

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-2 : NEW DELHI

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

ITA Nos.1365, 1379/Del/2018 & 2366/Del/2019
Assessment Years: 2012-13, 2013-14 & 2014-15

Pernod Ricard India Pvt. Ltd.,
Sudeep Rastogi, Vice President-
Taxation,
Pernod Richard India Pvt. Ltd.,
15th Floor, Building No.8C, DLF
Cyber City, DLF Phase-2,
Gurgaon.

Vs DCIT,
Central Circle-31,
New Delhi.

PAN: AAACS4781P

ITA Nos.1607, 1608/Del/2018 & 2601/Del/2019
Assessment Years: 2012-13, 2013-14 & 2014-15

DCIT,
Central Circle-31,
New Delhi.

Vs. Pernod Ricard India Pvt. Ltd.,
Sudeep Rastogi, Vice President-
Taxation,
Pernod Richard India Pvt. Ltd.,
15th Floor, Building No.8C, DLF
Cyber City, DLF Phase-2,
Gurgaon.

PAN: AAACS4781P

(Appellant)

(Respondent)

Assessee by : Shri Deepak Chopra, Advocate
Revenue by : H.K. Choudhary, CIT, DR

Date of Hearing : 12.03.2020
Date of Pronouncement : 15.05.2020

ORDER

PER R.K. PANDA, AM:

ITA No.1365/Del/2018 and ITA No.1607/Del/2018 are cross appeals and are directed against the order dated 28th December, 2017 of the CIT(A)-42, New Delhi, relating to A.Y. 2012-13. ITA No.1379/Del/2018 and ITA No.1608/Del/2018 are cross appeals and are directed against the order dated 29th December, 2017 of the CIT(A)-31, New Delhi for A.Y. 2013-14. ITA No.2366/Del/2019 and 2601/Del/2019 are cross appeals and are directed against the order dated 20th December, 2018 of the CIT(A)-44, New Delhi, relating to A.Y. 2014-15. Since common issues are involved in all these appeals, therefore, these were heard together and are being disposed of by this common order.

2. First we take up ITA No.1365/Del/2018 and ITA No.1607/Del/2018 as the lead case. Facts of the case, in brief, are that the assessee is a company engaged in the business of manufacture and trading of Indian made foreign liquor (IMFL). It filed its return of income on 29.11.2012 declaring the total income of Rs.872,20,37,142/-. This return was revised on 12th February, 2014 declaring the total income of Rs.857,14,19,260/-. Since the assessee had entered into certain international transactions, the AO made a reference u/s 92CA(1) to the TPO for determination of the ALP of the international transaction entered into by the assessee. The TPO, during the course of TP assessment proceedings observed that the assessee has entered into the following international transactions:-

S.No.	Description of the transaction	Amount (Rs.)
1.	Purchase of raw material	1,25,60,30,478
2.	Purchase of finished goods	34,25,70,563
3.	Provision of marketing support services	2,59,13,808
4.	Sale of finished goods	12,10,661
5.	Purchased of fixed assets	58,49,199
6.	Business Performance Guarantee	31,76,79,386
7.	Recovery of expenses	53,89,99,662
8.	Cost recharge from group companies	40,10,19,164

2.1 He further noted that the assessee has incurred the following AMP expenditure:-

	Manufacturing AMP/Sales	Distribution AMP/Sales
AMP for Brand Building	252,56,36,959	62,23,54,505 (Business Performance guarantee to be considered separately later)
Sales	5817,27,62,394	120,28,82,740
AMP/Sales	4.34%	51.7%

3. According to the TPO, the above AMP expenditure has been incurred primarily for building different brands. He noted that the AMP expenditure incurred by the assessee in relation to two segments is substantial in relation to the sales in the two segments. It was submitted by the assessee that it did not own any of the brands which were being sold by it in India except Master Blend and Nine Hills. He observed that brands under which the assessee manufactures IMFL and distributes BIO are all owned by the AEs of the assessee. Further, the advertisement campaign of the assessee shows that the assessee was promoting the brands in its advertisement and not the actual products. He, therefore, was of

the opinion that the AMP expenditure of the assessee had a direct bearing on the promotion of brands of its AEs. He, therefore, issued a show cause notice asking the assessee to explain as to why the AMP expenditure in the distribution segment should not be treated as an international transaction. Rejecting various explanations given by the assessee and relying on various decisions, the TPO proposed an upward adjustment of Rs.5,03,33,013/- in the distribution segment, the details of which are as under:-

5. Now, for rendering the marketing support function, the assessee would be entitled to the remuneration at comparable rates considering the average margins being earned in this segment. In this regard, the average OP/OC margin in the MSS segment is as follows based on a broad search carried out by this office:

S.No.	Company Name	OP/OC(%)
1.	Concept Communication Ltd,	4.00
2.	Cyber Media (India) Ltd.	7.96
3.	Just Dial Ltd.	28.86
4.	Killick Agencies & Mktg. Ltd.	8.96
5.	Marketing Consultants & Agencies Ltd.	10.53
	Average	12.06

5.1 Thus, applying the return of 12.06% on the assessee's Operating Costs, the reimbursement for AMP segment works out as follows:

AMP Expense	622354505
Arm's length price at a margin of 12.06%	697410458.3
AMP Compensation worked out as Actual in the	511886580.4
<i>Proposed adjustment u/s 92CA</i>	<i>1855,23,878</i>
5% of International Transaction	255,94,329

