$~41

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision : 5th February, 2019**

\+ **ITA 123/2019 & CM Nos.5324-25/2019**

COMMISSIONER OF INCOME TAX ..... Appellant
Through : Mr. Ashok K. Manchanda, Adv.

versus

SONY MOBILE COMMUNICATIONS ..... Respondent
Through : Mr. Nageswar Rao, Mr.Sandeep S. Karhail and Mr. Parth, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (ORAL)

1. The Revenue is aggrieved by a decision of the Income Tax Appellate Tribunal (hereafter referred as "ITAT") and impugns it in this appeal under Section 260A of the Income Tax Act, 1961 (hereafter referred as "Act"). It is urged that the ITAT fell into error in reversing the order of the Assessing Officer, who confirmed the transfer pricing analysis by the Transfer Pricing Officer (TPO) in respect of the respondent-assessee's international transactions reported for the assessment years.

2. The facts are that the assessee filed its income tax returns on 30.09.2008 declaring income at ₹53,95,06,079/-. This was processed u/s 143(1) dated 30.11.2008 as declared income. Later, notice under Section 143(2) dated 04.08.2009 and notice along with detailed questionnaire were issued on 02.08.2010 and duly served upon assessee, fixing the case for 25.08.2010. During the course of assessment proceeding, the case was

referred to TPO under Section 92CA for computation of the Arm's Length Price (hereafter referred as "ALP"). In the order dated 20.10.2011, under Section 92CA(3), the TPO proposed the ALP adjustments amounting to ₹69,94,95,650/-. The total income assessed was ₹1,35,25,96,901/-. The assessee filed an appeal before the ld. ITAT against the order passed by AO under Section 143(3)/144C of the Act who by order dated 30.08.2013 had decided the main issue of transfer pricing adjustment in relation to AMP expenses by setting it aside to the AO/TPO with specific directions based on the decision of the Special Bench of the Tribunal in the case of LG Electronics.

3. On the AMP issue, both the department and the assessee had preferred appeals before this court by ITA No. 155/ 2014 and 16/ 2014 respectively. This court's decision dated 16.03.2015 had set aside the matter of AMP to the ITAT to be decided on the principles outlined in the said order of the Court. As the matter of TP adjustment was pending before the ITAT, therefore, an order dated 30.03.2016 was passed under Section 254/143(3) read with Section 144C. Now, ITAT by order dated 26.07.2018 allowed the assessee's appeal with respect to Transfer Pricing adjustment which was remitted by this court to it on the AMP issue.

4. The Revenue questions the ITAT's impugned order as erroneous, submitting that the order of the Ld. ITAT is not acceptable because the impugned order seriously erred in holding that the TPO had accepted the comparables (adopted by the assessee) as bundled transaction and therefore, it would be illogical and improper to treat the AMP expenses as separate international transactions. It is urged, besides, by Mr.Ashok Manchanda, that the ITAT erred in not appreciating that the TPO had not accepted the assessee's adoption of TNMM as the most appropriate method. On the contrary, the TPO had used only the comparables selected by the assessee

for determining the excessive AMP spent as compared to that of the comparables applying the Bright Line Test (hereafter referred as "BLT") which was not approved by this court.

5. It is argued that the ITAT further seriously erred in accepting the assessee's new approach of treating the comparables as Bundled transaction under the TNMM, without giving the AO/TPO an opportunity of being heard or calling for a remand apart from TPO and thus failed in observing the principles of natural justice. Furthermore, the impugned order is erroneous in law in that it held that the assessee had not made or caused any value addition to the brand building of the AE, particularly when it was a little known brand in India in the mobile segment and it was not a simple case of brand maintenance held by it. It is submitted that the TPO has held that the expense incurred by the assessee is exclusively to promote the brand name/trade name 'Sony Ericsson' which is beneficially owned by the AE. The revenue argues that such expenditure has resulted into brand building and increased awareness of the products bearing the brand/trade name 'Sony Ericsson'. The expenditure incurred by the assessee-company is for the advantage of its AE and the assessee-company should have been suitably compensated by the AE. The TPO had found that the assessee-company has not been compensated at all by the AE, for its efforts in developing the local marketing intangible for which the assessee had incurred huge sum of ₹115.72 crores, drawing support from the provisions of Section 92F(v) of the Act, the TPO proceeded by treating this to be international transaction.

