

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER  
AND  
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**I.T.A .No. 1405/DEL/2015 (A.Y 2010-11)**

Canon India Pvt. Ltd. 7 <sup>th</sup> & 8 <sup>th</sup> Floor,, Tower-B, Building No. 5, DLF Cyber Terraces DLF Phase-III Gurgaon AAACC4175D  <b>(APPELLANT)</b>	Vs	DCIT Circle-5(2) New Delhi   <b>(RESPONDENT)</b>
--	----	---

**I.T.A .No. 2275/DEL/2015 (A.Y 2010-11)**

DCIT Circle-5(2) New Delhi   <b>(APPELLANT)</b>	Vs	Canon India Pvt. Ltd. 7 <sup>th</sup> & 8 <sup>th</sup> Floor,, Tower-B, Building No. 5, DLF Cyber Terraces DLF Phase-III Gurgaon AAACC4175D  <b>(RESPONDENT)</b>
--	----	--

**I.T.A .No. 832/DEL/2016 (A.Y 2011-12)**

Canon India Pvt. Ltd. 7 <sup>th</sup> & 8 <sup>th</sup> Floor, Tower-B, Building No. 5, DLF Cyber Terraces DLF Phase-III Gurgaon AAACC4175D <b>(APPELLANT)</b>	Vs	DCIT Circle-5(2) New Delhi   <b>(RESPONDENT)</b>
--	----	---

**I.T.A .No. 1052/DEL/2016 (A.Y 2011-12)**

DCIT Circle-5(2), Room No. G-22C, C. R. Building, I. P. Estate New Delhi <b>(APPELLANT)</b>	Vs	Canon India Pvt. Ltd. 2 <sup>nd</sup> Floor, Tower A & B, Cyber Greens DLF Phase-III Gurgaon AAACC4175D <b>(RESPONDENT)</b>
---	----	---

<b>Appellant by</b>	<b>Sh. Vishal Kalra, Adv, Sh. S. K. Aggarwal, Adv &amp; Sh Ankit Sahni, Adv</b>
<b>Respondent by</b>	<b>Sh. Sanjay. I. Bara CIT DR</b>

<b>Date of Hearing</b>	<b>23.05.2018</b>
<b>Date of Pronouncement</b>	<b>21.08.2018</b>

**ORDER****PER SUCHITRA KAMBLE, JM**

These four appeals are filed against the separate Assessment Orders dated 16/02/2015 and 01.01.2016 passed by DCIT, Circle 5(2), New Delhi u/s 143(3) r/w Section 144C of Income tax Act, 1961 by the assessee and the Revenue.

2. The grounds of appeal are as under:-

**I.T.A .No. 1405/DEL/2015**

*“Based on the facts and circumstances of the case, Canon India Private Limited (hereinafter referred to as “the Appellant”), respectfully submits in respect of the order passed by the learned Deputy Commissioner of Income Tax, Circle 5(2), New Delhi under section 143(3) / 144C of the Income Tax Act, 1961 (hereinafter referred to as the ‘Act’) on the following grounds:*

**A. Transfer Pricing Grounds**

1. *That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant under section 143(3) r.w.s*

144C(13) of the Act for the relevant assessment year at Rs 147,41,69,894 as against the returned income of Rs 47,55,95,410.

2. That on facts and circumstances of the case and in law the Learned AO/DRP /TPO erred in making an adjustment of Rs 77,26,36,692 in respect of alleged international transaction pertaining to excess advertisement, marketing and promotion ('AMP') expenditure, alleging that the same to be not at arm's length in terms of the provisions of Sections 92C(1) and 92C(2) of the Act read with Rule 10D of the Income-tax Rules,1962 ("the Rules").

3. That on the facts and circumstances of the case and in law, the DRP/AO have erred in not appreciating that suo moto adjustments proposed by the TPO in relation to Advertisement, Marketing and Promotion ("AMP") expenses incurred by the Appellant, without any reference from the AO, was beyond jurisdiction and bad in law.

4. That on the facts and in the circumstances of the case and in law, the Learned AO /DRP /TPO erred in alleging that AMP expenses paid to unrelated third parties in India are excessive, not for the purposes of its business and is an "international transaction" within the meaning of section 92B of the Act.

5. That on the facts and in the circumstances of the case and in law, the Learned AO/DRP/TPO erred in holding that the Appellant by incurring excessive AMP expenditure has resulted in creation of marketing intangible in favor of AE, for which it should be compensated along with a mark-up by the AE.

6. That on the facts and in the circumstances of the case and in law, the Learned AO /DRP /TPO have erred in holding that incurrence of excessive AMP expenditure would constitute a separate activity of rendition of brand building services and needs to be benchmarked separately along with mark-up.

7. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in using the "Bright Line" test, which is not a prescribed method under the TP regulations in place in India, as a method for benchmarking the AMP expenditure incurred by the Appellant without correctly applying any of the methods in the manner prescribed under Rule 10B of the Rules.

**Without prejudice to the above grounds that the AMP expenditure incurred is not amenable to Chapter-X, the Appellant craves to raise**

***following grounds of appeal on merits.***

8. *That on the facts and in the circumstances of the case and in law, the Learned AO / DRP / TPO erred by including trade discounts, volume rebates, commission, subsidy and other sales related expenses as part of AMP expenditure and further erred in not following the decision of the Tribunal in Appellant's own case for assessment years 2006-07 to 2008-09, wherein such expenses have been held to be excluded before benchmarking the alleged excessive AMP expenditure.*

9. *That on the facts and circumstances of the case and in law, the AO/ TPO have erred in arbitrarily rejecting and selecting comparable companies for benchmarking the AMP expenditure and, further, erred in not considering the functionally comparable companies for such alleged brand building services.*

10. *That on the facts and circumstances of the case and in law, the DRP/ AO/ TPO have erred in not granting the benefit of quantitative adjustments (such as non-payment of royalty / expenditure incurred on new product launches), while computing the alleged excessive AMP expenditure.*

11. *That the AO / DRP/ TPO erred on the facts and circumstances of the case and in law in not appreciating that mark-up could not be levied on the AMP expenditures incurred by the Appellant.*

11.1. *Without prejudice to the above and not admitting, if at all a mark-up should have been charged by the Appellant, assuming it to be a brand building service provider, the said mark-up could have been charged only on the value addition expenses incurred by the Appellant for such alleged brand promotion service and not the entire amount incurred / paid to third party vendors.*

12. *That on facts and circumstances of the case and in law, the Learned AO/DRP/TPO have erred in not providing the Appellant the benefit of 5 percent range as provided by the proviso of section 92C(2) of the Act.*

13. *That on the facts and in the circumstances of the case and in law, the Learned AO / DRP / TPO erred by applying Comparable Uncontrolled Price Method in a manner that is not prescribed or justified under the law.*

14. *That on the facts and in the circumstances of the case and in law, the Learned AO / DRP / TPO has erred by not carrying out the determination of arm's length price as required under section 92C of the Act read with rule 10D of Income Tax Rules, 1962.*

15. That on the facts and circumstances of the case and in law the AO /DRP/ TPO erred in not appreciating that all the transactions of the Appellant were established to be at arm's length by applying the Resale Price Method, and thereafter the AMP expenses, separately, cannot be alleged to be excessive.

16. That on the facts and in the circumstances of the case and in law, the Learned AO / DRP / TPO has erred by ignoring the provisions of Rule 10B(3) of the Rules and judicial pronouncements, which advocate usage of multiple year data of comparable companies for the purpose of determination of the arm's length price;

## **B. Corporate Tax Grounds**

### **B.1 Addition of subsidy received from CanonSingapore Pte. Ltd. but not utilized within the previous year - Rs. 3,23,31,873/-**

1. On the facts and in the circumstances of the case, the learned AO and the Hon'ble DRP have erred in making the addition of Rs. 3,23,31,873/- to the total income of the appellant.

1.1 On the facts and in the circumstances of the case, the learned AO has erred in proposing and the Hon'ble DRP has further erred in confirming that the amount of subsidy received in advance for meeting specific advertisement and sales promotion expenditure, but not utilized within the previous year, is taxable as revenue receipt.

1.2 On the facts and in the circumstances of the case, the learned AO and the Hon'ble DRP have erred in not appreciating that the unutilized/ unspent amount of subsidy is treated as current liability and not income in the books of account and the unspent amount is liable to be refunded if not utilized for the specified purpose.