6. Thus, an upward adjustment of Rs. 18,55,23,878/- is worked out in relation to the AMP expense. It is noted that the assessee has received an overall business performance guarantee sum of Rs. 31,76,79,386/-. Your AMP expense as a percentage of total operating expense works out to 42%. Thus, 42% of this BPG amount is taken as compensation that you have already

received in this regard for carrying out the AMP function. This works out to Rs. 13,51,90,865/-. After granting such set-off, the balance amount of Rs. 5,03,33,013/- is proposed as upward adjustment in your case in relation to the AMP function performed by you for promoting the brands owned by your AE. Accordingly, the Assessing Officer may proceed to make an upward adjustment of Rs.5,03,33,013/- in relation to the AMP expense in the Distribution segment of the assessee.

4. Similarly, the TPO in the manufacturing segment proposed an adjustment of Rs.57,83,00,000/-, the details of which are as under:-

The assessee's contentions have been duly considered. It is noted that as per the assessee's own submissions, Royal Stag, Imperial Blue, Something Special, Nine Hills Wine and Master Blend are sold exclusively in India. Blenders Pride, 100 Pipers, Fuel Vodka, Havana, Oaken Glow and Passport have sales outside India as per the assessee's submissions.

The contention of the assessee in relation to the AMP expenses that pertain to the brands whose sales happen exclusively in India is reasonable and is being permitted. However, there is no doubt that the benefit of enhanced brand value inures to the sole benefit of the legal owner i.e. the parent AE. Therefore, it is the considered view of this office that in the event of alienation of these brands by the legal owner, the assessee must be commensurately compensated for the function performed by it leading to the creation of valuable marketing intangibles in relation to these brands.

There are other brands legally owned by the parent AE including Blenders Pride whose sales also happen outside India. In case of such brands, it is the view of the undersigned that it is not possible to accurately delineate how much of the benefit of the assessee's AMP expense flows to the assessee and how much flows to the AE as the said brands are sold outside India as well. One of the many ways to apportion the benefit flowing from such AMP expenditure is to divide it in the proportion of sales. Since relevant data is not available on record the undersigned has taken a reasoned stand that in relation to AMP expenses pertaining to the brands which have sales outside India, the AMP expenditure must be borne equally by the assessee as well as the AE. Hence the AMP expense in relation to these brands is split 50:50 between the AE and the assessee.

14. Methodology

The brand-wise AMP expenditure is given below:

Blenders Pride	746,149,688	74.61
Imperial Blue	334,742,520	33.47
Royal Stag	990,919,226	99.09
Master Blend	17,329,321	1.73
Something Special	1,138,848	0.11
Nine Hills	24,991,341	2.50
100 Pipers	285,962,760	28.60
Fuel Vodka	70,834,394	7.08
Havana	25,583,848	2.56
Oaken Glow	11,908,925	1.19
Passport	16,076,088	1.61
Grand Total	2,525,636,959	252.56

The AMP expense in relation to brands having sales outside India is Rs.115.65 crores. 50% of the same works out to Rs.57.83 crores.

5. The AO, in the order passed u/s 143(3) r.w. section 143C(13) of the Act dated 26th February, 2016, made the above proposed addition. The assessee did not object to such order of the AO before the DRP, but, submitted that it will file appeal before the CIT(A) after final assessment order. The AO, in the final assessment order accordingly made T.P. addition of Rs.62,86,33,013/- which includes Rs.5,03,33,013 in the distribution segment and Rs.57,83,00,000/- in the manufacturing segment.

6. The AO, in the final assessment order also made addition of Rs.6,32,58,960/- on account of provision for transit breakage, Rs.50,38,72,290/- on account of brand expenses and Rs.63,24,54,323/- u/s 40a(ia) for non-deduction of tax from reimbursement of trade scheme to promoters. Thus, the AO determined the total income of the assessee at Rs.1039,96,37,846/-.

7. In appeal, the Id.CIT(A) held that the AMP expenditure is not an international transaction in the absence of sufficient evidence towards understanding, arrangement or action in concert in the case of manufacturing segment. He was of the opinion that the high scale of AMP expenditure year on year basis *per se* cannot be the yardstick to hold it as international transaction. According to him it can be the starting point to investigate, but, it cannot be taken as the evidence in itself. While holding so, he also noted that the ITAT in assessee's own case for A.Y. 2005-06 has held that no adjustment was warranted on account of AMP expenditure. He accordingly deleted the AMP expenditure added by the AO/TPO in the manufacturing segment amounting to Rs.57,83,00,000/-.