6. Learned counsel cited *Sony Ericsson Mobile Communications India (P) Ltd v Commissioner of Income Tax*, (2015) 374 ITR 118 (Del) and urged that this court had expressly disapproved the BLT and as a consequence, the ITAT should have not accepted the TPO's analysis and

the filters applied to determine comparable transactions of third party entities.

7. To determine the ALP of the international transaction of promoting the trade name/trade mark which is beneficially owned by the AE, the TPO issued show-cause notice to the assessee. The assessee filed detailed reply to the show-cause notice issued by the TPO. After considering the reply of the assessee, the TPO was of the opinion that the onus which was on the assessee to benchmark the international transaction relating to the expenditure incurred on AMP and receipt of compensation/reimbursement has not been discharged. The AO proceeded to benchmark the impugned international transaction.

8. The TPO determined the ratio of AMP/sales at 7.06 per cent and compared the same by adopting Bright Line Test in the case of comparables, which, according to the TPO was at 1.08 per cent. Comparing the ratio of AMP/sales in the case of the assessee with Bright Line the TPO found that the assessee has incurred excess expenditure of ₹98.02 crores. The TPO was of the strong belief that such excess of Bright Line limit should have been compensated by the AE and since the assessee has not been compensated by its AE, the TPO proposed to determine the ALP of the impugned international transaction at ₹98,02,37,631. Further, the TPO held that independent entities would not incur expenditure for promoting the trade names owned by some third party and, therefore, would have been remunerated for such efforts. A mark-up of 15 per cent on cost incurred by the independent party would be reasonable and applying the same, the TPO computed the adjustment at ₹1,12,72,73,275.

9. This court, in the main judgment in *Sony Ericsson* (supra) set aside the ALP adjustment, disapproving the Bright Line test. It was held that:

"127. We agree and accept the position in the portion reproduced above in bold and italics. The object and purpose of TP adjustment is to ensure that the controlled taxpayers are given tax parity with uncontrolled taxpayers by determining their true taxable income. There should be adequate and proper compensation for the functions performed including AMP expenses. Thus, we disagree with the Revenue and do not accept the overbearing and orotund submission that the exercise to separate 'routine' and 'non-routine' AMP or brand building exercise by applying 'Bright Line Test' of non-comparables and in all cases, costs or compensation paid for AMP expenses would be 'NIL', or at best would mean the amount or compensation expressly paid for AMP expenses. Unhesitatingly, we add that in a specific case this criteria and even zero attribution could be possible but facts should so reveal and require. To this extent, we would disagree with the majority decision in L.G. Electronics India (P) Ltd. (supra)."

The rejection of the Bright Line Test, the court recorded its findings as under :

"(i) In case of a distributor and marketing AE, the first step in transfer pricing is to ascertain and conduct detailed functional analysis, which would include AMP function expenses

(ii) The second step mandates ascertainment of comparables or comparable analysis. This would have reference to the method adopted which matches the functions and obligations performed by the tested party including AMP expenses.

(iii) A comparable is acceptable, if based upon comparison of conditions a controlled transaction is similar with the conditions in the transactions between independent enterprises. In other words, the economically relevant characteristics of the two transactions being compared must be sufficiently comparable. This entails and implies that difference, if any, between controlled and uncontrolled transaction, should not materially affect the conditions being examined given the methodology being adopted for determining the price or the margin. When this is not possible, it should be ascertained whether reasonably accurate adjustments can be made to eliminate the effect of such differences on the price or margin. Thus, identification of the potential comparables is the key to the TP

analysis. As a sequitur, it follows that the choice of the most appropriate method would be dependent upon availability of potential comparable keeping in mind the comparability analysis including befitting adjustments which may be required. As the degree of the comparability increases, extent of potential differences which would render the analysis inaccurate necessarily decreases.

(iv) The assessee, i.e. the domestic AE must be compensated for the AMP expenses by the foreign AE. Such compensation may be included or subsumed in low purchase price or by not charging or charging lower royalty. Direct compensation can also be paid. The method selected and comparability analysis should be appropriated and reliable so as to include the AMP functions and costs.

