assets and risk being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible."

33. Considering the aforementioned findings of the Hon'ble Jurisdictional High Court of Delhi In the case in hand, the operating profit margin of the assessee is at 5.01% in the manufacturing segment and 4.52% in the distribution segment and the same is higher than that of the comparable companies at 4.04% in the manufacturing segment and 4.46% in the distribution segment. TNMM has undisputedly been satisfied. Since the operating margins of the assessee are in excess of the selected comparable companies, no adjustment on account of AMP expenses is warranted."

40. The contention of the ld. DR that profit margin of assembly segment of the assessee is 3.70% whereas the same for comparable companies is at 4.70% cannot be accepted since the said margin is within arm's length range of +/- 5% as per proviso to section 92C92) of the Act.

41. Bench marking analysis of AMP expenses applying intensity approach can be understood from the following chart:

S.N Name of the company Operating Operating profits 0. profits on on operating operating revenues after revenues AMP adjustment 1 Hitachi Home and Life Solution Limited NC NC Penguin Electronic Limited 0.41% 0.42% 1.86% 1.86% 3 Trend Electronics Limited (erstwhile Videocon Communications Ltd) 5.29% 5.43% Value Industries Limited (erstwhile Videocon Appliances Limited) Whirlpool Of India Limited 9.56% 9.77% Arithmetic mean 4.28% 4.37% LGEIL 3.70% 3.70%

42. Considering the factual matrix from all angles, TP adjustment made by treating AMP expenses as an international transaction deserves to be deleted in line with the decision of this Tribunal in assessee's own case for Assessment Years 2008-09 and 2009-10. Accordingly, Ground No.4 is allowed.

43. Ground No. 5 relates to TP adjustment in respect of royalty.

44. The representatives of both the sides were heard at length on this quarrel. We find that this quarrel relates to the same set of facts which have been considered by this Tribunal in Assessment Year 2008- 09 and then in Assessment Year 2009-10. No new facts have been brought to our notice by either side. We find that this Tribunal in ITA No. 953/DEL/2014 in Assessment Year 2009-10 has followed its own decision given in ITA No. 6253/DEL/2013 in Assessment Year 2008-09. Facts considered by this Tribunal and the decision given read as under:

"36. On examination of agreement submitted, the TPO noted that the assessee company used to pay 1% royalty to LGEK till 1.1.2003 which was then increased to 3% and was subsequently increased to 5% of both domestic and export sales w.e.f. 01.01.2004. The TPO observed that rate of royalty payment have been unilaterally increased from 1% to 5% within a span of three years without commensuration enhancement in the right and benefit of the assessee company. The assessee company bench marked this transaction by applying Comparable Uncontrolled Price [CUP] method and selected the following comparables for the purpose of bench marking analysis:

Name of Foreign Collaborator	Name of Indian Company	Date of approval	Items of Manufacture	Royalty Rates - Domestic	Royalty Rates- Export	Duration of agreement (Years)
Corporation Japan Limited	International Limited		Television Receivers vapour			

Williams Group	Limited		usage of Air Conditioning		
Design Corporation	Internatio nal Limited				
Electronics Co. Limited	Appliances Limited		Reach-in-type and open type reach-in-cooler and open freezer		
Company of Japan	Electronic s Limited		Television Receiver Set and Sub-assemblies		
Inc	Internatio nal Limited				
Vilter Manufacturi ng Corporation	Frick India limited	Jan-03	Refrigeration Compressors	5%	8%

37. Out of the aforesaid 8 comparables, DRP/TPO considered only 3 comparables engaged in manufacture of colour television, viz., Toshiba Corporation, Japan, Kenwood Design Corporation and Victor Company of Japan and disregarded the remaining 5 comparables. Accordingly, the TPO arrived at average royalty rate of 4.50%. The DRP/TPO further made an adhoc adjustment of 1% from the average rate of royalty of 3 comparables of 4.5%, allegedly on the ground that the royalty agreement of the assessee is in perpetuity, while the agreement of the comparables is for a definite period. The DRP further observed that since the assessee has made payment of design and development charges to LGEK, the payment of royalty should be lower by 1%. Accordingly, the arm's length royalty was determined at 3.50% resulting into adjustment of Rs 34,30,08,092/-.

38. Before us, the ld. AR stated that all the comparable companies are engaged in manufacture of similar white goods/electronic products and, therefore, for undertaking benchmarking analysis, all the comparables should be taken into consideration. It is the say of the ld. AR that since royalty paid @ 5%, being the average rate of royalty of all the comparables, no adjustment on account of payment

of royalty is warranted.

39. We have carefully considered the underlying facts in issue. We find that an identical issue was considered by the coordinate bench in assessee's own case in A.Y 2007-08 in ITA No. 5140/DEL/2011. The relevant findings of the Tribunal read as under:

"10.7 The next question is about the determination of such reduction in the rate of royalty. Both the sides fairly agreed that the issue of quantification of adjustment to be allowed on account of fixed term and perpetual license is a virgin issue inasmuch as there is no precedent available on this point. We find that the TPO determined comparable average rate of 3.5% of the companies having fixed term agreements. Considering the fact that the assessee had a perpetual license, he discounted the uncontrolled royalty rate by 2%, thereby calculating the arm's length royalty rate at 1.5%. The DRP computed average rate of royalty of three comparable companies at 4.5% and, thereafter, reduced 1% on account of limited period of license used by the comparables vis-a- vis the assessee using the perpetual license. 10.8. There can be no quarrel on the fact that, other things being equal, a landlord intending to have a tenant for a long-term may compromise some amount of rent, in comparison with a landlord finding a tenant requiring the premises for a short-term.

The rate of rent in a former case will be lower for a variety of reasons, such as, not undergoing the process of finding a tenant every now and then, fear of the property remaining vacant for some time after the exit of the first tenant and incurring costs at the time of each let out. Difference between the rent charged by the landlord or paid by the tenants in the afore discussed two situations is nothing but a discount allowed to a tenant of long- term on the available market rate of rent. This analogy can be applied to the present facts by considering the discount which a licensor with a perpetual license may allow or the premium which a licensor with a fixed term license may charge. It can be seen that the TPO downgraded 2% on this score and reduced the unadjusted comparable rate of 3.5% to the adjusted 1.5%. To put it differently, the TPO treated the premium charged by the comparable licensors on account of fixed term licenses at 57% (2/ 3.5*100), or in other words, the discount at such rate to the prevalent market rate on account of perpetual license. However, the DRP treated such discount for perpetual license at 22% (1/4.5*100). Considering the entirety of the facts and circumstances of the instant case, we find that the rate of premium on the license with fixed term at 22% is on a higher side. In our considered opinion, the rate of such premium should be restricted to 10% of the average rate of royalty of the comparable cases.

10.9. It has been held above that the DRP rightly considered three companies as comparable, whose average rate of unadjusted royalty comes at 4.5% within the meaning of sub- clause (i) of rule 10B(1)(a). When rate is discounted with 10% under sub-clause (ii), resulting into a deduction of 0.45% (10% of 4.5), the arm's length rate of royalty as per sub-clause (iii) of rule 10B(1)(a) comes to 4.05% (4.5-0.45). It is this rate, which is directed to be applied as arm's length rate of royalty payment. V. Rule of Consistency."

40. Respectfully following the findings of the co-ordinate bench, we direct the TPO to determine the Arm's Length royalty @ 4.05%. Ground Nos. 4 to 4.4 are partly allowed.

45. As mentioned elsewhere, no new facts have been brought on record to our notice. Therefore, respectfully following the findings of the co-ordinate bench [supra], we direct the TPO/Assessing Officer to determine arm's length price of royalty @ 4.05%. Ground No. 4 with all its sub-grounds is partly allowed.