8. So far as the upward adjustment of Rs.5,03,33,613/- by the AO/TPO in the distribution segment is concerned, the Id.CIT(A) upheld the order of the TPO to the extent of existence of international transaction after placing reliance on the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. reported in 374 ITR 118. He considered the amount of Rs.31,76,79,386/- received by the assessee as business performance guarantee under the distribution segment to be the international transaction for AMP purposes. However, given that the TPO had used BLT to come to the conclusion that there existed an international transaction on account of AMP expenditure, the Id.CIT(A) disregarded his methodology while following the

decision of the Hon'ble Delhi High Court in the case of Maruti Suzuki Pvt. Ltd. vs. CIT, 381ITR 117. He noted that the TPO's methodology was incorrect since there was no justification provided by the TPO to debundle the transaction of AMP expenditure from the remaining distribution segment and the TPO had not segregated the routine and non-routine AMP expenditure. He observed that the comparable analysis carried out by the TPO using marketing support companies was without any basis and, in that manner, he eventually rejected the methodology applied by the TPO. Thereafter, the CIT(A) applied identical methodology for the manufacturing segment by using BLT to benchmark the international transaction of BPG and purchase of finished goods. However, since using such method of transaction was found to be at arm's length, no adjustment was directed by the CIT(A). The relevant observation of the Id.CIT(A) at para 5.77 to 5.79 read as under:-

5.77. The AO and the appellant were asked to submit the working of AMP intensity adjustment in this case for distribution segment exactly in line with the adjustment carried out for AY 2013-14 and 2014-15 which included steps a) to identify the excess intensity of AMP expenditure incurred by the appellant vis-a- vis the comparables b) to increase the expenditure incurred by the comparables in order to equalize the intensities c) the average profit margins returned by entities providing market support functions as identified above to be used for mark-up on the enhanced cost base of the comparables.

5.78 The copy of the remand report of the AO was received on 22/12/2017 and the same was served on the assessee on the same date. The TPO, further, submitted the details in this regard vide letter dated 27.12.2017. Further, the appellant also submitted details of AMP intensity adjustment vide email dated 22/12/2017. The AMP adjustment as worked out by the AO is as under:-

Adjustment for Distribution Segment (Amount (in Rs.))	
Operating revenue of the	1,20,28,82,740
Operating cost of the	1,14,47,65,561
Operating Profit	5,81,17,179
Arm's Length OP/ OR	4.83%
Arm's Length profit	5,80,99,236
Diff. between the ALP and reported margin	-17,943
international transaction	342570563
Proportionate Adjustment	(5,369)
5% of international transatransactions	1,71,28,528 1

* the above calculation does not include M/s. Delhi Duty Free Services Pvt. Ltd. because of non-availability of data.

5.79 In view of the above discussion, the ground of appeal is allowed because the AMP intensity adjustment for distribution segment has been found to be at Rs. Nil.

9. So far as the addition of Rs.6,32,58,960 on account of provision for transit breakage is concerned, the ld.CIT(A) partly allowed the ground raised by the assessee by directing the AO to allow the actual transit breakage for the impugned assessment year in the light of the decision of the Hon'ble Delhi High Court in the case of *Seagram Manufacturing Pvt. Ltd., reported in 378 ITR 581* which has subsequently been affirmed by the Hon'ble Apex Court vide CC No.12104 of 2016, order dated 11th July, 2017.

10. So far as the disallowance of Rs.50,38,72,290/- being 20% of brand building expenses of Rs.251,93,611,449/- is concerned, the ld.CIT(A), following the order of the Tribunal in assessee's own case for A.Y. 2004-05 and 2005-06, deleted the addition.

11. So far as the disallowance of reimbursement of trade scheme to promoters amounting to Rs.63,24,54,323/- u/s 40a(ia) for non-deduction of tax u/s 194H is concerned, he dismissed the same for non-deduction of tax by the assessee.

12. Aggrieved with such part relief granted by the CIT(A), the assessee as well as the Revenue are in appeal before the Tribunal by raising the following grounds:-

Assessee's grounds of appeal (2012-13)

1. That on the facts and in the circumstances of the case and in law, the order passed by the Commissioner of Income-tax (Appeals) [CIT(A)] under section 250 of the Income-tax Act, 1961 (the Act), to the extent prejudicial to the Appellant, is bad in law and void ab-initio.

Transfer Pricing addition made on account of Advertisement, Marketing and Promotional (AMP) expenses

Manufacturing Segment

2. That the CIT(A) grossly erred in law, once having concluded that there was no international transaction vis-a-vis the manufacturing segment, there arose no occasion to carry out any AMP intensity adjustment.

2.1. That the Ld. CIT(A) completely failed to appreciate that the direction to carry out AMP intensity adjustment, given by the jurisdictional High Court in their recent decisions, was on basis of the admitted fact regarding existence of international transaction and hence, not applicable to the facts of the instant case.

2.2. That the Ld. CIT(A) failed to appreciate that when the Manufacturing Segment of the Appellant had already been benchmarked using Transactional Net Margin Method (TNMM) and the operating margins of the Appellant were found to be at arms length with that of the comparable companies, there was no requirement to separately apply AMP intensity adjustment, in order to factor in the difference between the AMP functions performed by the Appellant and the comparable companies.

2.3 That the Ld. CIT(A), in the garb of AMP Intensity Adjustment, have compared the AMP functions of tested party, i.e., Appellant and comparable entities by using Brightline, i.e., AMP / Sales.

2.4. That the Ld. CIT(A) has erred in including the selling and distribution expenses while computing the AMP spend of the Appellant in complete disregard of the ratio laid down by the Hon'ble jurisdictional High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. : vs. CIT (supra).

Distribution Segment

3. That the Ld. TPO / CIT(A) has erred in observing / concluding that incurrence of AMP expenses in connection with the "Distribution Segment" constitutes a separate "International Transaction" under Section 92B of the Act and requires separate benchmarking.

3.1. That once the margins earned by the Appellant from its "Distribution Segment" were found to be at arm's length vis-a-vis the comparable companies, there arose no occasion for the CIT(A) to carry out any separate AMP intensity adjustment, in view of the ratio laid down by the jurisdictional High Court in the recent judgments.