(v) Where the AO/TPO accepts the comparables adopted by the assessee, with or without making adjustments, as a bundled transaction, it would be illogical and improper to treat AMP expenses as a separate international transaction, for the simple reason that if the functions performed by the tested parties and the comparables match, with or without adjustments, AMP expenses are duly accounted for. It would be incongruous to accept the comparables and determine or accept the transfer price and still segregate AMP expenses as an international transaction.

(vi) The AO/TPO can reject a method selected by the assessee for several reasons including want of reliability in the factual matrix or lack/non-availability of comparables. [see s. 92C(3) of the Act].

(vii) When the AO/TPO rejects the method adopted by the assessee, he is entitled to select the most appropriate method, and undertake comparability analysis. Selection of the method and comparables should be as per the command and directive of the Act and Rules and justified by giving reasons.

(viii) Distribution and marketing are interconnected and intertwined functions. Bunching of inter-connected and continuous transactions is permissible, provided the said transactions can be evaluated and adequately compared on aggregate basis. This would depend on the method adopted and comparability analysis and the most reliable means of determining ALP.

(ix) To assert and profess that brand building as equivalent or substantial attribute of advertisement and sale promotion "would be largely incorrect. It represents a co-ordinated synergetic impact

created by assortment largely representing reputation and quality. 'Brand' has reference to a name, trademark or trade name and like 'goodwill' is a value of attraction to customers arising from name and a reputation for skill, integrity, efficient business management or efficient service. Brand creation and value, therefore, depends upon a great number of facts relevant for a particular business. It reflects the reputation which the proprietor of the brand has gathered over a passage or period of time in the form of widespread popularity and universal approval and acceptance in the eyes of the customer. Brand value depends upon the nature and quality of goods and services sold or dealt with. Quality control being the most important element, which can mar or enhance the value.

(x) Parameters specified in para 17.4 of the order dt. 23rd Jan., 2013 in the case of L.G. Electronics India (P) Ltd. (supra) are not binding on the assessee or the Revenue. The 'Bright Line Test' has no statutory mandate and a broad-brush approach is not mandated or prescribed. We disagree with the Revenue and do not accept the overbearing and orotund submission that the exercise to separate 'routine' and 'non-routine' AMP or brand building exercise by applying 'Bright Line Test' of non-comparables should be sanctioned and in all cases, costs or compensation paid for AMP expenses would be 'NIL', or at best would mean the amount or compensation expressly paid for AMP expenses. It would be conspicuously wrong and incorrect to treat the segregated transactional value as 'NIL' when in fact the two AEs had treated the international transactions as a package or a single one and contribution is attributed to the aggregate package. Unhesitatingly, we add that in a specific case this criteria and even zero attribution could be possible, but facts should so reveal and require. To this extent, we would disagree with the majority decision in L.G. Electronics India (P) Ltd. (supra). This would be necessary when the ALP of the controlled transaction cannot be adequately or reliably determined without segmentation of AMP expenses.

(xi) The AO/TPO for good and sufficient reasons can debundle interconnected transactions, i.e. segregate distribution, marketing or AMP transactions. This may be necessary when bundled transactions cannot be adequately compared on aggregate basis.

(xii) When segmentation or segregation of a bundled transaction is required, the question of set off and apportionment must be examined realistically and with a pragmatic approach. Transfer

pricing is an income allocating exercise to prevent artificial shifting of net incomes of controlled taxpayers and to place them on parity with uncontrolled, unrelated taxpayers. The exercise undertaken should not result in over or double taxation. Thus, the AO/TPO can segregate AMP expenses as an independent international transaction, but only after elucidating grounds and reasons for not accepting the bunching adopted by the assessee, and examining and giving benefit of set off. Sec. 92(3) does not bar or prohibit set off.

(xiii) CPM is a recognised and accepted method under Indian TP regulation. It can be applied by the AO/TPO in case AMP expenses are treated as a separate international transaction, provided CPM is the most appropriate and reliable method. Adoption of CPM and computation of cost and gross profit margin comparable must be justified.

(xiv) The object and purpose of TP adjustment is to ensure that the controlled taxpayers are given tax parity with uncontrolled taxpayers by determining their true taxable income. Costs or expenses incurred for services provided or in respect of property transferred, when made subject-matter of ALP by applying CPM, cannot be again factored or included as a part of interconnected international transaction and subjected to arm's length pricing."