46. Ground No. 6 alongwith its sub-grounds relates to the transfer pricing adjustment in respect of Asian Regional Overheads expense.

47. Briefly stated, the facts of the case are that LG Electronics Singapore Limited provides services to the assessee in connection with marketing, finance, human resource, supply chain management, after sales support, etc. In consideration for services, the assessee, during the year under consideration, has paid a sum of Rs. 29,48,69,099/- to its associated enterprise. The TPO did not accept the transaction to be at arm's length and determined the ALP of such services at NIL holding that no specific benefit has been derived by the appellant.

48. Before us, it was strongly contended by the ld. counsel for the assessee that this Tribunal in assessee's own case in Assessment Years 2008-09 and 2009-10, has decided the issue in favour of the assessee and against the Revenue.

49. The ld. DR vehemently stated that this transaction was reported as an international transaction and was benchmarked applying TNMM on aggregation basis. It is the say of the ld. DR that this international transaction was not bench marked by the assessee separately. The ld. DR strongly contended that since there was a mark-up of 5% over and above the cost, therefore, the same was required to be benchmarked applying the most appropriate transfer pricing method.

50. The ld. DR further questioned why charges are being paid for brand management services when brand belonged to LG Korea and not to the assessee and therefore, questioned the requirement of marketing, planning and training services. The ld. DR vehemently stated that the evidences which have been brought on record do not pertain to the F.Y. 2009-10 relevant to the year under consideration.

51. The ld. DR further questioned the allocation of expenses in ratio of domestic sales as it results in higher allocation of the expenses to the Indian company and further questioned the allocation of president cost and general overheads of the AE.

52. Referring to earlier years decision of this Tribunal, the ld. DR stated that in earlier Assessment Years, factum of rendition of services was not disputed by the Revenue, but this year, the same is being challenged.

53. We have given thoughtful consideration to the rival contentions. In our considered opinion, the assessee is free to conduct business in the manner that the assessee deems fit and the commercial or business expediency of incurring any expenditure has to be from the assessee's point of view, which means that the Assessing Officer cannot step into the shooes of a business man. In our considered view, an item of expenditure has to be incurred wholly and exclusively for the purpose of business of

the assessee and whether the assessee has derived any benefit from incurring such expenditure is, according to us, irrelevant consideration for the purpose of determination of ALP.

54. There is no dispute that the brand LG is owned by LG Korea but such expenses are incurred for undertaking marketing or promoting sale of the group companies which includes the assessee. Therefore, it can be safely concluded that the same has been incurred for the purpose of the business of the assessee in ordinary course of its business.

55. We have already decided the quarrel relating to the aggregate bench marking while deciding Ground No. 4 relating to AMP expenses and the same reasoning would fully apply here also.

56. In so far as relevancy of the documents is concerned, we find that the following evidence and documents placed in the paper book, relate to the year under consideration:

S. No.	Particulars	Page Number	Remarks
1	2010 Marketing Capability Building Program	2038-2044 (Vol 6)	Marketing Capability building program, Presentation dated February, 2010
2	Market Trend and Competitor information - Early Warning Indicator	2143-2150 (Vol 6)	Analysis of Market share trend and competitor analysis - dated September, 2009
3	Review Report dated October 2009	2167-2207 (Vol 6)	Presentation/ report on exploring performance of marketing activities and identifying areas for improvement in relationship with retailers.
4	Report on DCR study - India, 2009	2208-2310 (Vol 6)	Evaluation of appellant's marketing activities and discussion on further strengthen dealer relationship
5	Email dated August 2009 regarding marketing and PR initiative launched by the associated enterprise	2311-2313 (Vol 6)	Video and other promotional material in connection with 'FI Rocks with Golden Ticket' project launched by the associated enterprise
6	Email dated April 2009 regarding marketing and PR initiative launched by the associated enterprise	2314-2318 (Vol 6)	Promotional material in connection with marketing project launched by the associated enterprise

	Email dated May 8, 2009 regarding	2319-2328 (Vol 6)	Email dated May, 8, 2009
7			
% NO.	Particulars	Page Number	Remarks
	strategy training workshop organised by the associated enterprises		
8	Copy of Detailed presentation on 'Developing Strategy and problem solving'	2329-2518	Detailed presentation on strate. development - May 22nd and 23rd, 2009
9	Email communication between Corporate marketing team of the associated enterprise and the employees of the appellant	2519-2523 (Vol 6)	Email dated 05-04-2009
10.	Brand in depth study - Report dated October, 2009	2524-2588 (Vol 7)	In depth study to diagnose the current status of brand and to identify influencing factors for brand preference
11	Presentation on global communication campaign	2630-2677 (Vol 7)	Report/presentation discussing marketing strategy for creating market awareness about innovative products offered by LG and to increase sales in Asian countries. Campaign was undertaken during April to December, 2009 with budget of USD 7.60 million (page 2632)
12	Marketing presentation on VC/AP (Air purifier) launch in India	2678-2698 (Vol 7)	Report/presentation on launch of new products in India - July, 2009. Report contains Marketing Plan, Training Schedule etc.
13	Marketing Presentation dated July, 2009	2699-2807 (Vol 7)	Presentation/ Report dated July 7, 2009 on Marketing Strategy, Product strategy and Design Lab and Corporate design. Contains analysis of marketing strategy of competitors
14	Email dated 3 October, 2009	2124-2142 (Vol 6)	Promotional and marketing material for launch of Borderless Series of TV.

57. In so far as allocation of expenses in proportion to sale is concerned, we find that the same is supported by the decision of the Hon'ble Madras High Court in the case of Manjushree Plantations Ltd 130 ITR 908 which has been approved by the Hon'ble Apex Court in the case of Consolidated Coffee 248 ITR 432 and also supported by the Hon'ble Delhi High Court in the case of EHPT India Pvt Ltd 350 ITR 41.

58. Considering the facts of the case in totality in light of the judicial decisions discussed hereinabove, and considering the past history of the assessee, we do not find any merit in the transfer pricing adjustment in respect of allocation of Asian Regional Headquarter expenses and direct the Assessing Officer/TPO to delete the same. Ground No. 6 is allowed.

59. For the sake of completeness, we would like to refer to the decision of this Tribunal given in Assessment Year 2008-09 in ITA No. 6253/DEL/2012 which is as under:

> "49. In our humble opinion, it is the prerogative of the assessee to decide as to whether or not the services are required. Documentary evidences brought on record show that significant services were rendered by RHQ benefitting the assessee to name a few such services, brand analysis, product analysis, market analysis, etc. Further, we find that the RHQ engages third party renowned consultants, such as, Mckinsey & Co to conduct market research and prepare reports. RHQ also conducts various training courses from time to time which are conducted with a view of imparting soft skills to the employees of the assessee company and for this purpose, executives from the RHQ visit the assessee company.
>
> 50. In so far as the allegation that these are share holder services, we do not find any merit in this argument of the Revenue. Services are provided by LG Electronics Singapore Pte Ltd, which is not a shareholder of the assessee company and was created to provide managerial support services to various entities in the region, in the form of undertaking market research, market performance analysis, conducting consumer interviews engaging the services of third party consultants for undertaking market/industry analysis, provision of supply chain management services, provision of after sale services etc. and such activities cannot be termed as share holder activity.
>
> 51. We find that the assessee engaged a third party consultant to determine the arm's length price of the services provided by the RHQ. The consultant determined ALP at Rs. 6,521/- per hour as against the comparable uncontrolled price of Rs. 11,670/- per hour. Since the hourly rate charged by RHQ is lower than comparable hourly rate of third parties transaction of regional head quarter charges meets the arm's length test.
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> 52. The Revenue has made the adjustment holding that the assessee was not required to incur such expenditure which are duplicative in nature. In our considered view, the assessee is free to conduct business in the manner that assessee deems fit and the commercial or business expediency of incurring any expenditure has to be seen from the assessee's point of view.