3.2. That the Ld. CIT(A) erred in observing, that payment of Business Performance Guarantee ("BPG") by AE to the Appellant, for performing distribution and marketing functions, goes to show that, there was an arrangement between the Appellant and its AE w.r.t. AMP.

3.3. That the Ld. CIT(A) failed to appreciate that the BPG was received by the Appellant for performing the distribution activity, of which AMP was only one of the functions, and hence, it could not be equated with direct subsidy received by an assessee in lieu of the AMP expenses incurred by it.

3.4. That the Ld. CIT(A) erred in concluding that the TPO had not applied Brightline for benchmarking AMP expenses.

3.5 That the Ld. CIT(A), in the garb of AMP Intensity Adjustment, have compared the AMP functions of tested party, i.e., Appellant and comparable entities by using Brightline, i.e., AMP / Sales.

3.6. That the Ld. CIT(A) has erred in including the selling and distribution expenses while computing the AMP spend of the Appellant in complete disregard of the ratio laid down by the Hon'ble jurisdictional High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. : vs. CIT : (2015) 374 ITR 118.

Re: Disallowance of INR 63,24,54,323/- being reimbursement of Trade Scheme to Sales Promoters under section 40(a)(ia) of the Act.

4. That the Ld. AO/ CIT(A) erred on facts and in law in disallowing trade schemes given to retailers through sales promoters of INR 63,24,54,323/-, on account of non-deduction of tax at source under section 40(a)(ia) of the Act.

4.1. That the Ld. AO / CIT(A) failed to appreciate that the transactions between the Appellant and the Retailers was on a principal to principal basis and hence, any payment made as trade incentive could not be characterised as "commission" and subjected to TDS under section 194H of the Act.

4.2. That the Ld. AO / CIT(A) failed to appreciate that transaction pertaining to payment of trade scheme was between the Appellant and Retailers and the Sales Promoters merely facilitating the disbursal of such incentives.

4.3. That the Ld. AO / CIT(A) has failed to appreciate that the reimbursement of trade scheme to promoters was in the nature of incentives and discounts to retailers and did not contain any element of commission and hence was not subject to TDS under section 194H of the Act.

4.4. That the Ld. AO/ CIT(A) has disregarded that the impugned amount was purely in the nature of cost-to-cost reimbursement and does not contain any element of commission/income and hence is not subject to TDS under section 194H of the Act.

4.5. That the Ld. AO/CIT(A) failed to appreciate that these trade schemes / incentives are given to Retailers to promote/boost sales of its products as the State Trading Corporations levies demurrage charges on the unmoving inventory lying with it.

4.6. That the Ld. AO/CIT(A) failed to appreciate that section 194H can be invoked only in cases where payment has been made/received in lieu of services rendered and in the facts of the present case, no services are being rendered by the Retailer to the Appellant.

4.7. That the Ld. AO/ CIT(A) failed to appreciate that the said expenditure was held to be a pure reimbursement not subject to TDS by the Ld. CIT(A) in the orders passed in the case of Appellant's sister concern, Seagram Distilleries Pvt Ltd for the Assessment Years 2005-06 to 2009-10.

Re: Consequential Grounds

5. That the Ld. AO / CIT(A) erred in levying interest under section 234B of the Act.

6. That the Ld. AO / CIT(A) erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The above Grounds of Appeals are all independent and without prejudice to each other.

The Appellant also craves leave to supplement, to cancel, amend, add and/or otherwise alter or modify, any or all, grounds of the appeal stated hereinabove.

Revenue's Grounds of appeal (A.Y. 2012-13)

1. Whether on the facts and circumstances of the case, Ld. CIT(A) has erred on the facts and in law by ignoring the various judicial decisions and without considering the basic finding of the TPO that the AMP spend incurred by the assessee is actually developing the brand owned by the foreign AE which is benefiting the foreign AE in various direct and indirect forms?

2. Whether in the facts and circumstances of the case of CIT(A) was right in holding that AMP expense does not constitute an international transaction and hence it does not lead to the creation of marketing intangibles?

3. Whether on the facts and circumstances of the case, the Ld. CIT(A) erred on the facts and in law by deleting the brand building expenditure when the TPO had established that the assessee had non-exclusive rights to use the trademarks within the territory of India and any marketing intangible developed could be utilised by third party manufacturers licensed by the foreign AE?

4. On the facts and in the circumstances of the case and in law, the Ld. CD (A) has erred in deleting the disallowance on account of brand expenses without appreciating the assessee enjoys an enduring benefit on account of advertisement expenses incurred by treating it as revenue expenditure.

5. That the grounds of appeal are without prejudice to each other.

6. That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time hearing of the appeal.

12.1. The assessee has also raised the following additional grounds:-

Additional Grounds raised by the assessee (A.Y.2012-13)

Ground 2.5: That the Ld. CIT(A) grossly erred in applying a distorted version of bright line test (BLT) under the guise of AMP intensity approach

to benchmark the international transaction of import of raw material which was not even disputed by the Ld. TPO in the first instance.