2. Without prejudice to above, on the facts and in the circumstances of the case, The deduction for the unspent subsidy amount added to the income in Assessment Year 2010-11 should be allowed in the Assessment Year 2011-12 where such sum has been utilized for the specified purpose and included in income for Assessment Year 2011-12.

**B.2 Without prejudices to the above, the Learned A.O has erred, in law and on facts, in not granting the claim of prepaid taxed and foreign tax credit claimed by the appellant.**

1. On the facts and in the circumstances of the case, after having computed a taxable income in cases of Appellant, the Ld. A.O has erred in not allowing the entire credit of prepaid taxes (TDS, advance tax and self assessment taxes) amounting to Rs.16,94,07,775/-.

2. On the facts and in the circumstances of the case, after having computed a taxable income in cases of Appellant, the Ld. A.O has erred in not allowing appropriate credit of foreign taxes amounting to Rs.13,28,981/-.

C. The Ld. A.O has erred, in law and on facts, in not allowing and granting the credit of set off of brought forward of losses of Rs.19,32,08,420/- claimed by the appellant.

D. The Ld. A.O has erred in law and on facts, in not allowing the deduction under Chapter VI-1 of the Act of Rs.3,97,500/- claimed by the appellant.

E. The Ld. A.O has erred, in law and on facts, in charging interest under section 234B of the Act.

F. The Ld. A.O has erred, in law and on facts, in charging interest u/s 234D of the Act.

G. The Ld. A.O had erred in making computational errors while determining the net amount payable by the appellant.

H. On the facts and in the circumstances of the case, the Ld. A.O has erred in initiating penalty proceedings u/s 271 (1) (C) of the Act.

### **I.T.A .No. 2275/DEL/2015**

The Assessing Officer DCIT, Circle - 5(2), New Delhi is hereby directed to file appeal in the above mentioned case before the ITAT, New Delhi on the following ground of appeal.

i) On the facts and in the circumstances of the case and in law, the Hon'ble DRP has erred in directing the AO to allow an amount of Rs. 43,26,35,542/- from the total amount of subsidy received in advance amounting to Rs. 46,49,73,415/- by considering the same as spent for purpose of advertisement ignoring the fact that the amount of subsidy received in advance had not been spent during the previous year under consideration

ii) On the facts and in the circumstances of the case, the Hon'ble DRP has

erred in deleting the addition made by the AO on account of low GP by ignoring the fact that the assessee had not offered any explanation/justification whatsoever regarding fall in GP.

iii) *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”*

### **I.T.A .No. 832/DEL/2016**

Based on the facts and circumstances of the case, **Canon India Private Limited** (hereinafter referred to as “the Appellant”), respectfully submits in respect of the order passed by the learned Deputy Commissioner of Income Tax, Circle 5(2), New Delhi under section 143(3) / 144C of the Income Tax Act, 1961 (hereinafter referred to as the “Act”) the following grounds:

#### **A Transfer Pricing Grounds**

1. That on the facts and circumstances of the case and in law, the Assessing Officer (“AO”) has erred in assessing the total income of the Appellant under section 143(3) r.w.s 144C(13) of the Act for the relevant assessment year (“AY”) at Rs 150,12,20,810 as against the returned income of Rs 55,79,77,442.

2. That on the facts and circumstances of the case and in law, the orders passed by the AO / Transfer Pricing Officer (“TPO”) were bad in law as the pre-requisite for applying Chapter-X, ie, existence of an international transaction between two Associated Enterprises (“AE”) under the provisions of section 92B of the Act, was not satisfied or existed in the present case.

2.1. That on the facts and circumstances of the case and in law, the order passed by the TPO was also bad in law for proposing a suo moto adjustment in relation to Advertisement, Marketing and Promotion (‘AMP’) expenditure incurred by the Appellant. Further, the AO / Dispute Resolution Panel (“DRP”) erred in not appreciating that such adjustment was beyond jurisdiction of the TPO, therefore, ultra-vires, bad in law and void ab-initio.

2.2. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in holding that the unilateral arrangement between the Appellant and Indian third parties for advertisement and promotion would be a “transaction” much less an “international transaction” within the meaning of Chapter X of the Act.

3. That on the facts and circumstances of the case and in law the AO / DRP / TPO have erred in making an adjustment of Rs. 74,59,78,403 in respect of alleged international transaction pertaining to excess AMP expenditure, alleging that the same to be not at arm's length in terms of the provisions of sections 92C(1) and 92C(2) of the Act read with Rule 10B of the Income-tax Rules, 1962 ("the Rules").

4. That on the facts and in the circumstances of the case and in law, the AO / DRP / TPO erred in alleging that AMP expenses paid to unrelated third parties in India are excessive and further erred in holding that the incurring of excessive AMP expenditure has resulted in creation of marketing intangible in favor of AE, for which it should be compensated by the AE.

**Without prejudice to the above grounds that the AMP expenditure incurred is not amenable to Chapter-X, the Appellant craves to raise following grounds of appeal on merits.**

5. That on facts and circumstances of the case and in law, the AO / DRP / TPO erred in law and on facts, in applying Profit Split Method ("PSM") to benchmark the alleged international transaction of incurring excessive AMP expenditure without establishing as to how PSM was the most appropriate method in terms of section 92C read with Rule 10B of the Rules and had applicability to the facts of the instant case.

5.1. That on the facts and circumstances of the case, DRP/ TPO erred in re-characterizing the functional analysis of the appellant and further erred in alleging that in the instant case the overseas entities is an entrepreneur and AE has assigned vital function that otherwise should have been carried out by itself.

5.2. That on the facts and circumstances of the case and in law, the TPO/ DRP erred in holding that the appellant is contributing to the intangible of the AE and thus, contributing to the global profit and therefore, the PSM is the most appropriate method for benchmarking the alleged international transaction pertaining to excessive AMP spent.

5.3. Without prejudice and notwithstanding to above, that on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in arbitrarily holding taxability of global profits proportionate to AMP expenditure

*incurred in India and further erred in arbitrarily allocating (1.8% of 35% of global profits) global profits using PSM method alleging that the appellant is contributing/ creating intangible on behalf of the AE and global profits need to be apportioned since various factors are effecting the accrual of income.*

*6. That on facts and circumstances of the case and in law, the AO / DRP / TPO have erred in not appreciating that distribution and marketing functions being interconnected and intertwined should be benchmarked on an aggregate basis as was established by the Appellant.*

*6.1. That on facts and circumstances of the case and in law, the AO / DRP have erred in arbitrarily rejecting comparable companies for the aggregate approach for the purpose of benchmarking the alleged excessive AMP expenses and holding that there are no appropriate comparable companies available to benchmark on an aggregate basis.*

*7. The AO / DRP / TPO have erred in holding that Distribution & Marketing (incurrence of AMP) should be benchmarked separately applying PSM method and further erred in not appreciating that the same would result in over taxation and is contrary to the computation machinery provided in Chapter X.*

*7.1. That on the facts and circumstances of the case and in law, the AO / DRP/ TPO have erred in not allowing the setoff excess margin earned by the Appellant from distribution function against the adjustment made on account of AMP expenditure even if the same was to be segregated and benchmarked separately.*

*8. That on facts and circumstances of the case and in law, the AO / DRP / TPO have erred in including subsidy from the scope of AMP expenditure while benchmarking the same on segregated basis.*

*8.1. That on facts and circumstances of the case and in law, the AO / TPO have erred in not excluding selling / business promotion expenses from the scope of AMP expenditure and further erred in not following the directions of the DRP to exclude the selling / business promotion expenses as per the details filed and the decision of the Tribunal in Appellant's own case for assessment years 2006-07 to 2008-09.*

9. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in not granting the benefit of quantitative / economic adjustments (such as non-payment of royalty / expenditure incurred on new product launches), while computing the alleged excessive AMP expenditure.

10. That on facts and circumstances of the case and in law, the AO / DRP / TPO have erred in not providing the Appellant the benefit of 5 percent range as provided by the proviso of section 92C(2) of the Act.

11. That on the facts and in the circumstances of the case and in law, the AO / DRP / TPO has erred by ignoring the provisions of Rule 10B(3) of the Rules and judicial pronouncements, which advocate usage of multiple year data of comparable companies for the purpose of determination of the arm's length price.