53. The Hon'ble Delhi High Court in the case of CIT vs Reebok India Co Ltd ITA No 213/2014, while deleting transfer pricing adjustment made by the TPO on the basis of similar reasoning held as under:

"183. On the question whether the royalty should have been paid or not, we are in agreement with the finding of the Tribunal that question of payment of royalty cannot be determined on the basis of profitability or earnings of the assessed, once it is accepted that know-how and technical information was provided. It is not alleged or the case of the Revenue that the technology or know- how was hopeless and useless. The finding of the Assessing Officer/TPO, that the assessee had not derived any commercial benefit as technology and know-how had not resulted in any substantial profit increase, has been rightly rejected as totally unsustainable. Profitability of the assessed could have been lower or varied due to various reasons and lower profitability in one or more years cannot lead to the conclusion that no benefits were derived or technology was unproductive. The justification given by the assessee for lower profits on account of bad debts, high rent, increase in legal cost stand highlighted and accepted by the Tribunal. 184. Transfer pricing provisions, as noted above, recognise separate entity principle. Therefore, as a sequitur, it follows that the AE is a separate entity and when it avails and secures advantage of technical know-how, it should pay arm's length price for the right to use. The arm's length price would be the fair market price of the technical know-how, which is licensed.

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

54. The Hon'ble Delhi High Court in the case of CIT vs Lumax Industries Limited ITA No 102/2014 held that the Transfer Pricing provisions do not authorize disallowance of any expenditure on the basis that it was not necessary for the assessee to incur the expenditure. The Hon'ble Court held as under:

"16. On the question of addition made by the AO on account of ALP for the payment of royalty, learned counsel for the Assessee has rightly referred to the decision in Commissioner of Income Tax v. Sony Ericsson Mobile Communication (2015) 374 ITR 118 where the determination of the ALP of the royalty paid as Nil was not approved. The Court's attention has also been drawn to the decision in Commissioner of Income Tax v. EKL Appliances Limited (2012) 345 ITR 241 wherein it was held

> that Rule 10B (1) (a) did not authorize disallowance of any expenditure on the ground that it was not necessary for the Assessee to have incurred such expense.

It was observed that though the quantum of expenditure could be examined, the entire expenditure could not be disallowed on the ground that it was not necessary."

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

> "34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in Dresser-Rand India Pvt. Ltd. v. Additional Commissioner of Income Tax, 2012 (13) ITR (Trib) 422.
>
> 35. The TPO's Report is, subsequent to the Finance Act, 2007, binding on the AO. Thus, it becomes all the more important to clarify the extent of the TPO's authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise - of factual verification is retained by the AO under Section 37 in this case.

Indeed, this is not to say that the TPO cannot - after a consideration of the facts - state that the ALP is 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure. That decision is outside the authority of the TPO...."

56. Considering this issue from another angle in the light of the decision of the Hon'ble Delhi high Court in the case of CIT vs Lumax Industries Limited ITA No 102/2014 we are of the opinion that once the assessee has satisfied the TNMM method i.e. the operating margins of the assessee are higher than those of the comparable companies [as mentioned elsewhere], no separate adjustment is warranted.

57. Same view was taken by the Hon'ble Delhi High Court in the case of Magneti Marelli Powertrain India Pvt. Ltd. ITA No 350/2014 wherein the Hon'ble High Court held as under:

> "17. As far as the second question is concerned, the TPO accepted TNMM applied by the assessee, as the most appropriate method in respect of all the international transactions including payment of royalty. The TPO, however, disputed application of TNMM as the most appropriate method for the payment of technical assistance fee of 38,58,80,000 only for which Comparable Uncontrolled Price ("CUP") method was

sought to be applied. Here, this court concurs with the assessee that having accepted the TNMM as the most appropriate, it was not open to the TPO to subject only one element, i.e payment of technical assistance fee, to an entirely different (CUP) method. The adoption of a method as the most appropriate one assures the applicability of one standard or criteria to judge an international transaction by. Each method is a package in itself, as it were, containing the necessary elements that are to be used as filters to judge the soundness of the international transaction in an ALP fixing exercise. If this were to be disturbed, the end result would be distorted and within one ALP determination for a year, two or even five methods can be adopted. This would spell chaos and be detrimental to the interests of both the assessee and the revenue. The second question is, therefore, answered in favour of the assessee; the TNMM had to be applied by the TPO/AO in respect of the technical fee payment too."

58. Considering the facts in totality in the light of the judicial decisions discussed hereinabove, the adjustment computed by the TPO/DRP on account of allocation of RHQ expenses is uncalled for and deserves to be deleted. Ground Nos. 5 to 5.5 are allowed."

60. Ground No. 7 relates to TP adjustment of Rs. 5,27,71,153/- in respect of international transaction of payment of export commission.

61. During the year under consideration, the assessee paid export commission of Rs. 8,86,08,280/- in respect of exports made using the marketing and distribution network of associated enterprises. The transaction was benchmarked applying TNMM and since the operating margin of the appellant 3.70% was within +/- 5% of the margin of the comparable companies at 4.70%, the transaction was considered to be at arm's length.

62. However, this approach of the assessee was negated by the TPO who was of the firm belief that since the assessee does not have any marketing infrastructure in the overseas markets, AMP/sales ratio of the appellant 1.82% shall be regarded as the arm's length rate of export commission, and accordingly, made addition of Rs. 5,27,71,153/-.

63. Before us, the ld. counsel for the assessee drew our attention to the decision of this Tribunal in the case of the assessee in Assessment Year 2009-10 and pointed out that since certain additional evidences were filed by the assessee in Assessment Year 2009-10, the quarrel was restored to the file of the Assessing Officer to be decided in light of the additional evidences.

64. It is the say of the ld. counsel for the assessee that similar application for admission of additional evidence has been filed for the year under consideration.

65. Per contra, the ld. DR objected to this contention of the ld. counsel for the assessee and vehemently stated that additional evidence enclosed in the paper book relates to the expenses on advertisement in other foreign jurisdiction. The ld. DR strongly contended that export commission cannot justifiably be paid in respect of expenses on advertisement incurred by LG Korea when LG

brand does not belong to the assessee and prayed for rejection of the additional evidence.

66. A perusal of the additional evidence shows that the same indicates brand promotion expenses incurred by LG Korea for promoting its brand name and overseas marketing and network. The assessee has been providing access to the overseas marketing/network which is continuously developed and maintained by the AE, because of which the assessee is able to export its product in these markets. It is not in dispute that the assessee has no office set up or infrastructure outside India to undertake exports and it is also not disputed by the Revenue that the assessee is able to secure orders for exports in the overseas market through the network and basis the established brand name of LG Korea.

67. In any case, in our considered view, the Assessing Officer shall examine the additional evidence and decide the issue afresh as per the directions of this Tribunal given in ITA No. 953/DEL/2014 for Assessment Year 2009-10. Ground No. 7 is allowed for statistical purposes.

68. Ground No. 8 relates to the adjustment to the service warranty charges received by the assessee by apportioning a margin of 32.95% on such cost of reimbursement.

69. Facts on record show that the TPO has made an adjustment of Rs. 19,17,39,195/- in respect of reimbursement of warranty service charges received from the AE on cost to cost basis. According to the TPO, the assessee is providing a service to the AE by servicing the warranty claims and, therefore, the assessee ought to have earned a mark-up of 32.95% on cost incurred for provisions of such services.

70. The ld. counsel for the assessee drew our attention to the decision of this Tribunal in assessee's own case for Assessment Year 2009-10 in ITA No. 953/DEL/2014 wherein the Tribunal has decided this issue in favour of the assessee.