10. The ITAT held that the directions of this court have to be complied with on a factual analysis of each case, and held as follows, in the impugned order:

"19. Keeping in mind the aforesaid findings of the Hon'ble High Court of Delhi, we find that the assessee-company is engaged in the distribution of mobile handsets in India. As part of this activity the company undertakes marketing and post-sales support for the mobile handsets. The AEs, on the other hand, are engaged in new product development, complex manufacturing and core marketing assuming all the businesses and entrepreneurial risks.

20. The AEs undertake complex R&D operations relating to the products. They are responsible for ensuring that the products are technologically in line with the market requirements and trends. The AEs are responsible for manufacturing the products that are sold across the globe. They are responsible for quality control, production scheduling, vendor development, inventory

management, supply chain management, packaging etc. We further find that the AEs own brand rights of all the products and are responsible for core marketing and pricing decisions of the products. The AEs are also responsible for undertaking global sales and distribution function. The AEs shall also provide marketing and product related information to the assessee like brochures, technical information material, etc. to enable the assessee to perform its functions in an efficient manner.

21. We find that the functions performed by the assessee are as follows :

(i) local marketing of mobile phones;

(ii) distribution of mobile phones/technology products; and

(iii) provision of repair and maintenance services.

22. These functions can be elaborately understood as under : SEIN has employed a team of employees for carrying out local marketing of mobile phones in India. The global recognition of brand name of Sony Ericsson provides good brand equity in India as well as overseas, this also provides support to SEIN's marketing efforts. SEIN also undertakes various product promotion activities such as conducting road shows, participation in industry events, advertising in all forums of media channels, which include magazines, newspaper, television, radio etc. Some of the activities undertaken by the team include :

(a) determining both the long-term as well as short-term business development policies in relation to the India market,

(b) framing and implementing market penetration, future growth etc. strategies for the Indian market,

(c) ensuring customer satisfaction in India.

23. The overall marketing strategy is developed by the AEs as they have the requisite experience for undertaking this activity. Based on the broad guidelines provided by the AEs, SEIN develops the local advertising and marketing initiatives.

Distribution of Mobile phones/technology products

24. Since the mobile handsets and accessories purchased by SEIN are sold through distributors in India, SEIN is responsible

for developing and maintaining dealer network. The Indian entity is responsible for identifying and selecting dealers, negotiating terms with them, providing product information to dealers etc. It also undertakes routine functions like credit appraisals, order processing, warehousing of products, inventory management, logistic management, receivables management etc.

25. The sales team is responsible for promotion and sale of products in India. It also looks into maximizing its customer base by acquiring more customers and retaining its old customers. The Indian entity purchases high-end mobile phones from its AEs. For low-end mobile phones, the AEs have appointed a contract manufacturer in India for manufacturing low-end mobile phones and selling the same to SEIN at negotiated rates. Further, as per the transfer pricing model, pricing of products between SEIN and its AEs contract manufacturer is regulated in a manner that ensures that SEIN earns an arm's length return with respect to the distribution activity. The price is adjusted according to the price level development in the market, and operating cost changes in SEIN. Therefore, based on the price level development in the market, if at the year-end SEIN is not able to achieve arm's length return with respect to its distribution activity, then as per the transfer pricing model receives credit notes from its AEs to achieve an arm's length return on sales. Based on the above model followed by SEIN, it is able to achieve an arm's length margin after considering all total operating cost.

26. Based on the above guidance and facts as enunciated above, it is evident that the compensation model of the assessee is structured in such a manner that the reimbursement of any excess third party expenses is already in-built in the TP adjustment compensation received by SEIN which allows it to consistently earn an operating margin which is higher than the comparables.