Ground 2.6: That without prejudice to other grounds, the Ld. CIT(A) grossly erred in allowing the inclusion of M/s. Som Distilleries Limited based on Ld. TPO's order in Appellant's own case for subsequent year, without appreciation that the said comparable would fail the functions, assets and risks (FAR) test as prescribed under Rule 10B(2) of the Income-tax Rules, 1962 (the Rules) when compared with the Appellant, vis-à-vis manufacturing segment of the Appellant.

Ground 2.7: That without prejudice to other grounds, the Ld. CIT(A) grossly erred in not allowing the inclusion of M/s. Jagatjit Industries Ltd. based on Ld. TPO's order in Appellant's own case for subsequent year, without appreciation that the said comparable had similar FAR as prescribed under Rule 10B(2) of the Rules when compared with the Appellant, vis-a-vis manufacturing segment of the Appellant.

Ground 2.8: That without prejudice to other grounds, the Ld. CIT(A) grossly erred in not allowing the inclusion of M/s. United Spirits Limited based on Ld. TPO's order in Appellant's own case for subsequent year, without appreciation that the said comparable had similar FAR as prescribed under Rule 10B(2) of the Rules when compared with the Appellant, vis-a-vis manufacturing segment of the Appellant.

Ground 2.9: That without prejudice to other grounds, the Ld. CIT(A) grossly erred in not allowing the inclusion of M/s. Empee Distilleries Limited based on Ld. TPO's order in Appellant's own case for subsequent year, without appreciation that the said comparable had similar FAR as prescribed under Rule 10B(2) of the Rules when compared with the Appellant, vis-a-vis manufacturing segment of the Appellant.

Ground 3.7: That the Ld. CIT(A) grossly erred in applying a distorted version of BLT under the guise of AMP intensity approach to benchmark the international transaction of purchase of finished goods which was not even disputed by the Ld. TPO in the first instance.

Assessee's grounds of appeal (2013-14)

1. That on the facts and in the circumstances of the case and in law, the order passed by the Commissioner of Income-tax (Appeals) [CIT(A)] under Section 250 of the Income-tax Act, 1961 (the Act), to the extent prejudicial to the Appellant, is bad in law and void ab-initio.
Transfer Pricing addition made on account of Advertisement, Marketing and Promotional (AMP) expenses

Manufacturing Segment

2. That the CIT(A) grossly erred in law, once having concluded that there was no international transaction vis-a-vis the manufacturing segment, there arose no occasion to carry out any AMP intensity adjustment.

2.1 That the Ld. CIT(A) completely failed to appreciate that the direction to carry out AMP intensity adjustment, given by the jurisdictional High Court in their recent decisions, was on basis of the admitted fact regarding existence of international transaction and hence, not applicable to the facts of the instant case.

2.2 That the Ld. CIT(A) failed to appreciate that when the Manufacturing Segment of the Appellant had already been benchmarked using Transactional Net Margin Method (TNMM) and the operating margins of the Appellant were found to be at arms length with that of the comparable companies, there was no requirement to separately apply AMP intensity adjustment, in order to factor in the difference between the AMP functions performed by the Appellant and the comparable companies.

2.3 That the Ld. CIT(A), in the garb of AMP Intensity Adjustment, have compared the AMP functions of tested party, i.e., Appellant and comparable entities by using Brightline, i.e., AMP / Sales.

2.4 That the Td. CIT(A) erred in including the selling and distribution expenses while computing the AMP spend of the Appellant in complete disregard of the ratio laid down by the honorable jurisdictional High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. : vs. CIT (supra).

2.5. That the Ld. CIT(A) erred in rejecting functionally similar comparable companies that were selected by the Appellant in its Transfer Pricing Documentation on ad-hoc and unsubstantiated basis.

2.6. That the Ld. CIT(A) has wrongly appreciated the functional profile of Khoday India Limited (KIL) as the CIT(A) has incorrectly concluded that KIL is engaged in manufacture of country liquor.

2.7. That Ld. CIT(A) erred in concluding that segmental details of KIL-IMFL segment were not available and hence, it could not be regarded as a suitable comparable, in complete disregard of the fact that KIL was engaged only in manufacture of IMFL.

2.8. That Ld. TPO/CIT(A) grossly erred in facts and in law in rejecting KIL without appreciating that it has been accepted as a comparable company in appellant's own case in the immediately preceding as well as in the subsequent

year, i.e., AY 2012-13 and 2014-15 and there is no change in the functional profile of KIL in the assessment year under consideration.

2.9. That the CIT(A) erred in setting aside, issue of inclusion of M/s Radico Khaitan Ltd. as a suitable comparable, by directing the AO to verify whether sale receipts from other products was miniscule, even when all material facts were on record.

2.10. That the Ld. TPO/CIT(A) erred in facts and in law in rejecting M/s United Spirits Ltd. (USL) on the ground that it possesses intangibles and undertakes significant R&D activities in complete ignorance of the fact that R&D activities undertaken and the intangible owned by USL were extremely miniscule.

2.11 That the stand adopted by Ld. CIT(A) is self contradictory as one hand CIT(A) observes that balance sheet value of intangibles does not capture its true impact on profitability and sales and on the other hand. Ld. CIT(A) upholds the action of the TPO in rejecting USL as a suitable comparable on the ground of owning intangibles.

2.12. That the Ld. TPO/CIT(A) have wrongly rejected M/s Jagatjeet Industries Ltd. as a suitable comparable, on the ground of non-availability of segment wise AMP data, even when all the material facts were available on record.