71. The ld. DR vehemently contended that providing service warrantee to the customers is a contractual obligation of the assessee and its primary responsibility. It is the say of the ld. DR that since the assessee is providing service, the assessee should also charge mark-up on the same.

72. The ld. DR further stated that there is no reciprocity in the arrangement and the mark up should have been charged for providing warranty support services. Once again, referring to the combined TNMM analysis, the ld. DR contended that the same does not benchmark this transaction and even otherwise, the margin of the assessee is less than that of the comparable companies. The ld. DR also contended that adjustment relating to products such as monitors compressors which are not covered under royalty agreement should be sustained.

73. After considering the rival contentions, we are of the considered view that the assessee, as an independent distributor, has sold the products purchased from the AE in the domestic market and has earned profit margin of 5.78% from such sale. In our considered opinion, warrantee is an inherent obligation of the assessee while selling products to third party customers. To discharge such obligation, the assessee has engaged third party service providers and entire functions related

to rendering of such warranty services are performed by such third party service providers.

74. It is an undisputed fact that the products are imported from the AE, which is the manufacturer and, therefore, the ultimate warranty liability/cost is to be borne by manufacturing entity i.e. the AE. In such a scenario, the assessee is only acting as a pass through. The entire cost incurred in providing warranty services is reimbursed by the AE and now, such reimbursement, in our considered view, there is no basis for charging of mark-up by the assessee.

75. Further, we find that the facts are identical to the facts considered by this Tribunal in ITA No. 953/DEL/2014 for Assessment Year 2009-10. Therefore, considering the facts in totality, in light of the decision already taken on this issue by this Tribunal, we direct the Assessing Officer/TPO to delete the impugned adjustment. Ground No. is 8 allowed.

76. Ground No. 9 relates to the TP adjustment of Rs. 43,46,50,613/- in respect of international transaction of payment of design and development charges.

77. Facts on record show that the assessee has paid a sum of Rs. 43.46 crores on account of payment for design and development services rendered by the AE. The TPO was of the firm belief that design and development services are covered under the royalty agreement and, therefore, determined ALP of this international transaction at NIL.

78. Before us, it was strongly submitted that R&D department for each product of the assessee determines the need for carrying out changes in the design or specifications of the product and seeks assistance from the AE in case it does not have the technical know-how to carry out such modifications and on such service, the technical team of the AE undertakes the development of the product in consultation with the assessee and in light of the specifications provided by the assessee.

79. It is the say of the ld. counsel for the assessee that design and development fee specification relates to the customization of products specific to the assessee. The ld. counsel for the assessee vehemently stated that the AE performs R&D activities on a global basis to develop platform technologies for new products. However, modifications and customization of these products are needed for certain markets as per their local regulations and cultural needs.

80. The ld. counsel drew our attention to the license agreement dated 01.07.2001 entered into by the assessee with the AE and pointed out that it clearly provides for additional and separate consideration for new models designed and developed by the AE for the assessee as provided under clause 4.2 of the agreement.

81. The ld. counsel for the assessee further pointed out that out of the total design and development fee of Rs. 43,46 crores, a sum of Rs. 16,01 crores relates to products such as monitors and compressors which are not covered under royalty agreement.

82. Strong reliance was placed on the decision of the co-ordinate bench in the case of Denso India Ltd ITA No. 1857/DEL/2014 and Mitsubishi Electric Automotive India Pvt Ltd in ITA No.

312/DEL/2015.

83. The ld. counsel for the assessee further stated that for the purpose of applying the TNMM, operating profit was computed after taking into consideration payment towards design and development fee to the AE and since the operating margin of the assessee is in the range +/- 5% with that of the comparable companies, no adjustment is required.

84. We have given thoughtful consideration to the orders of the authorities below qua the rival contentions. At the very outset, we have to reiterate that the international transactions entered into by the assessee have been aggregated for the purpose of bench marking applying TNMM as the most appropriate method. The comparables selected by the assessee were earning average margin of 3.70% as against margin of the assessee at 4.70% for manufacturing segment. As mentioned elsewhere, and for the sake of repetition, we have to state that OPM of the assessee is within +/- 5% range of the comparable companies and, therefore, international transaction entered into by the assessee has to be considered being at arm's length.

85. For this proposition, we draw support from the TP Guidelines for multinational corporations and tax administrations by the Organization for Economic Co-operation and Development [OECD] which state the following on aggregation of transactions:

> "3.9 Ideally, in order to arrive at the most precise approximation of arm 's length conditions, the arm's length principle should be applied on a transaction-by-transaction basis. However, there are often situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis. Examples may include I. some long-term contracts for the supply of commodities or services, 2. rights to use intangible property, and 3. pricing a range of closely-linked products (e.g. in a product line) when it is impractical to determine pricing for each individual."

86. Similar guidance is given by the US and Australian TP Regulations on this issue and the same read as under:

> "The combined effect of two or more separate transactions (whether before, during, or after the taxable year under review) may be considered, if such transactions, taken as a whole, are so interrelated that consideration of multiple transactions is the most reliable means of determining the arm's length consideration for the controlled transactions. Generally, transactions will be aggregated only when they involve related products or services. The US regulations gives examples. One of the examples which is relevant to the issue is reproduced below:
>
> "Enters into a license agreement with SI. Its subsidiary, which permits SI to use a proprietary manufacturing process anil to sell the output from this process throughout a specified region. SI uses the manufacturing process and sells its output to S2, another subsidiary of P, which in turn resells (he output to uncontrolled parties

> in the specified region. In evaluating the arm's length character of the royalty paid by SI to P, it may be appropriate to consider the arm's length character of the transfer prices charged by SI to S2 and the aggregate profits earned by SI and S2 from the use of the manufacturing process and the sale to uncontrolled parties of the products produced by SI"

87. Rule 10A(d) of the Rules provides that closely linked transactions can be considered together. In light of the above discussion, we are of the considered view that it is possible to conduct combined evaluation of interlinked transactions and it is equally possible for the AE involved in the controlled transaction to undertake/provide benefit in one controlled transaction to compensate for the benefit received in the other controlled transaction. Accordingly, benefit received should be set off against the benefit provided.

88. Clubbing of closely linked transactions has also been upheld by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications [supra] wherein the Hon'ble Jurisdictional High Court held that clubbing of closely linked, including continuous transactions, is permissible in appropriate cases. In the same breath, the Hon'ble High Court held that once the Revenue accepts the TNMM as the most appropriate method, then it would be inappropriate for the Revenue to treat a particular expenditure as a separate international transaction. The relevant findings read as under:

> "82. There is considerable tax literature and text that CUP Method, i.e. Comparable Uncontrolled Price Method, RP Method, i.e. Resale Price Method and CP Method, i.e. Cost Plus Method can be applied to a transaction or closely linked, or continuous transactions. Profits Split Method and TNM Method grouped as □transactional profit methods', can be equally effective and reliable when applied to closely linked or continuous transactions. Thus, it would be inappropriate to proceed with the arm's length computation methods, with a pre-conceived suppositions on singularity as a statutory mandate. Clubbing of closely linked, which would include continuous transactions, may be permissible and not ostracized. Aggregation of closely linked transactions or segregation by the assessed should be tested by the Assessing Officer/TPO on the benchmark and the exemplar; whether such aggregation/ segregation by the assessed should be interfered in terms of the four clauses stipulated in Section 92C(3) of the Act, read with the Rules. It would, among other aspects, refer to the method adopted and whether reliability and authenticity of the arm's length determination is affected or corrupted. XXXXX
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> 91. 91. In case the tested party is engaged in single line of business, there is no bar or prohibition from applying the TNM Method on entity level basis. The focus of this method is on net profit amount in proportion to the appropriate base or the PLI. In fact, when transactions are inter-connected, combined consideration may be the most reliable means of determining the arm's length price. There are often situations where closely linked and connected transactions cannot be evaluated adequately on separate basis. Segmentation may be mandated when controlled bundled transactions cannot be adequately compared on an aggregate basis. Thus, taxpayer

> can aggregate the controlled transactions if the transactions meet the specified common portfolio or package parameters. For complex entities or where one of the entities is not □plain vanilla distributor', it should be applied when necessary and applicable comparables on functional analysis, with or without adjustments are available. Otherwise, the TNM Method should not be adopted or applied on account of being an inappropriate method.
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> XXXXX
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> 101. However, once the Assessing Officer/TPO accepts and adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would as noticed above, lead to unusual and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the inter- linked transaction. This would be also in consonance with Rule 10B(1)(e), which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the assumption that functions, assets and risk being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible.