### **Corporate Tax Grounds**

#### **B.1 Addition of subsidy received from Canon Singapore Pte. Ltd. but not utilized within the previous year - Rs. 197,264,964/-**

1. That on the facts and in the circumstances of the case and in law, the AO / DRP have erred in making the addition of Rs. 197,264.964/- to the total income of the appellant.

1.1. That on the facts and in the circumstances of the case and in law, the AO has erred in making and the DRP has further erred in confirming that the amount of subsidy received in advance for meeting specific advertisement and sales promotion expenditure, but not utilized within the previous year, is taxable as revenue receipt.

1.2. That on the facts and in the circumstances of the case and in law, the AO / DRP have erred in not appreciating that the unutilized/ unspent amount of subsidy is treated as current liability and not income in the books of account and the unspent amount is liable to be refunded if not utilized for the specified purpose.

1.3. That on the facts and in the circumstances of the case and in law, the Assessing Officer / DRP have erred in not following the Hon'ble Delhi High Court's order in appellant's own case.

2. Without prejudice to above, that on the facts and in the circumstances of the case and in law, the deduction for the unspent subsidy amount added to the income in AY 2011-12 should be allowed in the AY 2012-13 where such sum has been utilized for the specified purpose and included in income for AY 2012-13.

**B.2 Without prejudice to the above, the Learned AO has erred, in law and on facts, in not granting the claim of prepaid taxes.**

1. That on the facts and in the circumstances of the case and in law, after having computed a taxable income in case of Appellant, the learned AO has erred in not allowing the credit of TDS amounting to Rs.385,168/-.

B.3 That on the facts and in the circumstances of the case and in law, in not allowing the deduction under Chapter VI-A of the Act of Rs. 500,000/- claimed by the Appellant.

B.4. That on the facts and in the circumstances of the case and in law, in charging interest under section 234B of the Act.

**I.T.A .No. 1052/DEL/2016**

1. On the facts and in the circumstances of the case and in law, Hon'ble DRP has erred in restricting the ALP from Rs. 74,59,78,408/- to Rs. 53,21,45,194/- u/s 92CA(3) of the Income Tax Act 1961.

2. On the facts and in the circumstances of the case and in law, the Hon'ble DRP-1 has ignored the facts that such expense i.e. selling expenses are included in the AMP expense of the AE, which is taken as a base for the profit split. If selling and distribution expenses are to be excluded from the assessee's AMP expense, the same should be excluded from the AMP expense of the AE. However, that information is not available in public domain. If only the selling and distribution expense of the assessee are removed and not of the AE, the PSM (Profit Split Method) calculation will go wrong.

3. The appellant craves to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

3. We are taking up the factual matrix for A.Y. 2010-11. The assessee company is engaged in the business of trading of photocopiers, fax machines,

printers, scanners, digital cameras and projectors, printer cartridges, toners and software development and export. In this case, the assessee company filed return of income declaring income of ₹ 47,55,95,410/- after set off of brought forward losses of ₹ 19,32,08,420 on 27.09.2010. The return was process under section 143 (1) of the Income Tax Act, 1961. The notice under section 143(2) of the Act was issued for selecting the case for scrutiny. Notice under section 142(1) of along with a detailed questionnaire was issued for furnishing the details. In response to the said notices Chartered Accountants and Authorized Representatives of the assessee company attended from time to time and filed the necessary details. During the year, the assessee entered into international transaction with its associated enterprises. The case was referred to Transfer Pricing Officer for determination of Arm's Length Price under section 92CA(1) of the Act in respect of international transaction entered into by the assessee during the Finance year 2009-10. The TPO vide order dated 23.01.2014 determined the Arm's Length Price with respect to the international transaction carried out by the assessee and directed the Assessing Officer to add a sum of ₹ 86,84,79,282 to taxable income of the assessee. Vide notice under section 143(2) dated 29.01.2014, the assessee was asked to explain why a sum of ₹ 86,84,79,282 should not be added to the taxable income of the assessee as directed by the TPO. The assessee reiterated the submissions as were put before the TPO. As per the directions of the TPO, the Assessing Officer adopted the Arm's Length Price determined by the TPO and accordingly an amount of ₹ 86,84,79,282 being the difference in the Arms Length Price determined by the TPO was added back to the total income of the assessee. In this regard a draft of the proposed order of assessment was passed and sent to the assessee. The assessee filed objections before the Dispute Resolution Panel challenging the variation proposed to be made in the draft order. The DRP vide order dated 24.12.2014 has restored the matter to the file of the transfer pricing officer for verification. The TPO vide report dated 21.01.2015 revised the value of

compound adjustment to ₹77,26,36,692/-instead of ₹ 86,24,79,282/-as proposed in the draft assessment order. In compliance to the directions of the DRP and the order of TPO, the addition amounting to ₹77,26,36,692/-was made on account of ALP. The Assessing Officer also made an addition of ₹ 3,23,31,873 being subsidy received from Canon Singapore Pte. Ltd. but not utilised within the previous year. During the year assessee claimed set-off of brought forward losses and unabsorbed depreciation to the extent of ₹ 19,32,08,420/-. On going through the Assessment Order for the A.Y. 2009-10 it is seen that there is no losses/unabsorbed depreciation carried forward for set off. Hence the set off claimed by the assessee was not allowed by the Assessing Officer.

4. Being aggrieved by the assessment order, the assessee as well as the Revenue filed appeals before us.

5. Firstly we are taking up the Assessee's appeal for A.Y. 2010-11. As regards Ground Nos. 1 and 2, the same are general in nature. Hence Ground Nos. 1 and 2 are dismissed.

6. Ground No. 3 relating to jurisdiction of the TPO to determine ALP of an international transaction and not to re-characterize transaction as an international transaction. The Ld. AR submitted that the TPO while examining this issue suo moto, held that there exists an international transaction by incurring excessive AMP expenditure. The Ld. AR submitted that the provisions of section 92CA of the Act, enables the TPO only to compute the Arm's Length Price for transaction and it is the Assessing Officer who has to arrive at a satisfaction that there exists an international transaction. Sub-section (2B) to section 92CA only enables the TPO to benchmark an international transaction which has not been reported under section 92E of the Act. However, the TPO does not have jurisdiction to adjudicate / determine the character of transaction, that is, whether it is an international transaction or not. Further sub-section (1) to section 92CA of

the Act requires that Assessing Officer with the prior approval of the Principal Commissioner or the Commissioner, to refer for the computation of ALP of an international transaction to the TPO under section 92C of the Act. The Ld. AR further submits that the intent of legislature has been clarified by the CBDT vide instruction No 3/2016. The Board has clarified that role of the TPO begins only after a reference is received from the Assessing Officer and is limited to determination of ALP in relation to the international transactions referred by the assessing officer. Further the satisfaction to be arrived at by the Assessing Officer regarding the existence of the international transaction for making the reference to the TPO. The Ld. AR relied on the decision of the Hon'ble Delhi High Court case of Indo- Rama synthetics (India) Pvt. Ltd. vs. ACIT (2016) 386 ITR 665 (DEL) wherein the Hon'ble High Court has rejected revenues contention that CBDT instruction 3/2016 dated March 10, 2016 which was replaced by instruction 15/2015 specifically lays down procedure to be followed by Assessing Officer making TPO reference prospective. The Hon'ble High Court has held that the instruction clarifies the correct legal position and cannot be construed as not applying to the facts on hand. Being procedural it requires to be applied even the case where a reference was made by the Assessing Officer to the TPO prior to the issue is of the circular. The Ld. AR relied on the decision of Hon'ble Punjab and Haryana High Court in the case of Shri Vishnu Etables (India) Ltd. vs. DCIT (2016) 387 ITR 385 and Hon'ble Gujarat High Court in the case of Alpha Nipon Innovatives Ltd. vs. DCIT (2016) 291 CTR 309. In the present case, the TPO had first constructed/determine that the inference of AMP expenditure as a deemed international transaction based upon conjecture and surmises though none existed on facts and law and then arbitrarily determined the ALP of the said international transaction. The Ld. AR submitted that the provisions of the Act provides that the TPO can only determine ALP of an international transaction however jurisdiction of the TPO includes adjudication of characterization of transaction to be an international transaction. The Ld. AR further submitted

that if Ground No. 3 of the appeal of the assessee is decided in favour of the assessee then all the other grounds of assessee's appeal pertaining to Transfer Pricing addition becomes academic.