2.13. That the Ld. CIT(A) has erred in facts and in law in computing the AMP expenses /sales of the Appellant without including sale of third party bottlers for the year under consideration, which is contrary to the earlier approach of the Ld. TPO/Honble DRP for AY 2007-08 to 2011-12.

2.14. That the Ld. TPO/ CIT(A) erred in treating provisions no longer required written back as non-operating item disregarding the fact that such provisions when created were pertaining to the routine operations / normal course of business and thereby ought to be considered as operating in nature.

2.15. That the Ld. TPO/ CIT(A) erred in making protective adjustment in respect of the AMP expenditure relating to the manufacturing segment while following the Brightline Method which does not have any statutory mandate.

Distribution Segment

3. That the Ld. TPO / CIT(A) has erred in observing / concluding that incurrance of AMP expenses in connection with the Distribution Segment constitutes a separate International Transaction under Section 92B of the Act and requires separate benchmarking.

3.1. That once the margins earned by the Appellant from its Distribution Segment were found to be at arm's length vis-a-vis the comparable companies, there arose no occasion for the CIT(A) to carry out any separate AMP intensity adjustment, in view of the ratio laid down by the jurisdictional High Court in the recent judgments.

3.2 That the Ld. CIT(A) erred in observing, that payment of Business Performance Guarantee (BPG) by AE to the Appellant, for performing distribution and marketing functions, goes to show that, there was an arrangement between the Appellant and its AE w.r.t. AMP.

3.3. That the Ld. CIT(A) failed to appreciate that the BPG was received by the Appellant for performing the distribution activity, of which AMP was only one of the functions, and hence, it could not be equated with direct subsidy received by an assessee in lieu of the AMP expenses incurred by it.

3.4. That the Ld. CIT(A) erred in concluding that the TPO had not applied Brightline for benchmarking AMP expenses.

3.5. That the Ld. CIT(A), in the garb of AMP Intensity Adjustment, have compared the AMP functions of tested party, i.e., Appellant and comparable entities by using Brightline, i.e., AMP / Sales.

3.6. That the Ld. CIT(A) has erred in including the selling and distribution expenses while computing the AMP spend of the Appellant in complete disregard of the ratio laid down by the Hon'ble jurisdictional High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. : vs. CIT : (2015) 374 ITR 118.

3.7. That the Ld. CIT(A) erred in rejecting functionally similar comparable companies that were selected by the Appellant in its Transfer Pricing Documentation on ad-hoc and unsubstantiated basis.

3.8. That the CIT(A) erred in setting aside, issue of exclusion of M/s Delhi Duty Free Services Pvt. Ltd. (DDFS), by directing the AO to verify whether related party transactions undertaken by DDFS were in excess of 25%, even when all material facts were on record.

3.9. That the Ld. TPO / CIT(A) erred in making protective adjustment in respect of the AMP expenditure relating to the distribution segment while following the 'Brightline Method' which does not have any statutory mandate.

Re: Disallowance of INR 134,86,21,901/- being reimbursement of Trade Scheme to Sales Promoters under section 40(a)(ia) of the Act.

4. That the Ld. AO/ CIT(A) erred on facts and in law in disallowing reimbursement of trade schemes given to sales promoters amounting to INR 134,86,21,901, on account of non-deduction of tax at source under section 40(a)(ia) of the Act.

4.1. That the Ld. AO / CIT(A) failed to appreciate that the transactions between the Appellant and the Retailers was on a principal to principal basis and hence, any payment made as trade incentive could not be characterised as commission and subjected to TDS under section 194H of the Act.

4.2. That the Ld. AO / CIT(A) failed to appreciate that transaction pertaining to payment of trade scheme was between the Appellant and Retailers and the Sales Promoters merely facilitating the disbursal of such incentives.

4.3. That the Ld. AO / CIT(A) has failed to appreciate that the reimbursement of trade scheme to promoters was in the nature of incentives and discounts to retailers and did not contain any element of commission and hence was not subject to TDS under section 194H of the Act.

4.4. That the Ld. AO/ CIT(A) has disregarded that the impugned amount was purely in the nature of cost-to-cost reimbursement and does not contain any element of commission/income and hence is not subject to TDS under section 194H of the Act.

4.5. That the Ld. AO/CIT(A) failed to appreciate that these trade schemes / incentives are given to Retailers to promote/boost sales of its products as the State Trading Corporations levies demurrage charges on the unmovable inventory lying with it.

4.6. That the Ld. AO/CIT(A) failed to appreciate that section 194H can be invoked only in cases where payment has been made/received in lieu of services rendered and in the facts of the present case, no services are being rendered by the Retailer to the Appellant.

4.7. That the Ld. AO/ CIT(A) failed to appreciate that the said expenditure was held to be a pure reimbursement not subject to TDS by the Ld. CIT(A) in the orders passed in the case of Appellant's sister concern, Seagram Distilleries Pvt Ltd for the Assessment Years 2005-06 to 2009-10.

Re: Consequential Grounds

5. That the AO / CIT(A) erred in levying interest under section 234D of the Act.

6. That the Ld. AO / CIT(A) erred in initiating penalty proceedings under section 271(l)(c) of the Act.

The above 'Grounds of Appeals' are all independent and without prejudice to one and another.

The Appellant also craves leave to supplement, to cancel, amend, add and/or otherwise alter or modify, any or all, grounds of the appeal stated hereinabove.