89. The above decision of the Hon'ble High Court of Delhi was followed in the case of Maruti Suzuki India Ltd 381 ITR 117 wherein the Hon'ble High Court held that as long as the operating margins of the assessee are higher than those of the comparable companies, no transfer pricing adjustment is warranted. The relevant findings read as under:

> "86. In Sony Ericsson it was held that if an Indian entity has satisfied the TNMM i.e. the operating margins of the Indian enterprise are much higher than the operating margins of the comparable companies, no further separate adjustment for AMP expenditure was warranted. This is also in consonance with Rule 10B which mandates only arriving at the net profit by comparing the profit and loss account of the tested party with the comparable. As far as MSIL is concerned, its operating profit margin is 11.19% which is higher than that of the comparable companies whose profit margin is 4.04%. Therefore, applying the TNMM method it must be stated that there is no question of TP adjustment on account of AMP expenditure."

90. It would be pertinent to refer to the decision of the Hon'ble Delhi High Court in the case of Magneti Marelli Powertrain India Pvt Ltd ITA No..50/2014 for Assessment Year 2009-10 wherein the Hon'ble High Court held that having accepted TNMM as the most appropriate method in respect of all international transactions, it was not open to the TPO to subject only one element i.e. payment of technical assistance to an entirely different method. The Hon'ble High Court held as under:

> "17. As far as the second question is concerned, the TPO accepted TNMM applied by the assessee, as the most appropriate method in respect of all the international transactions including payment of royalty. The TPO, however, disputed application of TNMM as the most appropriate method for the payment of technical assistance fee of 38,58,80,000 only for which Comparable Uncontrolled Price ("CUP) method was sought to be applied. Here, this court concurs with the assessee that having accepted the TNMM as the most appropriate, it was not open to the TPO to subject only one element, i.e payment of technical assistance fee, to an entirely different (CUP) method. The adoption of a method as the most appropriate one assures the applicability of one standard or criteria to judge an international transaction by. Each method is a package in itself as it were, containing the necessary elements that are to be used as filters to judge the soundness of the international transaction in an ALP fixing exercise. If this were to be disturbed, the end result would be distorted and within one ALP determination for a year, two or even five methods can be adopted. This would spell chaos and be detrimental to the interests of both the assessee and the revenue. The second question is, therefore, answered in favour of the assessee; the TNMM had to be applied by the TPO/AO in respect of the technical fee payment too. "

91. Considering the facts of the case in totality in light of the afore- stated judicial decisions, we do not find any merit in the TP adjustment in respect of international transaction of payment of design and development charges. We, accordingly, direct the Assessing Officer/TPO to delete the same. Ground No. 9 is accordingly, allowed.

92. Ground No. 10 relates to the transfer pricing adjustments of Rs.1,93,41,427/- in respect of amount outstanding in the account of AE written off during the year under consideration.

94. Facts on record show that the assessee had paid advance to its AE for supply of monitors. However, the AE closed its operations and went into liquidation due to bankruptcy and, therefore, could not refund the advance received. The assessee had no choice but to write off the advance. The TPO disallowed the write off holding that no documents have been furnished by the assessee to demonstrate that the assessee has filed case for recovery of advance.

95. Before us, the ld. counsel for the assessee vehemently stated that the amount written off does not fall within the purview of Chapter X of the Act as the same does not arise from an international transaction and, therefore, does not require determination of ALP.

96. On the other hand, the ld. DR drew our attention to the findings of the TPO at Para 15 of his order and pointed out that bankruptcy occurred during FY 2010-11, which is subsequent to the year under consideration.

97. The ld. DR further stated that the entire transaction is doubtful and there was no need for giving the impugned advance and the impugned advance was given by the assessee only to support financially its AE and, being transaction between a related party, the same has to be determined at

ALP as done by the TPO and there is no error or infirmity in such determination.

98. We have given thoughtful consideration to the orders of the authorities below. Firstly, it is incorrect to say that no objection was raised in respect of write off of advance paid to AE treating the same as an international transaction. We find that a specific ground was raised. We further find that the advance was paid to the AE for supply of monitors, when the AE was a going concern carrying on business. When the company closed its operations in the year under consideration and went into bankruptcy proceedings, the advance so given was written off and claimed as deduction as trading loss.

99. Dehors whether the impugned transaction can be termed as an international transaction, the write off has to be allowed as a trading loss and also as a bad debt, as the same was given in the ordinary course of the business for purchase of monitors. We, therefore, do not find any reason in denying the write off. Further, bankruptcy certificate which is placed at pages 3414 to 3422 of the paper book Volume IX clearly shows the fact that the liabilities in the books of AE were far more than the book value of assets and the AE was not even able to pay the debt due to third-party creditors.

100. Even assuming that the impugned transaction falls within the ambit of international transaction between two AEs, then also, the TPO is obliged under the law to determine ALP by following any one of the prescribed methods of determining the ALP as detailed in section 92C(1) of the Act. This has also been clarified by the Central Board of Direct Taxes in Instruction No. 3 of 2003 dated 20.05.2003.

101. Facts on record show that the TPO has not applied any one of the prescribed methods in Section 92C(1) of the Act to determine ALP before disallowing the write off. In view of the above, we direct the AO/TPO to delete the impugned disallowance. Ground No 10 is, accordingly, allowed.

102. Ground No. 11 relates to the disallowance of salary of Rs. 36,33,50,841/- paid to expatriates u/s 37(1) of the Act holding that the expatriate employees work under direct control of LG Korea.

103. Briefly stated, that the facts of the impugned issue are that the assessee is engaged in the business of manufacturing consumers electronics and home appliances. During the year under consideration, in order to manufacture such technologically advanced goods, the assessee has employed 3,970 people including 42 expatriates, who were also on the payroll of LG Korea.

104. During the course of scrutiny assessment proceedings and on examination of the claim, the AO disallowed the salary amounting to Rs. 36,33,50,841/- paid to the said 42 expatriates by holding that the said expatriates were of the holding company/AE LG Korea and were serving the business interest of the holding company and, therefore, salaries paid to such expatriates by the assessee was not incurred wholly and exclusively for the business interests of the assessee.

105. Before us, the ld. counsel for the assessee stated that there is no dispute that the expatriates were employees of LG Korea earlier and therefore, continued to have lien on their employment with

LG Korea. But during the year under consideration were in total employment with, and were working under the direct control and supervision of the assessee. It is the say of the ld. AR that the assessee was legal and economic owner of such expatriates during the year under consideration.

106. The ld. counsel drew our attention to the employment letters and Form No. 16 issued by the assessee. The ld. counsel further stated that while employing these expatriates, the assessee has followed a strict, well defined recruitment process, headed by the HRD of the assessee and expatriates hired by the assessee had to go through recruitment process of the assessee and were selected on the basis of their skills and merits.