7. The Ld. DR relied upon the provisions of Section 92CA of the Act and submitted that the reference made to the TPO was rightly done and the TPO has the power to decide the issues which are having direct bearing to the reference. The Ld. DR submitted that the CBDT circular is also reiterating the provisions of Section 92CA of the Act.

8. We have heard both the parties and perused all the records. As regards to Ground No. 3 of the Assessee's appeal, it is pertinent to note here sub-section (2A) of Section 92CA which reads as under:

*“92CA. (1) Where any person, being the assessee, has entered into an international transaction [or specified domestic transaction] in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the 1 [Principal Commissioner or] Commissioner, refer the computation of the arm's length price in relation to the said international transaction [or specified domestic transaction] under section 92C to the Transfer Pricing Officer.*

*(2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction [or specified domestic transaction] referred to in sub-section (1).*

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

*transaction is an international transaction referred to him under sub-section (1).“*

It is clear that any transfer pricing issue can be taken up by the TPO as the same is referred to the TPO by the Assessing Officer as per sub-section 1 of Section 92CA of the Act. In fact, sub-section 2 of Section 92CA itself is clear in that respect that where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction [or specified domestic transaction] referred to in sub-section (1) of the Act. Thus, Ground No. 3 is dismissed.

9. Ground no. 4 is relating to non-existence of international transaction. Ground no. 5 is relating to no creation of marketing intangible in favour of AE. Ground no. 6 is relating to non rendition of any brand building services. For these three grounds, the Ld. AR submitted that existence of an international transaction is sine qua non to invoke the provisions of transfer pricing. The AMP expenditure incurred does not fall within the definition of international transaction and therefore the same was not reported in form 3CEB as the same expenditure was incurred in relation to third-party vendors in India. The AMP expenditure by assessee is unilateral action. The TP regulation would be applicable to transaction began arrangement understanding reaction in consort in relation to purchase sale or lease/use of tangibles/intangible property or any other transaction having bearing on profits, income, losses or assets of such enterprises. In other words to be an international transaction it should be pursuant to an arrangement, understanding or action in consort between the assessee and it's AE transaction to be classified as an international transaction under chapter X of the Act per se involves a bilateral contract/understanding between the parties

under unilateral action without any binding obligation cannot be termed as transaction. The Ld. AR further submitted that in the present case the following table depicts the varying degree of AMP/sales ratio. The varying AMP/sales pattern for the assessee over the years suggested that the assessee was under no obligation from its AE to incur AMP expenditure, contrary to the situation where AMP/sales would have been a fixed percentage on account of an agreement:

Year (A.Y)	2006-07	2007-08	2008-09	2009-10	2010-11
Sales (refer TP study)	292,09,04 1	389,42,11,23 1	516,54,36,62 8	668,00,97,48 1	920,22,02,00 7
AMP	9,70,90,07 3	15,40,05,865	25,47,70,,50 3	24,47,27,290	30,14,20,000
AMP/Sale s (in %)	3.32	3.95	4.93	3.66	3.30

The Ld. AR further submitted that the benefit of AMP expenditure is clearly evident from the enhanced sales of the assessee. It is apparent that the marketing activities conducted by the assessee led to a greater penetration of the assessee in the market. This can be seen from the table demonstrating the increase of sales of assessee. The Ld. AR further submitted that there is a relationship with AE that of principal to principal. The assessee is a distributor of Canon products imported from its AEs and these transactions are carried out on principal to principal basis. The assessee is only responsible for improving its business market in India and increasing the sales of products. The assessee had incurred expenditure on AMP to cater to local market needs. It is to be appreciated that the AMP expenditure has been incurred in relation to local product advertisements into domestic independent third parties, thus the domestic unilateral expenditure incurred by the assessee for the purpose of its business cannot be classified as intentional international transaction under section 92B (2) of the Act. The Ld.

AR further submitted that onus to prove existence of international transaction has not been discharged by the revenue. It is settled law that the onus to prove the existence of arrangement regarding incurrence of unilateral AMP expenditure by the taxpayer is solely for the brand promotion of its foreign AE is on the revenue. Existence of an international transaction cannot be a matter for inference or surmise and the burden to prove the existence of an agreement/arrangement prior to incurring of the AMP expenses is on the revenue. Unless revenue definitely shows that the Assessee was obliged to incur AMP expenses of certain level for promoting its AE's Brand, an international transaction cannot be inferred. The Ld. AR relied on the following decisions:

- Maruti Suzuki India Ltd. vs. CIT (2016) 381 ITR 154 (Del)
- CIT vs. Whirlpool of India Ltd. (2016) 381 ITR 154 (Del)
- Honda Siel Power Products (2016) 283 CTR 322 (Del)
- Bausch & Lomb Eyecare (India) (P) Ltd. vs. ACIT (2016) 381 ITR 227 (Del)
- Widex India Pvt. Ltd. vs ACIT: [2017] 78 taxmann.com 348 (Chandigarh - Trib.)
- Nippon Paint India Pvt vs ACIT: [2017] 79 taxmann.com 8 (Chennai - Trib.)
- Essilor India Private Limited Vs DCIT: [2016] 178 TTJ 69 (Bangalore - Trib.)
- Goodyear India Ltd v DCIT: [2016] 70 taxmann.com 67 (Delhi - Trib.)
- Loreal India Private Limited v DCIT: [2016] 49 ITR(T) 473 (Mumbai - Trib.) Heinz India Private Limited: [TS-194-ITAT-2016(Mum)-TP]
- Thomas Cook (India) Limited: 2016] 49 ITR(T) 178 (Mumbai - Trib.)
- Mondelez India Foods Pvt Ltd: [2016] 70 taxmann.com 112 (Mumbai - Trib.)

- India Medtronic Private Limited: [2016] 66 taxmann.com 218 (Mumbai - Trib.)
- Johnson & Johnson Limited: [TS-19-ITAT-2016(Mum)-TP]
- Toshiba India Pvt. Ltd: ITA No. 944/Del/2016 (TS-159-ITAT-2016(DEL)-TP)
- Honda Siel Power Product Ltd: TS-238-ITAT-2016(DEL)-TP
- Fujifilm India Pvt. Ltd: [TS-237-ITAT-2016(DEL)-TP]

In the present case also, the assessee has contested the very existence of international transaction between itself and its AE, concerning AMP expenditure. As a result, the question of existence of the alleged international transaction has to be decided in accordance with law. The Ld. AR relied upon the following decisions, wherein the Hon'ble Delhi High Court has held that the issue of existence of international transaction, has to be examined afresh for each assessment year, separately:

- i. Sony Ericsson Mobile Communications India Pvt. Ltd. vs DCIT: ITA 638/2015 & 648/2015 (Delhi HC)
- ii. Daikin Air conditioning India Pvt. Ltd. vs ACIT: ITA 269/2016 (Delhi HC) -

The Ld. AR submitted that if the above ground no. 4, 5, 6 of the Assessee's appeal are decided in favour of the assessee then all other grounds of assessee's appeal and Departmental appeal shall be academic.

10. The Ld. DR relied upon the order of the TPO and Assessment Order.

11. We have heard both the parties and perused all the records. This issue is not verified properly by the TPO and therefore, it requires verification as there is no mention of the specific agreements to the effect of the AMP whether is a international transaction or not. Therefore, we direct the TPO/AO to verify this issue in light of the agreements signed by the assessee

with its AEs as well as the main company. Needless to say the assessee be given the opportunity of hearing by following principles of natural justice. Ground No. 4, 5 and 6 of the assessee's appeal are partly allowed for statistical purpose.

12. The Ld. AR further submitted that without prejudice to the aforesaid, AMP expenditure is not amenable to Chapter – X, the assessee's contentions in relation to benchmarking of the alleged international transaction are as under:

- Ground No. 7 is relating to wrong application of Bright Line Test by the AO/DRP/TPO.
- Ground No. 13 is relating to wrong application of CUP method in a manner not prescribed under law by the AO/DRP/TPO.
- Ground No. 14 is relating to wrong determination of ALP of the alleged international transaction as per Section 92C of the Act, read with, Income Tax Rules, 1962.