Revenue's Grounds of appeal (A.Y. 2013-14)

1. Whether on the facts and circumstances of the case, Ld. CIT(A) has erred on the facts and in law by ignoring the various judicial decisions and without considering the basic finding of the TPO that the AMP spend incurred by the assessee is actually developing the brand owned by the foreign AE which is benefiting the foreign AE in various direct and indirect forms?

2. Whether in the facts and circumstances of the case of CIT(A) was right in holding that AMP expense does not constitute an international transaction and hence it does not lead to the creation of marketing intangibles?

3. Whether on the facts and circumstances of the case, the Ld. CIT(A) erred on the facts and in law by deleting the brand building expenditure when the TPO had established that the assessee had non-exclusive rights to use the trademarks within the territory of India and any marketing intangible developed could be utilised by third party manufacturers licensed by the foreign AE?

4. On the facts and in the circumstances of the case and in law, the Ld. CD (A) has erred in deleting the disallowance on account of brand expenses without appreciating the assessee enjoys an enduring benefit on account of advertisement expenses incurred by treating it as revenue expenditure.

5. That the grounds of appeal are without prejudice to each other.

6. That the appellant craves leave to add, amend, alter or forgo any grounds of appeal either before or at the time hearing of the appeal.

Additional Grounds raised by the assessee (A.Y.2013-14)

Ground 2.16: That the Ld. CIT(A) grossly erred in applying a distorted version of bright line test (BLT) under the guise of AMP intensity approach to benchmark the international transaction of import of raw material which was not even disputed by the Ld. TPO in the first instance.

Ground 2.17: That without prejudice to other grounds, the Ld. CIT(A) grossly erred in allowing the inclusion of M/s. Som Distilleries Limited, without

appreciation that the said comparable failed the functions, assets and risks (ñFARò) test as prescribed under Rule 10B(2) of the Income-tax Rules, 1962 (ñRulesò) when compared with the Appellant, vis-a-vis manufacturing segment of the Appellant.

Ground 3.10: That the Ld. CIT(A) grossly erred in applying a distorted version of BLT under the guise of AMP intensity approach to benchmark the international transaction of purchase of finished goods which was not even disputed by the Ld. TPO in the first instance. ò

Assessee's grounds of appeal (2014-15)

ñ1. That on the facts and in the circumstances of the case and in law, the order passed by the Commissioner of Income-tax (Appeals) [ñCIT(A)ò] under Section 250 of the Income-tax Act, 1961 (ñthe Actò), to the extent prejudicial to the Appellant, is bad in law and void ab-initio.

Transfer Pricing addition made on account of Advertisement, Marketing and Promotional (ñAMPò) expenses

Distribution Segment

2. That the Ld. TPO / CIT(A) has erred in observing / concluding that incurrance of AMP expenses in connection with the ñDistribution Segmentò constitutes a separate ñInternational Transactionò under Section 92B of the Act and requires separate benchmarking.

3. That the Ld. TPO/ Ld. AO/Ld. CIT(A) failed to discharge the onus to establish the existence of an ñarrangementò or ñaction in concertò whereby, the AE being the owner of the intellectual property, had directed any level of AMP expenditure to be incurred by the Appellant.

4. That once the margins earned by the Appellant from its ñDistribution Segmentò were found to be at arm's length vis-a-vis the comparable companies, there arose no occasion for the TPO to carry out any separate AMP intensity adjustment, in view of the ratio laid down by the jurisdictional High Court in the recent judgments.

5. That the Ld. CIT(A) erred in concluding that the existence of international transaction solely by relying upon the finding given in the appellate orders for AY 2012-13 and 2013-14, without carrying out any independent examination and verification of the facts in existence, for the year under consideration

6. That the Ld. CIT(A) erred in observing, that payment of Business Performance Guarantee (BPG) by AE to the Appellant, for performing distribution and marketing functions, goes to show that, there was an arrangement between the Appellant and its AE w.r.t. AMP.

7. That the Ld. TPO/CIT(A) failed to appreciate that the BPG was received by the Appellant for performing the distribution activity, of which AMP was only one of the functions, and hence, it could not be equated with direct subsidy received by an assessee in lieu of the AMP expenses incurred by it.

8. That the Ld. CIT(A), in the garb of AMP Intensity Adjustment, have compared the AMP functions of tested party, i.e., Appellant and comparable entities by using Brightline, i.e., AMP / Sales which is specifically struck down by the jurisdictional Delhi High Court.

9. That the Ld. TPO/ CIT(A) has erred in including the selling and distribution expenses while computing the AMP spend of the Appellant in complete disregard of the ratio laid down by the Hon'ble jurisdictional High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. v. CIT : (2015) 374 ITR 118.

10. That the Ld. TPO/CIT(A) erred in rejecting functionally similar comparable companies that were selected by the Appellant in its Transfer Pricing Documentation on ad-hoc and unsubstantiated basis.

11. That the CIT(A) erred in setting aside, issue of exclusion of M/s Delhi Duty Free Services Pvt. Ltd. (DDFS), by directing the AO to verify whether related party transactions undertaken by DDFS were in excess of 25%, even when all material facts were on record.

Re: Disallowance of disbursement of Trade Scheme to Retailers via sales promoters on account of non-deduction of tax at source under section 40(a) (ia) of the Act.