107. The ld. counsel further stated that the assessee shares the job description of the persons to be hired with its AE LG Korea which recommends the names of the people having requisite skills for the relevant job description. It was stated that the expatriates were employed by the assessee for the purpose of its business and were not deputed by the holding company to serve its business. It was also strongly contended that during the period of employment of expatriates, the remuneration for services was directly paid by the assessee and LG Korea was not responsible to pay any remuneration or perquisite for performing their responsibilities. Salary was paid by the assessee after deducting tax at source in accordance with the provisions of the Act and the same has been accepted by the revenue.

108. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of Carborandum 108 ITR 335.

109. Per contra, the ld. DR strongly supporting the findings of the Assessing Officer, pointed out that it is LG Korea who nominates its employees for the purpose of deputation to the assessee. The ld. DR pointed out that only employees from LG Korea have been seconded to the assessee. It was further stated by the ld. DR that expatriates continued to have lien over their employment while on deputation in India, which clearly establishes a continuous action between the assessee and LG Korea. It was further contended that the expatriates come to India and work under the control of LG Korea reported to them and do not resign from their employment in Korea.

110. The ld. DR further contended that the AO/DRP has only contributed 25% cost of the salary of expats to the alleged PE of LG Korea in India.

111. We have considered the orders of the authorities below and have given thoughtful consideration to the rival submissions. We have also perused the employment agreement between the assessee and the expat employees. On perusal of the agreement it clearly shows that the expatriates were wholly and exclusively working for the business interest/benefit of the assessee and were not entitled to render service of any nature whatsoever to any other person. It is also true that the assessee follows a well-defined recruitment process which is headed by HRD of the assessee.

112. Process of recruitment, as exhibited at page 405 of the paper book Volume II, shows that a requisition for recruitment is raised to the HRD and on such a receipt of such a requisition, the HRD evaluates job requirement and requisite skills and competencies to fill vacant posts. Thereafter,

requisition is made to LG Korea. Based on job profile, LG Korea nominate its employees and thereafter HRD of the assessee shortlists the employees from pool of names suggested by LG Korea and conducts independent interviews and finally the assessee takes final decision of recruitment.

113. Considering the entire factual matrix, the only logical conclusion that can be drawn is that, such expatriates were employees of the assessee during the year under consideration and worked under the direct control and supervision of the assessee for the purpose of business of the assessee, and for such services they were paid remuneration directly by the assessee, on which tax was deducted at source as per the relevant provisions of the Act, which part has not been disputed by the revenue.

114. The decision of the Hon'ble Supreme Court in the case of Carborandum [supra] squarely apply on the facts of the case, in as much, as the assessee company had taken such expatriates on its payroll on the basis of various agreements of employment, and such expatriate employees worked under the direct control of the assessee company for day to day working. Considering the facts of the case in totality, it can be safely concluded that the expatriates were wholly and exclusively working for the business interest of the assessee and payment of salary to such expatriates is allowable u/s 37 of the Act. We, accordingly, direct the Assessing Officer to delete the impugned addition. Ground No. 11 is allowed.

115. Ground No. 12 relates to the treatment of sales tax subsidy of Rs. 84,07,00,774/- as taxable revenue receipt.

116. During the year under consideration, the assessee has received subsidies as under:

- Subsidy from Maharashtra Government - Rs. 58,64,82,702/-

- Subsidy from Uttar Pradesh Government - Rs. 25,42,18,072/-

117. The subsidy from Maharashtra Government was in respect of manufacturing unit in Ranjangaon, Pune. In order to encourage the dispersal of industries to the less developed areas of the State, the Maharashtra Government has announced for Industrial Policy of Maharashtra State Government 2001. Objective of the said policy is to accelerate the flow of investment and creating large scale employment opportunities.

118. An identical issue was considered by this Tribunal in assessee's own case in Assessment Year 2008-09 ITA No. 6253/DEL/2012 and in Assessment Year 20009-10 in ITA No. 953/DEL/2014. All the issues raised by the ld. counsel and the reliance on the decisions have been duly considered by this Tribunal in earlier Assessment Years. Therefore, we do not find any reason to divulge from the decision taken in the earlier years.

119. The findings given by this Tribunal in Assessment Year 2009-10 in

41. An identical issue was considered and decided by the Tribunal in assessee's own case in ITA No. 6253/DEL/2012 for assessment year 2008-09 vide Ground No. 8 of that appeal. The relevant

findings of the co-ordinate bench read as under:

> "78. We have given thoughtful consideration to the orders of the authorities below. We have also considered the orders of the coordinate bench in assessee's own case and the various judicial decisions relied upon by the ld. AR. In A.Y 2002-03, the coordinate bench in ITA No. 1404/DEL/2007 has held as under:
>
> "9. We have heard both the parties and gone through the material available on record. In this case the assessee had collected sales tax as a part of dealers' price. At the year end the sales tax portion, which formed the part of dealers' price had been bifurcated and has been claimed as capital subsidy. We have also gone through the Notification No. 1179 dated 31.03.1995 issued by the State Government of Uttar Pradesh. The State Govt. has provided sales tax exemption with an objective to promote the development of certain industries which have been set up or undertaken modernisation, diversification, backward integration by way of fixed capital investment of Rs.50 crores or more. The exemption of from sales tax or benefit of reduced rate of tax is available to those units which have started production or have carried out expansion or modernisation or backward integration etc. between 1.12.1994 and 31.03.2000. Para 2 of the notification specifies that the exemption or reduction in the rate of sales tax including the additional tax would not be more than 5 per cent of sale of goods. In case where tax rate was more than 5 per cent including additional tax, the balance was to be paid by the unit.
>
> Para7 (2) of the notification provides for the exemption of sales tax to the extent of exemption or reduction in tax. Item (2) of the Schedule includes Greater Noida Industrial Development Area wherein exemption from sales tax to the extent of 200 per cent of capital investment has been provided. None of the clauses of the Notification authorises the assessee to collect the sales tax and retain the same with it. The exemption of sales tax was available from the date of first sale or the date within the period of six months from the date of production, whichever is earlier.
>
> The said notification also provided that the eligibility certificate to the assessee will be issued by the joint/additional director of concerned Development Authority and the same will be produced before the concerned assessing officer. The Addl. Director Industries, Greater Noida Industrial Development Authority, vide letter No. 1344 dated 23/06/1999 issued eligibility certificate to the assessee. As per this certificate fixed capital investment is of Rs.51,57,95,446/- . The date of commencement of production is 9/03/1998 and the first sale was affected on 27th March, 1998. The assessee applied for exemption from trade tax [sales tax] vide application dated 10/09/1998. The exemption from trade tax [sales tax] was provided from 27th March, 1998 to 26th March, 2013 for a period of 15 years or till the time the exemption of sales tax was availed of to the extent of 200 per cent of fixed capital investment i.e. Rs.1,02,75,90,892/- whichever was earlier. This certificate also provided the items i.e. Colour TV, Washing machine and Air-conditioners on which

exemption from sales tax was provided. Another certificate was issued on 27th September, 2000 vide letter No. 1519 in respect of printed circuit voice for CTV number 8,12,000 and Micro-wave Oven 1,00,000. In this certificate, the sales tax exemption in first three years has been provided to the extent of 100 per cent, next three years 75 per cent, next two years 50 per cent and next two years 25 per cent. In all exemption from sales tax was provided for 10 years.

10. Neither the certificates issued by Greater Noida Industrial Development Authority nor the Notification issued by the State Govt. authorises the assessee to collect sales tax from its customers. The assessee has been exempted from collecting the sales tax from customers on the sales made with effect from 27th March, 1998. In fact, the ld. counsel for the assessee made a statement at the bar, during the course of hearing, that neither the Notification has authorized the assessee to collect sales tax nor the assessee had collected the sales tax as such. The assessee had included the element of sales tax in the dealers' price as a sale price of the product. In the States other than Uttar Pradesh, the sales tax so collected as a part of dealers' price has been paid to respective State Governments, whereas in the case of the assessee, since the assessee was not liable to pay sales tax, as exemption has been provided to the extent of 200 per cent of fixed capital investment, the sales tax element which is embedded in the sale price have been retained by the assessee as excess sales consideration. At the year-

end the assessee has allocated the sales tax element from dealer's price and has claimed the same as capital subsidy. Therefore, the collection of dealers' price has been made in the ordinary course of trading activities. When the assessee is not permitted to collect the sales tax under the notification issued by the State Govt. the collection of sales tax as a part of dealers' price is nothing but constitutes a trading receipt....."