Provision of post-sales support services

27. Prior to SEIN starting its operations in India, the AEs were selling mobile phones directly into India and for rendering warranty support services, they had engaged third party providers. In its initial period of operations, SEIN neither had the necessary set up nor developer processes for providing warranty services to its customers. Accordingly, its AEs provided

such post-sales support to SEIN by subcontracting the warranty support services to third service providers and subsequently charged the cost to SEIN without any mark-up. However, once the necessary processes were developed by SEIN for provision of warranty support services, it discontinued the availment of services from the AEs and directly provided such services to its customers. SEIN entered into contracts with third party service pro-B for provision of repair and maintenance services for the mobile phones sold by it and under warranty. Subsequently, the AEs terminated the contract with the third party, service for warranty services and entered into a contract with SEIN for providing warranty support services to the customers of AEs. SEIN provided such support services to its AEs during the last quarters of the Financial Year and costs incurred by SEIN towards such third party services provider was reimbursed by its AEs on cost to cost basis.

General Management Functions

28. The functions addressed below are common functions that are carried out by any business irrespective of their size and type. These functions are the drivers of every business and are indispensable in the economic environment.

Corporate strategy determination:

29. Generally, all local policies within SEIN are determined by its own management who continuously monitor the economic environment surrounding the company, assess their strategic position within the industry and target to achieve the broad group objectives.

Finance, accounting, treasury and legal function:

30. SEIN is responsible for managing the finance, treasury, legal and accounting functions. In certain areas, wherever necessary, SEIN is guided by the group policies. SEIN is also responsible for all local statutory compliance's.

Human resource ('HR') management function:

31. The HR function is co-ordinated by its management, which is responsible for recruitment, development and training of the personnel including the emolument structure. In this respect,

where appropriate, this function is guided by the group policies. However, AEs take all long-term strategic decisions relating to the Sony Ericsson products.

32. Having considered the respective functions of the AE and the assessee-company, we find that insofar as comparables are considered, there is no quarrel. There is no dispute that TNMM is the most appropriate method and the assessee's net margin is at 2.5 per cent whereas the mean margin of comparable companies is at 0.4 per cent. As mentioned elsewhere, during the course of assessment proceedings, the assessee has undertaken a fresh search for comparables indentifying a set of 19 comparable with average margin of 0.48 per cent. In addition, the assessee has also furnished a margin of 12 comparables identified by the TPO for BLT computation where average margin works out to minus 0.35 per cent.

33. From the above, it can be safely concluded that the assessee earned margin of 2.5 per cent after considering AMP expenditure which is much higher than the average margin of comparables. Moreover, as mentioned elsewhere, AE has assured that the assessee-company earns net margin of at least 2 per cent on its sales and remunerates it for any shortfall in margins by way of credit notes. During the year, the assessee-company has received two credit notes totalling to Rs. 73.83 crores which were adjusted against purchases in financial statements since the same were received to cover up for short fall in margin under TNMM for transaction of purchase of goods.

34. Para 6.37 of the OECDs Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, Edition 2010 suggests that:

"Where the marketer/distributor acts as an agent of a principal which supplies goods, it will normally be sufficient to compensate the distributor with a service fee and not provide it with a return on marketing intangibles. TPG paragraph suggests that where the distributor bears the cost of marketing activities, whether it should be compensated with a return on any intangibles created through such expenditures will turn on the contractual rights of the parties. The paragraph also indicates that there may be a difference between long-term and short-term relationships. Finally, it indicates that where the distributor

bears 'extraordinary' marketing expenditures, beyond those a comparable independent distributor with similar rights might incur for its own benefit, it may be entitled to a return on intangibles. Paragraph 6.38 finally suggests that such a return might be provided by means of a purchase price reduction or a reduction in applicable royalty rates. TPG para 6.39 indicates that even if one can determine that a marketer/distributor are entitled to a return on the marketing intangibles, determination of the appropriate return is a very difficult matter. That paragraph provides little specific guidance for measuring the appropriate returns, other than suggesting that the actual conduct of the parties over a period of years may be relevant."

35. From the above guidelines, even the OECD suggests that it will be sufficient to compensate the distributor with a service fee and not provide it with a return on marketing intangibles. It is further suggested that where the distributor bears the cost of marketing activity, whether it should be compensated with, a return on any intangible created through such expenditures will turn on the contractual rights of the parties. Elsewhere we have mentioned the functions of the assessee-company and the AE. In our considered opinion, it is merely a presumption that the assessee has incurred some extraordinary expense in excess of the normal routine expenses and should have been compensated by the AE. As mentioned elsewhere, the assessee has spent advertisement expenses at Rs. 66,05,56,778 business promotion and selling expenses at Rs. 49,66,58,381 totalling to Rs. 1,15,72,15,159.