13. The Ld. AR submitted that the AO/TPO/DRP determined transfer pricing adjustments relating to the AMP expenditure by applying the Bright Line Test which is not recognized under the Indian transfer pricing regulations, as a prescribed method under Section 92C of the Act for benchmarking of the Assessee's AMP expenditure. The Ld. AR relied upon the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication India (P) Ltd. vs. CIT (Supra), Maruti Suzuki (supra) and several other cases, whereby, the High Court has held that Bright Line Test is ultra-vires the provisions of the Act and cannot be applied for computing the ALP or benchmarking the AMP expenditure. The Ld. AR also relied upon the decision of the Delhi Benches of ITAT in case of Nikon India Private Ltd. vs. DCIT (ITA No. 4574/DEL/2017) and Van Melle India Pvt. Ltd. vs. DCIT (ITA No. 1073/Del/2017) wherein it is held that transfer pricing adjustment should not be made by applying Bright Line Test, even on protective basis,

because the Hon'ble High Court has not approved the application of Bright Line Test in several cases. Thus, in view of the aforesaid, the AO/TPO/DRP have grossly erred in determining the AMP adjustment, applying the BLT method.

14. The Ld. DR relied upon the orders of the AO, TPO and directions of the DRP.

15. We have heard the submissions made by both the parties and of the view that since the main issue of AMP is remanded back to the file of the TPO/AO it will be appropriate to send this issue to the file of TPO/AO as well. Thus, Ground No. 7, 13, 14 are partly allowed for statistical purpose.

16. As regards to Ground No. 8 relating to exclusion of direct selling and distribution expenses along with subsidy from ambit of AMP expenditure, the Ld. AR submitted that AMP expenditure is not an international transaction. The Ld. AR further submits that the AO/TPO/DRP have not given due cognizance to the nature of expenses when benchmarking AMP expenditure, incurred by the assessee during the year under consideration. The Ld. AR submitted that during the relevant assessment year, the Assessee incurred expenditure in relation to sales commission, trade discounts, selling & administration, along with certain expenditure out of special purpose subsidy. However, the TPO considered whole of these expenditures, including subsidy, as part of the AMP expenditure as under:

Particulars	Amount (INR)
AMP spent of Assessee	30,14,21,790
Trade Discount	30,44,59,945
Commission	85,86,473

Selling & administrative expenses	19,66,32,788
Subsidy	46,49,73,415
Total AMP considered by TPO	127,60,74,411

The Ld. AR submitted that the trade discount, commission and other sales related expenses are not in the nature of “brand promotion”, i.e. they are not directly or immediately related to “brand building”, in fact, these expenditures have live link and direct connect with increase in sales or turnover. Further, selling and administrative expenses primarily pertain to direct selling activities being conducted by the Assessee to push its sales in the Indian market and accordingly should be excluded for the purpose of AMP analysis of Assessee. The Ld. AR pointed out that TPO itself in its order dated 01.01.2016, for subsequent A.Y. 2011-12 has not included trade discount, commission and other selling and administrative expenditure in the ambit of AMP expenditure for benchmarking purposes. The Ld. AR further pointed out that the Tribunal vide order dated 03.05.2013 for A.Y. 2006-07 to 2008-09 held that all selling expenditure including trade discount and commission along with subsidy should be excluded from the ambit of AMP expenditure. Thus, the same read with the subsequent directions of the Hon’ble Delhi High Court in Assessee’s own case i.e. judgment in batch of cases of Sony Ericsson (supra) case, the TPO should be directed to exclude Trade discount, commission and special purpose subsidy from the ambit of the AMP expenditure. Thus, following the order of the Tribunal for A.Y. 2006-07 to 2008-09 read with the subsequent directions of the Hon’ble Delhi High Court in Assessee’s own case, the TPO should be directed to exclude Trade discount, commission, selling and administrative expenses and special purpose subsidy from the ambit of the AMP expenditure, tabulated as under:

Particulars	Amount (INR)
-------------	--------------

Trade Discount	30,44,59,945
Commission	85,86,473
Selling & administrative expenses	19,66,32,788
subsidy	46,49,73,415
Total	97,46,52,621

In addition, the Ld. AR pointed out that the amount of Rs. 30,14,21,790 i.e. AMP spent of assessee, further has certain sales related expenses included in it, which TPO in A.Y. 2011-12 have deleted and which accordingly, warrants reduction. For which a detailed break up was placed by the Ld. AR at page no. 967 of the Paper Book 3. The Ld. AR also relied on the following decisions:

Particulars	Expenses not forming part of AMP
Haier Appliances India P. Ltd. vs. DCIT (204) 146 ITD 730 (Del)	<ul style="list-style-type: none"> <li>• Dealer Gift</li> <li>• In-shop demonstrator expenses</li> <li>• Freebies items/ free gifts</li> </ul>
Glaxo Smithkline Consumer Healthcare Ltd. vs. ACIT (ITA Nos. 1148/Chd/2011 and 290/Chd/2014)	<ul style="list-style-type: none"> <li>• Sales promotion</li> <li>• Sales promotion (others)</li> </ul>
A.W. Faber Castell (India) Pvt. Ltd. vs. DCIT ITA No. 577/Mum/201	<ul style="list-style-type: none"> <li>• Freebies items/ free gifts</li> </ul>
Reebok India Co. vs. ACIT (2014) 146 ITD 469	<ul style="list-style-type: none"> <li>• Scheme or incentive</li> </ul>
Panasonic Sales & Services India Pvt. Ltd. vs. ACIT (2013) 157 TTJ 615	<ul style="list-style-type: none"> <li>• Dealer Gift</li> </ul>

(Chennai)	
LG Electronics India Pvt. Ltd. vs. ACIT (2015) 153 ITD 591 (Del)	<ul style="list-style-type: none"> <li>• Dealer Gift</li> </ul>

Thus, the Ld. AR submitted that the TPO be directed to exclude sales related expenses and subsidy from AMP expenditure while bench marking the same.

17. The Ld. DR relied upon the order of the AO/TPO and directions of the DRP.

18. We have heard both the parties and perused all the relevant material available on record. The TPO vide order dated 01.01.2016, for subsequent A.Y. 2011-12 has not included trade discount, commission and other selling and administrative expenditure in the ambit of AMP expenditure for benchmarking purposes. The Tribunal vide order dated 03.05.2013 for A.Y. 2006-07 to 2008-09 held that all selling expenditure including trade discount and commission along with subsidy should be excluded from the ambit of AMP expenditure. Thus, the same read with the subsequent directions of the Hon'ble Delhi High Court in Assessee's own case i.e. judgment in batch of cases of Sony Ericsson (supra) case, the TPO should be directed to exclude Trade discount, commission and special purpose subsidy from the ambit of the AMP expenditure. Thus, following the order of the Tribunal for A.Y. 2006-07 to 2008-09 read with the subsequent directions of the Hon'ble Delhi High Court in Assessee's own case, it will be appropriate to direct the TPO to exclude Trade discount, commission, selling and administrative expenses and special purpose subsidy from the ambit of the AMP expenditure, as given in the tabulated form hereinabove after verifying the same in accordance with the records available with the TPO/AO. Thus, this issue is remanded back to the file of the TPO/AO. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground No. 8 of the assessee's appeal is partly allowed for statistical purpose.

19. Ground No. 9 is relating to final comparables selected by AO/TPO/DRP for benchmarking AMP expenditure. Ground No. 10 is relating to quantitative adjustments. Ground No. 11 and 11.1 are relating to mark-up. Ground No. 12 is relating to benefit to proviso of section 92C(2) of the Act. Ground No. 16 is relating to multiple year data. The Ld. AR submitted that since AO/TPO/DRP has applied Bright Line Test which is not a statutory method for benchmarking AMP expenditure, the aforesaid grounds become academic as at the outset the main issue is covered against the department. The Ld. AR further submitted that without prejudice to the above, even otherwise, the AO/TPO/DRP erred in not appreciating that the assessee had not provided any value added / brand building services by incurring AMP expenditure, and therefore, no mark-up can be charged.

20. The Ld. DR relied upon the orders of the AO and TPO as well as directions of the DRP.

21. We have heard both the parties and perused all the relevant records. It is pertinent to note that the issue of AMP has been remanded back to the file of the TPO/AO. Therefore, these grounds become infructuous. Hence Ground No. 9, 10, 11, 11.1, 12 and 16 are dismissed.