79. In A.Y 2003-04, the coordinate bench in ITA No. 3729/DEL/2009 has held as under:

"In view of the above, Ld. Departmental Representative claimed that the issue is squarely covered in favour of the Revenue. However, ld. Counsel of the assessee submitted that the Tribunal has not considered the matter properly. He submitted that the appeal against the tribunal order is pending in the Hon'ble High Court of All. However, upon careful consideration, we find that there is no proper justification to deviate from the decision of the ITAT in assessee's own case. The appeal against the Tribunal order is still pending in Hon'ble High Court. Under the circumstances, the judicial propriety mandates that we adhere to the decision of the Tribunal in assessee's own case. Accordingly, respectfully following the precedent as above, we uphold the order of the Ld. Commissioner of Income Tax(A)."

80. We find that the assessee's appeal against the order of the Tribunal for A.Y 2002-03 is pending before the Hon'ble High Court. Judicial propriety mandates that we adhere to the decision of the

coordinate bench in assessee's own case. Respectfully following the precedents [supra] we decline to interfere with the findings of the CIT(A). Ground No. 8 is accordingly dismissed.

42. Respectfully following the precedent, we decline to interfere with the findings of the DRP. Ground No. 9 is accordingly dismissed."

120. Respectfully following the decision of the co-ordinate bench, Ground No. 12 is dismissed.

121. Ground No. 13 relates to the disallowance of Rs. 124,29,24,672/- paid to LK Electronics Inc. Korea holding the same to be in the nature of capital expenditure.

122. During the year under consideration, the assessee has paid royalty amounting to Rs. 177,56,06,674/- to LG Korea for the right to use technology and know how for manufacture and sale of goods. Basis the findings given in earlier Assessment Years, the Assessing Officer disallowed royalty amounting to Rs. 124,29,24,672/- being net of transfer pricing adjustment of Rs. 53,26,82,002/-.

123. An identical issue was considered by this Tribunal in assessee's own case in Assessment Year 2008-09 ITA No. 6253/DEL/2012 and in Assessment Year 20009-10 in ITA No. 953/DEL/2014. The relevant findings read as under:

> "43. Ground No. 10 relates to disallowance of Rs. 97,71,71,875/- out of aggregate royalty amounting to Rs. 1,39,59,59,821/- paid to LG Electronics, Korea holding the same to be in the nature of capital expenditure.
>
> 44. A similar issue was decided in favour of the assessee by the Tribunal in assessee's own case in ITA No. 6253/DEL/2012 for assessment year 2008-09 vide Ground No. 10 of that appeal. The relevant findings of the co-ordinate bench read as under:
>
> "88. We find that the Tribunal in assessee's own case for A.Y. 2007-08 has decided this issue in favour of the assessee and against the Revenue. Respectfully following the findings of the coordinate bench, we direct the Assessing Officer to treat royalty payment of Rs. 85.75 crores as revenue expenditure. Ground No. 10 is allowed."

45. Respectfully following the precedent, we direct the Assessing Officer/TPO to delete the impugned disallowance. Ground No. 10 is allowed.

124. Respectfully following the decision of the co-ordinate bench, we direct the Assessing Officer to delete the impugned disallowance. Ground No. 13 is, accordingly, allowed.

125. Ground No. 14 relates to the disallowance of export commission of Rs. 3,58,37,127/- paid to LG Electronics Inc. Korea holding the same to be diversion of income.

126. Facts on record show 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 assists the assessee to increase the export of CTVs through its huge marketing network across the globe for which the assessee pays commission @ 4.50% of the export of CTVs made to various entities in the Middle East and South Asian countries. Such payment was disallowed by the Assessing Officer holding the same to be diversion of income.

127. Before us, the ld. counsel for the assessee has furnished some additions evidences u/r 29 of the ITAT Rules, 1962 with a prayer to admit the same in line with the earlier Assessment Years.

128. A perusal of the Tribunal order in assessee's own case in Assessment Year 2008-09 ITA No. 6253/DEL/2012 and in Assessment Year 20009-10 in ITA No. 953/DEL/2014 show that similar disallowance was made for which additional evidences were admitted and the matter was remanded by the Tribunal to the Assessing Officer for fresh adjudication. Relevant findings in ITA No. 6253/DEL/20112 for Assessment Year 2008-09 read as under:

> "89. Ground Nos. 11 & 11.1 pertain to disallowance of payment of export commission of Rs. 8,78,45,287/- holding the same to be diversion of profits to LG Electronics Korea 'LGEK'.
>
> 90. An identical issue was considered by the coordinate bench in A.Y 2007-08 and has decided the same against the assessee. The ld. AR contends that certain documents were not furnished by the assessee and if the same are considered as additional evidence, the issue may be set aside for fresh adjudication.
>
> 91. It is not in dispute that in A.Y 2007-08 this issue was decided against the assessee by the Tribunal. The assessee has filed application u/r 29 of the ITAT Rules for admission of additional evidence in support of payment of export commission to its AE. In our considered opinion, such additional evidences need to be verified before deciding this issue. We, accordingly, restore this matter to the file of the Assessing Officer. The assessee is directed to furnish relevant documentary evidences and the Assessing Officer is directed to consider the same and decide the same afresh after giving reasonable opportunity of being heard to the assessee. Ground No. 11 is treated as allowed for statistical purposes."

129. Similar finding was given in Assessment Year 2009-10 in ITA No. 953/DEL/2014 and the same read as under:

> "18. In addition to this, in Ground No. 11, the assessee has objected to the disallowance of export commission of Rs. 10,43,12,616/- which includes TP adjustment of Rs. 3,52,34,484/-.
>
> 19. The assessee has filed an application u/r 29 of the ITAT Rules for admission of additional evidence in support of payment of export commission to AEs. Similar

> application was filed in assessment year 2008-09 and the Tribunal, after considering the same, has remanded the matter to the file of the Assessing Officer to decide the issue after considering the additional evidence placed on record by the assessee. Relevant findings of the co-ordinate bench read as under:
>
> "91. It is not in dispute that in A.Y 2007-08 this issue was decided against the assessee by the Tribunal. The assessee has filed application u/r 29 of the ITAT Rules for admission of additional evidence in support of payment of export commission to its AE. In our considered opinion, such additional evidences need to be verified before deciding this issue. We, accordingly, restore this matter to the file of the Assessing Officer. The assessee is directed to furnish relevant documentary evidences and the Assessing Officer is directed to consider the same and decide the same afresh after giving reasonable opportunity of being heard to the assessee. Ground No. 11 is treated as allowed for statistical purposes."

20. Respectfully following the findings of the co-ordinate bench, we restore this matter to the file of the Assessing Officer. The Assessing Officer is directed to consider the additional evidences and decide the same afresh after giving reasonable opportunity of being heard to the assessee. Ground Nos. 7 and 11 are allowed for statistical purposes."

130. Respectfully following the findings of the co-ordinate bench, we direct accordingly. Ground No. 14 is allowed for statistical purposes.

131. Ground No. 15 relates to the restriction of the deduction claimed u/s 80JJAA of the Act at Rs. 20,01,771/-

132. Facts on record show that the assessee claimed deduction u/s 80JJAA amounting to Rs. 40,79,577/- in respect of Noida Unit and Rs. 96,65,389/- in respect of Pune unit. The Assessing Officer, following the findings given in earlier Assessment Years, allowed the claim of deduction to the extent of Rs. 20,01,771/- and disallowed Rs. 1,17,43,195/-.