36. We do not find any force in the findings of the lower authorities that the abovesaid expenditure on AMP has been incurred exclusively to promote the brand/trade name 'Sony Ericsson' and such expenditure has resulted into brand building and increased awareness of the products bearing brand/trade name 'Sony Ericsson' and also that such expenditure incurred by the assessee-company is for the advantage of its AE.

37. "Brand" means unique design, sign, symbol, words, or a combination of these, employed in creating an image that identifies a product and differentiates it from its competitors. Over the time, this image becomes associated with a level of credibility, quality, and satisfaction in the consumer's mind.

Thus, brands help harried consumers in crowded and complex marketplace, by standing for certain benefits and value.

38. As mentioned elsewhere, the assessee's AEs are engaged in designing and developing new technology and products for mobile communication and over the years have successfully developed several new products and technologies. The AEs are responsible for core marketing and pricing decisions of the products. Also, the AEs are responsible for undertaking the global sales and distribution functions. Therefore, in our opinion, by incurring advertisement expenses in the domestic market, the assessee could not have done any value addition to the brand name of the AE.

39. Advertisement expenditure incurred by the assessee-company could not have added any value to the brand Sony Ericsson owned by the AE. Since this is the first year of business in India, the assessee had to advertise aggressively but could not be considered as expenditure incurred for brand building. At the most, the same can be considered as having been incurred for brand maintenance. As the saying goes "Public memory is very short", such companies have to hit the public eyes through advertisements via print media or electronic media or any other mode of advertisement because, again as the saying goes "Out of sight, out of mind". Sony Ericsson being a new entrant in the mobile segment in the year under consideration, the assessee had to incur advertisement expenses to remind the general public of its existence in the domestic market. In our considered view, such advertisement expenses cannot be considered as being incurred towards brand building. As mentioned elsewhere, the AEs own brand rights of all products and are responsible for core marketing and pricing decisions of the products and are also responsible for undertaking global sales and distribution function.

40. "Marketing" means the management process through which goods and services move from concept to the customer. It includes the coordination of four elements :

(i) identification, selection and development of a product,

(ii) determination of its price,

(iii) selection of a distribution channel to reach the customer's place, and

(iv) development and implementation of a promotional strategy.

41. Items 1, 2 and 4 mentioned here-in-above are not applicable in the case of the assessee-company. Further, marketing is based on thinking about the business in terms of customer needs and their satisfaction. Marketing differs from selling because "selling concerns itself with the tricks and techniques of getting people to exchange their cash for your product. It is not concerned with the values that the exchange is all about. And it does not, as marketing invariably does, view the entire business process as consisting of a tightly integrated effort to discover, create, arouse and satisfy customer needs." In other words, marketing has less to do with getting customers to pay for your product as it does developing a demand for that product and fulfilling the customer's needs.

42. In the light of the aforesaid definition, the assessee has employed a team of employees for carrying out local marketing of mobile phones in India. Global recognition of the brand name "Sony Ericsson" provides support to the assessee-company in its marketing effort. The assessee has also undertaken various product promotion activities, such as, conducting road shows, participating in industry events, advertisement in all forms of media channels, etc.

43. Advertisement means a means of communication with the users of a product or service. Advertisements are messages paid for by those who send them and are intended to inform or influence people who receive them.

44. "Business promotion expenses" means all expenses incurred in respect of promotion of business. Though, all expenses relating to the advertisement and publicity also help to promote the sales of a business firm but there are so many expenditures which are not advertisement expenses even then they play very important role in maintaining the prestige of the business firm. For example :

(a) Refreshment expenses for business clients.

(b) Gifts to the business clients on certain events.

(c) To sell the goods to the clients at special discount for their personal use etc.

45. Though, these expenses can be booked in advertisement and publicity expenses account but to have the idea of actual expenditures on these types of expenses, a separate head as 'Business promotion expenses' or 'sales promotion expenses' or 'expenses with business clients' is created.