22. As regards to Ground No. 15, the Ld. AR submitted that the AO/ TPO/ DRP erred in not appreciating that when all the transactions of assessee were established to be at arm's length, AMP expenditure, separately, cannot be alleged to be excessive. The Ld. AR submitted that the issue pertaining to determination of ALP for the AMP expenditure has been elaborately dealt with by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication (supra). The Hon'ble High Court while laying down the principles for determination of ALP in relation to AMP expenditure, has prescribed that in case the main transaction of import has been benchmarked following Resale Price Method (RPM) then at first place aggregated approach should be adopted, and if taxpayer is able to

demonstrate that the international transaction of distribution and marketing is at arm's length there should be any adjustment. The Ld. AR submitted that in fact, the Hon'ble Delhi High Court in the case of distributor has upheld the use of RPM as one of the most appropriate method. Further, the court under no circumstances propounded that the PSM is one of the most appropriate method to benchmark the AMP expenses. Applying the said principles laid down by the Hon'ble High Court, the assessee has computed the adjusted gross margin of the comparable companies to demonstrate that the adjusted gross margin of the assessee vis-à-vis the comparable companies is better and therefore, the alleged transaction / attribution of marketing function of the assessee (which was at principle to principle basis) is at arm's length and no adjustment is required for the same. A tabulation showing the aforesaid adjusted gross margins was annexed to the synopsis by the Ld. AR. The Ld. AR submitted that from the perusal of the adjusted gross margins would show that the assessee's margins were better than that of the comparable companies and therefore, no adjustment on account of AMP expenditure was required to be made. The adjustment made by the AO/TPO, is therefore, prima facie untenable and deserves to be deleted. The Ld. AR alternatively, submitted that comparability adjustment can be carried out in line with provisions of Rule 10B(3) of the Rules in respect of the intensities of the AMP expenditure incurred by comparables vis-à-vis assessee. The Ld. AR further pointed out that TPO for A.Y. 2014-15 has proposed and done the benchmarking of alleged international transaction following the intensity approach, vide order dated 17.10.2017.

23. The Ld. DR relied upon the orders of the AO, TPO and directions of the DRP.

24. We have heard both the parties and perused all the relevant records. It is pertinent to note that the issue of AMP has been remanded back to the file

of the TPO/AO. Therefore, these grounds become infructuous. Hence Ground No. 15 is dismissed.

25. As relates to Corporate tax issues specifically Ground No. B, B.1, 1, 1.1, and 1.2, the Ld. AR relied upon the ITAT decision in assessee's own case for A.Ys. 2006-07, 2007-08 and 2008-09 (ITA Nos. 4602/Del/2010, 5593/Del/2011 & 6086/Del/2012 order dated 03.05.2013) wherein the unutilized subsidy is allowed by the Tribunal. The said view is affirmed by the Hon'ble High Court vide order dated 03.08.2015 in assessee's own case .

26. The Ld. DR relied upon the order of the AO and TPO as well as directions of the DRP.

27. We have heard both the parties and perused all the relevant records available. It is pertinent to note that this issue has been allowed by the Tribunal in earlier assessment years in assessee's favour. The Tribunal held as under:

*"14. Apropos unrealized subsidy, it is a trite law that every receipt does not tantamount to income, as per charging sections 4 & 5 of the I.T. Act. While examining whether the receipt is chargeable as income or not, relevant facts and circumstances are to be seen. From the record it clearly emerges that the subsidy provided by CSPL is in lump sum with specific direction that this amount is to be spent only for specified purposes and the unspent amount is to be held in trust for and on behalf of CSPL. This is duly confirmed by CSPL and this fact is further corroborated by the fact that unutilized amount is not credited to the P&L A/c but taken to balance-sheet as a current liability. Once it is acknowledged as current liability assessee does not become owner of this amount and the receipt of unspent amount does not Canon India Pvt. Ltd. become income of the assessee. Besides, this method of accounting has been followed by the assessee consistently. In these circumstances, we are of the view that unspent subsidy being not*

*income of the assessee but a liability to be spent for specified purposes and recoverable for non-utilization for specific purposes cannot be treated as income of the assessee. Therefore, this ground of the assessee is also allowed. Since we have allowed the main ground, there is no need to go into alternate arguments."*

28. The said view taken by the ITAT has been affirmed by the Hon'ble Jurisdictional High Court in ITA Nos. 137 & 138/2014 vide order dated 03.08.2015 in assessee's own case and relevant findings have been given in para 20 of the said order which read as under:

*"20. We are, therefore, unable to accept the Revenue's contention that the unutilized subsidy is required to be recognized as income of the Assessee in the year of its receipt. This would be contrary to the matching concept, which is the substratal principle for computing income during a relevant period. It is necessary that income be recognized along with the corresponding expenditure incurred for earning the income. Thus, where an Assessee follows the Accrual/Mercantile system of Accounting - as in this case - income can be recognized only when the matching expenditure is also accounted for irrespective of the cash outflows/inflows during the year. It would thus, not be correct to recognize the subsidies received for incurring specific expenditure Canon India Pvt. Ltd. as income without accounting for the corresponding expenditure."*

Thus, the issue is squarely covered in favour of the assessee. Therefore, Ground Nos. B.1, 1, 1.1, 1.2 are allowed.

29. As relates to Ground No. B.2, 1, 2 regarding not granting the claim of prepaid taxes and foreign tax credit claimed by the assessee, the Ld. AR submitted that the Assessing Officer has not allowed the entire credit of prepaid taxes (TDS, advance tax and self assessment taxes) which should have been done by the Assessing Officer. Therefore, the Ld. AR requested to

remand back this matter to verify the same by the Assessing Officer. The Ld. DR did not object for the same.

30. We have heard both the parties and perused all the relevant records available before us. From the records it can be seen that the Assessing Officer has not allowed credit of pre-paid taxes to the assessee which should have been taken into consideration. Therefore, it will be appropriate to remand back this issue to the file of the Assessing Officer. Thus, this issue is remanded back to the file of the Assessing Officer. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground No. B.2, 1, 2 of the assessee's appeal are partly allowed for statistical purpose.

31. As relates to Ground Nos. C, D, E regarding not allowing and granting the credit of set off of brought forward of losses of Rs. 19,32,08,420/- claimed by the assessee, not allowing the deduction under Chapter VI-A of the Act of Rs. 3,97,500 and charging interest under Section 234B of the Act respectively, the Ld. AR submitted that the same may be remanded back to the file of the Assessing Officer for verification and decide these issue a fresh. The Ld. DR relied upon the Assessment Order.

32. We have heard both the parties and perused all the relevant records available before us. The Assessing Officer has not verified these claims of the assessee in proper way given under the Income Tax Act. Therefore, it will be appropriate to remand back this issue to the file of the Assessing Officer. Thus, this issue is remanded back to the file of the Assessing Officer. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground No. C, D, E of the assessee's appeal are partly allowed for statistical purpose.

33. As regards to Ground No. F, G, and H the same are consequential, hence dismissed.

34. In result, assessee's appeal being ITA No. 1405/DEL/2015 for A.Y. 2010-11 is partly allowed for statistical purpose.

35. As regards Revenue's appeal, the Ld. AR submitted that the same should not be allowed as per the submissions made in the appeal filed by the assessee. The Ld. DR relied upon the directions of the DRP.

36. We have heard both the parties and perused all the relevant records available before us. Ground No. i) of the Revenue's appeal is already decided in favour of the assessee as per Ground Nos. B, B.1, 1, 1.1, 1.2. Therefore, Ground No. i) of the Revenue's appeal is dismissed. As relates to Ground No. ii) is regarding deletion of the addition made by the Assessing Officer on account of low GP by the DRP by ignoring the fact that the assessee had not offered any explanation/ justification whatsoever regarding fall in GP. From the records, the Assessee has given the explanation regarding the fall in GP rates and the same was totally ignored by the Assessing Officer. Therefore, DRP rightly deleted this addition. Ground No. ii) of the Revenue's appeal is dismissed. Ground No. iii) is general in nature, hence dismissed.

37. In result, Revenue's appeal being ITA No. 2275/Del/2015 for A.Y. 2010-11 is dismissed.

Now we are taking up the appeal for A.Y. 2011-12

38. The Ld. AR submitted that Grounds of appeal Nos. 1 and 3 are general. Therefore, Ground No. 1 and 2 are dismissed.

39. As regards to Ground No. 2.1 relating to jurisdiction of TPO limited to determination of ALP of an international transaction and not to re-characterize transaction as an 'international transaction', the same are identical with Ground no. 3 of the Appeal filed by the Assessee for A.Y. 2010-11. Therefore, the observations made in that respect are applicable in the present appeal as well. Hence Ground No. 2.1 is dismissed.