133. We find that an identical quarrel arose in Assessment Year 2008- 09 and 2009-10 and this Tribunal in ITA No. 6253/DEL/2012 and in Assessment Year 20009-10 followed in ITA No. 953/DEL/2014 has decided this issue as under:

> "92. Ground Nos. 12 & 12.1 relate to disallowance of deduction under section 80JJAA of the Act to the extent of Rs. 29,06,091/-
>
> 93. Facts on record show that the assessee claimed deduction u/s 80JJAA of the Act amounting to Rs. 44,50,635/-. The said amount pertained to deduction in respect of additional wages paid in financial years 2005-06, 2006-07 and 2007-08. The Assessing Officer has allowed the deduction in respect of claim pertaining to the A.Y under consideration amounting to Rs. 15.44 lakhs and disallowed the claim of deduction pertaining to A.Y 2006-07 and 2007-08 amounting to Rs. 29.06 lakhs.

94. Before us, the ld. AR contended that due to the amendment in section 80JJAA of the Act, the assessee is very much entitled for the claim of deduction. It is the say of the ld. AR that the only dispute is whether workmen who joined the assessee company in the earlier years and worked for less than 300 days in that year and therefore, were not regarded as "regular workmen" in that year. It is the say of the ld. AR that if the amendment is considered in its true perspective, such workmen will be considered as "regular workmen" in the subsequent years in which their period of employment becomes equal to or more than 300 days.

95. Per contra, the ld. DR stated that the amendment brought in section 80JJAA is w.e.f. 1.4.2019 and, therefore, the same is not applicable for the year under consideration.

96. We have carefully considered the orders of the authorities below qua the issue. There is no dispute that he assessee satisfies all the conditions for claiming deduction u/s 80JJAA of the Act. For our convenience, section 80JJAA reads as under:

"80JJAA. (1) Where the gross total income of an assessee, being an Indian company, includes any profits and gains derived from any industrial undertaking engaged in the manufacture or production of article or thing, there shall, subject to the conditions specified in sub-section (2), be allowed a deduction of an amount equal to thirty per cent of additional wages paid to the new regular workmen employed by the assessee in the previous year for three assessment years including the assessment year relevant to the previous year in which such employment is provided.

(2) No deduction under sub-section (1) shall be allowed--

(a) if the business is formed by splitting up or the reconstruction of an existing business.

"Provided further that where an employee is employed during the previous year for a period of less than two hundred and forty days or one hundred and fifty days, as the case may be, but is employed for a period of two hundred and forty days or one hundred and fifty days, as the case may be, in the immediately succeeding year, he shall be deemed to have been employed in the succeeding year and the provisions of this section shall apply accordingly;".

97. The claim of the assessee is that the workmen who joined in the preceding year in which such workmen worked for less than 300 days should be considered provided that the period of employment of such workmen is equal to or more than 300 days in the relevant previous year. What the assessee contends is that new workmen, who did not fall in the category of "regular workmen", on account of employment being for less than 300 days in the year of appointment, should be considered as "regular workmen" in the subsequent year, provided such workmen continue to be employed with the company and the total period of their employment is equal to or more than 300

days in the subsequent year. Thought this contention of the assessee has been take care of by the second proviso, but the same has been given effect from 1.4.2019.

98. If the effect of the second proviso is given retrospectively, then the assessee's claim of deduction is allowable. Memorandum explaining provisions of Finance Bill 2018 states that the amendment is intended to rationalize the deduction of 30% of additional wages "by allowing the benefit for a new employee who is employed for less than the minimum period during the first year but continues to remain employed for the minimum period in subsequent year.

99. In our considered opinion, this amendment i.e. second proviso is clarifactory in nature and is intended to remove the anomaly so as to advance legislative intention of providing incentive to new worker for more than 300 days and must be given retrospective effect. For this proposition, we draw support from the judgment of the Hon'ble Supreme Court in the case of Allied Motors Pvt. Ltd Vs. CIT 224 ITR 677 [SC]. The relevant finding of the Hon'ble Supreme Court reads as under:

> "In the case of Goodyear India Ltd. v. State of Haryana and Anr. (188 ITR 402) this court said that he rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act.
>
> Therefore, in the well known words of Judge learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of R.B. Jodha Mal Kuthiala v. Commissioner of Income-tax, Punjab, Jammu & Kashmir and Himachal Pradesh (82 ITR 570), this Court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to made the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.
>
> This view has been accepted by a number of High Court. In the case of Commissioner of Income-Tax v. Chandulal Venichand ([1994] 209 ITR 7), the Gujarat High Court has held that he first proviso to section 43B is retrospective and sales-tax for the last quarter paid before the filing of the return for the assessment year is deductable. This decision deals with assessment year 1984-85. The Calcutta High Court in the case of Commissioner of Income-tax v. Sri Jagannath Steel Corporation ([1991] 191 ITR
>
> 676), has taken a similar view holding that the statutory liability for sales-tax actually discharge after the expiry of accounting year in compliance with the relevant stature is entitled to deduction underSection 43B. The High Court has held the amendment to be clarificatory and, therefore, retrospective. The Gujarat High Court in the above case held the amendment to be curative and explanatory and hence retrospective.

> The Patna High Court has also held the amendment inserting the first proviso to be explanatory in the case of Jamshedpur Motor Accessories Stores v. union of India and Ors. ([1991] 189 ITR 70.), It was held that amendment inserting first proviso to be retrospective. The special leave petition from this decision of the Patna High Court was dismissed. The view of the Delhi High Court, therefore, that the first proviso to section 43B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his Principles of statutory Interpretation, 4th Edn. Page 291, "It is well settled that if a statute curative or merely declaratory of the previous law retrospective operation is generally intended." In fact the amendment would not serve its object in such a situation unless it is construed as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained."

100. Similar view was taken by the Hon'ble Supreme Court in the case of CIT Vs. Alom Extrusions Ltd 319 ITR 306 wherein the Hon'ble Supreme Court held that where a proviso in section is inserted to remedy unintended consequences to make section workable the proviso which supplies obvious omission therein in required to be read retrospectively in operation particularly to give effect to section as a whole.

101. Same view was followed by the Hon'ble Supreme Court in the case of CIT Vs. Kolkata Export Company 404 ITR 654.

102. Respectfully following the ratio laid down by the Hon'ble Supreme Court [supra] we direct the Assessing Officer to allow claim of deduction u/s 80JJAA of the Act as claimed by the assessee."

134. Respectfully following the findings of the co-ordinate bench, we direct the Assessing Officer to allow claim of deduction. Ground No. 15 is accordingly, allowed.

135. Ground No. 16 relates to levy of interest u/s 234B, C and D of the Act.

136. The same being consequential, the Assessing Officer is directed to charge interest as per the provisions of law.

137. In the result, the appeal of the assessee in ITA No. 755/DEL/2015 is allowed in part for statistical purposes.

The order is pronounced in the open court on 16.08.2022.

Sd/-	Sd/-
[YOGESH KUMAR]	[N.K. BILLAIYA]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 16th August, 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation
Date on which the typed draft is placed before the dictating Member
Date on which the typed draft is placed before the Other Member
Date on which the approved draft comes to the Sr.PS/PS
Date on which the fair order is placed before the Dictating Member for pronouncement
Date on which the fair order comes back to the Sr.PS/PS
Date on which the final order is uploaded on the website of ITAT
Date on which the file goes to the Bench Clerk
Date on which the file goes to the Head Clerk
The date on which the file goes to the Assistant Registrar for signature on the order Date of dispatch of the Order