46. Testing the functions performed by the assessee vis-à-vis AMP expenses incurred by it, we do not find that the assessee has incurred AMP expenses for the benefit of its AE. All the expenditures incurred by the assessee are in relation to its business and its promotion. Moreover, as mentioned elsewhere, the net margin is much higher than the comparables and looking from that angle also, we do not find any merit in the TP adjustments. It is incorrect to say that the amount of Rs. 73.83 crores received by the assessee by way of credit notes represents the excess price charged by AE which has been credited to the assessee. The business model of the assessee with its AE is such that the AE ensures that the assessee achieves an arms' length return on sales made by it.

47. Assuming, yet not accepting that the assessee should have been compensated by its AE towards AMP and such compensation as worked out by the TPO is Rs. 69.94 crores, then also no adjustment is required since the assessee has received credit notes worth Rs. 74.83 crores and has been suitably compensated.

48. If the AMP expenses are considered as an independent transaction and combined transaction approach is not considered, then also excessive profit derived by benchmarking of distribution segment should be adjusted with alleged excessive AMP expenditure thereby providing benefit of set off. This view finds support from the judgment of the Hon'ble High Court of Delhi in its findings at cl. xii at p. 140 in Tax Appeal Nos. 16 of 2014 at paras 136 to 146.

49. But this will only be considered when the AO/TPO has rejected the comparables adopted by the assessee as a bundled transaction. In the case in hand, and as mentioned elsewhere, the AO/TPO has accepted the comparables adopted by the assessee as bundled transaction and, therefore, it would be illogical and

improper to treat the AMP expenses as separate international transaction as mentioned by the Hon'ble High Court in its list of findings at cl. (v) at p. 138 of its order.

50. To sum up, considering the guidelines/findings of the Hon'ble High Court of Delhi (supra) and considering the facts of the case in hand from all possible angles, we are of the considered view that the assessee-company has been suitably compensated by its AEs and, therefore, no further adjustment is required. We order accordingly.

51. Before closing, the dispute that AMP expenses are not international transaction has been settled by the Hon'ble Delhi High Court in the afore-mentioned judgment at para 52 wherein the Hon'ble High Court has rejected this contention. In the result, the appeal of the assessee in ITA No. 6410/Del/2012 is allowed."

11. The Revenue's only argument is that for determining the comparables, ITAT relied on the TP analysis conducted by the TPO and that such an exercise was based on application of the "bright line" test, which has since been discarded. The allied submission is that the ITAT should have remitted the entire matter for fresh consideration by the TPO.

12. Having gone through the entire record, the court is of the opinion that the revenue's arguments are insubstantial and unmerited. There is no *per se* rule that in every case, the ITAT had to necessarily remit each matter. Given that the materials in the form of reports and documents were available with the ITAT, that the tribunal itself carried out the analysis, based on the record, of the facts which were disclosed before the TPO, does not result in any credence to the revenue's complaint that it was not given sufficient opportunity. This court notices that the matters were required to be re-examined by the ITAT itself in *Sony Ericsson,* and in view of the further circumstance that the remit was pending for 3 years, the revenue's arguments have no force.

13. On the second issue, i.e. that the AMP exercise is flawed, this court again feels that the analysis carried out by the ITAT, having regard to the details pertaining to the comparable entities, is fairly exhaustive and reasonable; the findings are in Paras 39-49 of the impugned order. The ITAT's findings, consequently that since the brand under which the assessee's products were marketed were relatively unknown in India, the advertisement expenditure could not have been said to inure to the benefit of the AE, which was otherwise a well known brand overseas. Similarly, the nature of its marketing and business expenditure was considered. The revenue's grouse that the TPO had treated the AMP expenditure as a bundled one, is not also tenable. *Sony Ericsson* itself indicates that there cannot be a dogmatic approach as to whether bundled transactions of the kind ought to be segregated and that the entire issue is a fact dependent exercise. The TPO treated the transactions as a bundled one; this court holds that as such that is not a question of law. Lastly, both on the credit notes as well as the fact that in the case of comparables, the margins were in fact lower; the ITAT therefore, correctly, in the opinion of this court recorded its findings that the assessee had been suitably compensated by its AEs.

14. For the foregoing reasons, this court holds that there is no substantial question of law; the appeal is therefore dismissed, but without order on costs.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

FEBRUARY 05, 2019