40. As regards to Ground No. 2 & 2.2 relating to non-existence of International transaction and Ground No. 4 relating to no creation of marketing intangible in favour of AE, the same are identical with Ground no. 4 & 5 of the Appeal filed by the Assessee for A.Y. 2010-11. Therefore, the observations made in that respect are applicable in the present appeal as well. This issue is not verified properly by the TPO and therefore, it requires verification as there is no mention of the specific agreements to the effect of the AMP whether is a international transaction or not. Therefore, we direct the TPO/AO to verify this issue in light of the agreements signed by the assessee with its AEs as well as the main company. Needless to say the assessee be given the opportunity of hearing by following principles of natural justice. Ground No. 2, 2.2 and 4 of the assessee's appeal are partly allowed for statistical purpose.

41. Grounds of appeal Nos. 5, 5.1, & 5.2 are relating to incorrect approach of the TPO to benchmark the alleged international transaction using Profit Split Method ("PSM"). The Ld. AR submitted that the TPO made TP adjustment of INR 74,59,78,403 in the AY 2011-12 on the following basis:

- > TPO concluded that Assessee is incurring excessive AMP expenditure in India basis higher AMP expenditure of Assessee (as a percentage of sales) compared to Canon Inc., AMP percentage to sales (at consolidated level) (*refer para 20 at page 96 of paper-book 1*);
- > Thereafter, TPO observed that such excessive AMP expenditure:
  - i. Adds to the brand value of Canon group, i.e., Assessee is contributing to valuable intangible to its AE; and
  - ii. Leads to increased global profits for Canon group.

- > Accordingly, TPO concluded that Canon Inc. should compensate Assessee for excessive AMP expenditure, being an international transaction for creation of marketing intangible in India.

The Ld. AR pointed that the TPO under the grab of PSM, has applied BLT only, by comparing the AMP expenditure to sales ratio of the Assessee with the AE. By comparing the AMP expenses to sales ratio of the Assessee and the AE, in a way the TPO is comparing two controlled transactions, which is against the very premise of transfer pricing, as the intend of the legislature under transfer pricing is, that controlled transaction is to be compared with uncontrolled transaction. The Ld. AR submitted that the TPO placed reliance on the decision of the Rolls Royce Plc [2011] 339 ITR 147 (Delhi) for the purpose of attributing global profit to the various functions undertaken by Canon Inc. The TPO, accordingly attributed the global profits in the following ratio:

- > Manufacturing - 50 percent
- > Research and development - 15 percent
- > AMP - 35 percent

42. In view of the above, the Ld. AR submitted that the TPO incorrectly applied the PSM method and computed the adjustment as under: -

- i. As Canon Inc. follows calendar year, TPO estimated global operating profit of Canon group from the consolidated financial statements of Canon Japan at of 385,181 million yen, arrived at by adopting a weighted average approach. (75 percent from financials ended December, 2010 and 25 percent from financials ended 2011).
- ii. Allocated 35 percent of aforesaid operating profit to AMP function. The same resulted in 134,813 Million Yen (equivalent to INR 7455,15,89,000)

- iii. Thereafter, compared the Assessee's AMP expenditure to global AMP expenditure and determined the average AMP ratio 1.8%.
- iv. The 1.8% computed above was multiplied with the 35% profits amounting to INR 7455,15,89,000 for arriving at the amount attributable to India (as per Rolls Royce Plc decision) and added the same to the income of the Assessee as a transfer pricing adjustment amounting to INR 134,19,28,602.
- v. Lastly, the amount of subsidy being INR 48,06,63,749 and 35% of net profit earned by the Assessee in India being INR 11,52,86,450, was reduced from the above amount calculated at S No. (iv) above, and the final adjustment was computed at INR 74,59,78,403.

43. The Ld. AR submitted that the DRP upheld the use of PSM by TPO as well as the computation of adjustment, however, directed the TPO to examine the nature of Assessee's AMP expenditure and exclude selling expenses. Consequently, the TPO vide order dated January 28, 2016 giving effect to the DRP directions recomputed the adjustment after excluding selling expenses from ambit of AMP expenditure. The same resulted in TP adjustment being reduced to INR 53,21,45,104 as against adjustment of INR 74,59,78,403.

44. The Ld. AR further submitted that the lower authorities have erred in applying PSM as a method to benchmark the alleged international transaction of brand building services and further the same has also been applied incorrectly, de-hors conditions laid down in Rule 10B(1)(d) of the Income-tax Rules, 1962 ('Rules'). The Ld. AR submitted that PSM is applicable only in situation cases where there is a transfer of intangible between AEs or where there are multiple inter-related international transactions which cannot be separately benchmarked. In this regard, the Ld. AR pointed out table herein under, which as per the Ld. AR culls out the intent of legislature as provided in Rule 10B(1)(d) of the Rules for applying

the PSM method:

S. No.	Rule 10B(1) (d) of the Rules	Assessee's submissions
	<p>“profit split method, which may be applicable mainly in international transactions <i>[or specified domestic transactions]</i> involving transfer of unique intangibles or in multiple international transactions <i>[or specified domestic transactions]</i> which are so interrelated that they cannot be evaluated separately for the purpose of determining the arm's length price of any one transaction, by which—</p>	<p>As per sub-clause (d) of Rule 10B(1) PSM is applicable where the transaction involves transfer of unique intangible or multiple inter related international transactions from which arm's length price cannot be separately determined.</p> <p>In the instant case, the alleged transaction sought to be benchmarked by the lower authorities is rendition of brand building services to the AEs. In other words, it is to be appreciated that (a) there is no allegation of transfer of unique intangibles and (b) there are no inter related transactions between the AE and the Assessee, from which arm's length price cannot be determined separately, because the allegation is that the Assessee is rendering</p>

		<p>brand building services and not that the Assessee and the AE are jointly rendering brand building services to a third party.</p>
2.	<p>(i) the combined net profit of the associated enterprises arising from the international transaction <i>[or the specified domestic transaction]</i> in which they are engaged, is determined;</p> <p>the relative contribution made by each of the associated enterprises to the earning of such combined net profit, is then evaluated on the basis of the functions performed, assets employed or to be employed and risks assumed by each enterprise and on the basis of reliable external market data which indicates how such contribution would be evaluated by unrelated enterprises performing comparable functions in similar circumstances;</p> <p>the combined net profit is then split amongst the enterprises in proportion to their relative</p>	<p>As per the Sub-Rules, the combined net profit of the AEs (Assessee and the AEs) from the international transaction in which they are engaged is to be determined / attributed. In the instant case, there is no such transaction that has been alleged by the lower authorities from which the combined net profit is to be determined. It is the respectful submission of the Assessee that as per this Sub-Rule one would appreciate that there should be a combined transactions by the AEs to third party from which the profit earned by the AEs is to be separately determined / split.</p> <p>It will be appreciated that the combined contribution as well as combined earning of profits</p>

	contributions, as evaluated under sub-clause (/');	is absent in the alleged transaction, because the transaction being alleged herein is rendition of brand building by the assessee to the A.E.
Ground No. 3	iv) the profit thus apportioned to the assessee is taken into account to arrive at an arm's length price in relation to the international transaction <i>[or the specified domestic transaction]</i> :  Provided	Sub-rule (iv) contemplates that the profits, thus, apportioned by the above steps should be taken into account to arrive at the ALP in relation to the international transaction by comparing the same with the uncontrolled transaction. The TPO in the instant case has not brought on record any such uncontrolled transaction to benchmark the alleged profit held to be attributable to the Assessee for rendition of brand building services.

45. The Ld. AR submitted that AMP expenditure in India is not for the purpose of brand promotion of Canon. The TPO erred in stating that the Assessee should be compensated for enhancing the value of the brand and global profits of Canon group. The Ld. AR submitted that Delhi High Court in the Assessee's own case, i.e., decision in Sony Ericsson (supra) case, held

that AMP expenses do not necessarily lead to brand promotion of foreign AE. paras 9.10 and 106 of the order of High Court is in Assessee's own case (Supra). The Ld. AR pointed out that the Hon'ble Delhi High Court in the Assessee's own case (supra) has not blessed PSM as an appropriate method to benchmark the transaction of AMP function. On the contrary, it directed that the aggregate approach is to be adopted and if taxpayer is able to demonstrate that the international transaction of distribution and marketing is at arm's length there should not be any adjustment [Refer paras 164 and 165 of the Sony Ericsson judgment (Supra)in Assessee's own case],

46. Thus, the Ld. AR submitted that Resale Price Method (RPM) has been held to be one of the most appropriate methods for distributors in the High Court ruling. Also, in Assessee's own case the TPO has not disputed / questioned RPM for benchmarking the distribution function. In view of the same, RPM should be considered as the most appropriate method for benchmarking distribution and marketing function on an aggregate basis.

47. The Ld. AR further submitted that Canon Inc. is following a different accounting year. The TPO have simply considered 75% of profits for the calendar year 2010 and 25% of profits for the calendar year 2011 to arrive at the profit of Canon Inc. for the period corresponding to April 01, 2010 - March 31, 2011. Thus TPO have made an attempt to reconstruct the profit and loss account of Canon Inc on an arbitrary basis. Such an approach would result in unreliable / arbitrary financial results for the period under consideration. The Ld. AR further submitted that no Function, Asset and Risk ("FAR") analysis carried out by TPO. As per Rule 10B(1)(d) of the Rules, while applying PSM the relative contribution made by each of the AEs to the earning of such combined net profit he evaluated on the basis of the FAR. However no FAR analysis has been undertaken by TPO.

48. The Ld. DR relied upon the orders of the AO, TPO as well as the directions of the DRP.

49. We have heard both the parties and perused all the relevant records available before us. Since the main issue of AMP is remanded back to the file of the TPO/AO it will be appropriate to send this issue to the file of TPO/AO as well. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus, Ground No. 5, 5.1 and 5.2 are partly allowed for statistical purpose.

50. Ground No. 6, 6.1, 6.2 and 7 is relating to not adopting aggregated approach. The Ld. AR submitted that the issue pertaining to determination of ALP for the AMP expenditure has been elaborately dealt with by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication (supra). The Court while laying down the principles for determination of ALP in relation to AMP Expenditure has prescribed that in case the main transaction of import has been bench mark following resale price method (RPM) then at first place aggregate approach should be adopted.

51. The Ld. DR relied upon the orders of the AO and TPO as well as directions of the DRP.

52. We have heard both the parties and perused all the records. The submissions made for Ground No. 6, 6.1, 6.2 & 7 are similar to the submissions made for Ground No. 15 for AY 2010-11 by the Ld. AR. Therefore, the same directions are given in the present appeal as well. It is pertinent to note that the issue of AMP has been remanded back to the file of the TPO/AO. Therefore, these grounds become infructuous. Hence Ground No. 6, 6.1, 6.2 & 7 are dismissed.

53. As regards to Ground No. 8 & 8.1 relating to exclusion of certain selling and distribution expenditure and subsidy, the same are identical with Ground no. 8 of the Appeal filed by the Assessee for A.Y. 2010-11. Therefore, the observations made in that respect are applicable in the present appeal as well. Thus, following the order of the Tribunal for A.Y. 2006-07 to 2008-09

read with the subsequent directions of the Hon'ble Delhi High Court in Assessee's own case, it will be appropriate to direct the TPO to exclude Trade discount, commission, selling and administrative expenses and special purpose subsidy from the ambit of the AMP expenditure, as given in the tabulated form by the Ld. AR along with the synopsis at the time of hearing after verifying the same in accordance with the records available with the TPO/AO. Thus, this issue is remanded back to the file of the TPO/AO. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground No. 8 of the assessee's appeal is partly allowed for statistical purpose.

54. As relates to Ground No. 9 regarding not granting quantitative /economic adjustments, the Ld. AR submitted that the same is academic. Hence Ground No. 9 is dismissed.

55. As relates to Ground No. 10 regarding 5% range benefit, the same is consequential. Hence Ground No. 10 is dismissed.

56. As relates to Corporate Grounds i.e. Ground Nos. B.1, 1, 1.1, 1.2, 1.3 and 2 regarding addition of subsidy received from Canon Singapore Pte. Ltd. but not utilized within the previous year, the same are identical to that of the earlier A.Y. 2010-11's ground Nos. B, B.1, 1, 1.1, and 1.2. The said issue is squarely covered by the ITAT's decision in assessee's own case for A.Ys. 2006-07, 2007-08 and 2008-09 (ITA Nos. 4602/Del/2010, 5593/Del/2011 & 6086/Del/2012 order dated 03.05.2013) wherein the unutilized subsidy is allowed by the Tribunal. The said view is affirmed by the Hon'ble High Court vide order dated 03.08.2015 in assessee's own case. Hence Ground Nos. B.1, 1, 1.1, 1.2, 1.3 and 2 are allowed.

57. As relates to Ground No. B.2, 1, and B.3 regarding not granting the claim of prepaid taxes that of credit of TDS and deduction under Chapter VI-A of the Act, the same are identical to that of the earlier A.Y. 2010-11 that of

assessee's appeal Ground Nos. B.2, 1 and D. Both these grounds have been remanded back to the file of the Assessing Officer in A.Y. 2010-11. The Assessing Officer has not verified these claims of the assessee in proper way given under the Income Tax Act. Therefore, it will be appropriate to remand back this issue to the file of the Assessing Officer. Thus, this issue is remanded back to the file of the Assessing Officer. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground No. B.2, 1 and B.3 of the assessee's appeal are partly allowed for statistical purpose.

58. As regards to Ground No. B.4 and B.5 the same are consequential, hence dismissed.

59. In result, ITA No. 832/Del/2016 i.e. assessee's appeal for AY 2011-12 is partly allowed for statistical purpose.

60. As regards Department Appeal, for AY 2011-12, the Ld. DR submitted that Ground No. 1 and 3 are general in nature. Hence, Ground No. 1 & 3 of Revenue's appeal is dismissed.

61. As regards Ground No. 2, the same is related to quantum of AMP Expenditure to be considered for bench marking AMP, the Ld. DR relied upon the order of the TPO and submitted that the DRP ignored the fact that expenses i.e selling expenses are included in the AMP Expense of the AE which is taken as a base for the profits split. If selling and distribution expenses are to be excluded from the assessee's AMP Expense, the same should be excluded from the AMP Expenses of the AE. If only the selling and distribution expense of the assessee's are removed and not of the AE, the PSM (Profit Split Method) calculation will go wrong.

62. The Ld. AR submitted that the DRP has rightly directed TPO to verify the expenditure and exclude selling expenditure. The Ld. AR relied upon the Hon'ble Delhi High Court decision in case of Sony Ericsson (Supra) has also

directed for the exclusion for sales expenses. The Delhi Bench in assessee's own case vide order dated 3/5/2013 for AY 2006-07 to 2008-09 also directed for exclusion of sales related expenses. The Ld. AR further submitted that the Department is admitting that PSM Method is not workable for determining the ALP in relation to the alleged international transaction pertaining to rendition of brand building services. Thus, the Ld. AR submitted that on this account PSM deserved to be negative.

63. We have heard both the parties and perused all the relevant material available on record. Since, the issue of AMP is set aside to the file of the AO/TPO, Ground No. 2 of the Revenue's appeal become infructuous. Hence, Ground No. 2 is dismissed.

64. In result, ITA No. 1052/Del/2016 being Revenue's appeal for AY 2011-12 is dismissed.

**Order pronounced in the Open Court on 21<sup>st</sup> August, 2018.**

**Sd/-  
(R. K. PANDA)  
ACCOUNTANT MEMBER**

**Sd/-  
(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

Dated: 21/08/2018  
*R. Naheed \**

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	23.07.2018
Date on which the typed draft is placed before the dictating Member	23.07.2018
Date on which the typed draft is placed before the Other Member	23.07.2018
Date on which the approved draft comes to the Sr. PS/PS	21/08/2018
Date on which the fair order is placed before the Dictating Member for pronouncement	21/08/2018
Date on which the fair order comes back to the Sr. PS/PS	21/08/2018
Date on which the final order is uploaded on the website of ITAT	21/08/2018
Date on which the file goes to the Bench Clerk	21/08.2018
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	