12. That the Ld. AO/ Ld. CIT(A) erred on facts and in law in disallowing payment of trade schemes to retailers via sales promoters amounting to INR 1,68,93,84,224/-, on account of non-deduction of tax at source under section 40(a)(ia) of the Act.

13. That the Ld. CIT(A) erred in rejecting the additional evidence filed by the Appellant on the ground that sufficient opportunity was granted to the Appellant during the course of assessment proceedings to show-cause as to why the trade schemes paid to retailers via sales promoters should not be disallowed, however, the Appellant did not produce any documents which were now sought to be filed as additional evidence.

14. That the Ld. CIT(A) rejected the additional evidence in complete ignorance of the fact that disallowance of trade scheme by AO was made solely on the basis of finding(s) given in the assessment orders for the preceding years and there is no mention/discussion regarding non-production of the relevant evidences by the Appellant in the assessment order.

15. That the Ld. AO erred in alleging that no reply/details were furnished by the Appellant on the issue of trade scheme despite the fact that comprehensive submissions /details were filed by the Appellant during the course of assessment proceedings and have also been reproduced by the AO in para 3 of the assessment order.

16. That the Ld. AO/ Ld. CIT(A) failed in appreciating that the relevant documentation regarding trade scheme reimbursements i.e. debit notes, agreements with sales promoters etc were duly filed before the AO during the course of assessment proceedings.

17. That the allegations made by the Ld. AO in the remand report are completely baseless and unfounded and do not find any mention in the assessment order passed by him.

18. That the Ld. CIT(A) erred in confirming the disallowance solely by relying upon the appellate orders passed for AY 2012-13 and 2013-14 and in complete ignorance of the additional evidence as well as rejoinder to remand report filed by the Appellant which counter / rebut the allegations/findings given therein.

19. That the Ld. CIT(A) completely failed to appreciate that the Appellant was prevented by sufficient cause from producing the additional evidence during the course of assessment proceedings as the CIT(A) order for AY 2012-13, which alleged ambiguity and incompleteness was passed only on 28.12.2017 (received in first week of January, 2018), i.e., pursuant to completion of assessment for the captioned assessment year.

20. That the Ld. AO/ Ld. CIT(A) erred in alleging that case of the Appellant is not covered under any of the exceptions laid down in Rule 46A of the Income Tax Rules, 1962.

21. That the Ld. CIT(A) failed to appreciate that the case of the Appellant was clearly covered under clause (c) to Rule 46A(1) as the Appellant was prevented by sufficient cause to produce the additional evidence before the AO, which was relevant and indispensable for adjudication of the issue pertaining to disallowance of trade scheme.

22. That the Ld. AO/ Ld. CIT(A) failed to appreciate that the amounts of commission paid to sales promoters and disbursement of trade schemes to retailers through sales promoter had been separately charged by the Appellant in its books of accounts and TDS was duly deducted and deposited on the amounts of commission paid.

23. That the disbursement of trade scheme could not have been classified as commission, which was subject to withholding under section 194H of the Act, as the payments were meant for retailers, who were separate and independent entities and were neither, in any way, acting as agents of the Appellant nor were they providing any service to the Appellant.

24. That the Ld. AO/ Ld. CIT(A) failed to appreciate that existence of a principal - agent relationship is a mandatory pre-requisite for treating the payments as "Commission" and withholding tax under section 194H of the Act.

25. That the Ld. AO/ Ld. CIT(A) completely overlooked the fact that the trade schemes were meant solely for the retailers and the sales promoters were merely acting as conduits / pass through entity.

26. That the Ld. AO/ Ld. CIT(A) failed to appreciate that the reimbursement of trade scheme to promoters was in the nature of discounts and did not contain any element of commission and hence was not subject to TDS under section 194H of the Act.

27. That the Ld. AO/ Ld. CIT(A) failed to appreciate that the impugned amount was purely in the nature of cost-to-cost advances and did not contain any element of commission/income and hence could not have been subjected to TDS under section 194H of the Act.

28. That the Ld. AO/ Ld. CIT(A) failed to appreciate that the said expenditure was held to be a pure reimbursement not subject to TDS by the Ld. CIT(A) in the orders passed in the case of Appellant's sister concern, Seagram Distilleries Pvt Ltd for the Assessment Years 2005-06 to 2009-10.

29. That the Ld. AO/ Ld. CIT(A) failed to appreciate that the trade schemes reimbursed to sales promoters is already part of the Transfer Pricing Adjustment on account of AMP adjustment and separate disallowance under section 40(a)(ia) of the Act, has resulted in a double disallowance.

Re: Consequential Grounds

30. That the Ld. AO erred in initiating penalty proceedings under section 271(l)(c) of the Act.

31. That the Ld. AO erred in initiating penalty proceedings under section 271C of the Act.

Revenue's Grounds of appeal (A.Y. 2014-15)

1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) was legally justified in ignoring the various judicial decisions and without considering the basic finding of the TPO that the AMP spend incurred by the assessee is actually developing the brand owned by the foreign AE which is benefitting the foreign AE in various direct and indirect forms.

2. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) was legally justified in deleting the brand building expenditure when the TPO had established that the assessee had non-exclusive rights to use the trademarks within the territory in India and any marketing intangible developed could be utilized by third party manufactures licensed by the foreign AE.

3. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) was legally justified in holding that AMP expense does not constitute an international transaction and hence it does not lead to creation of marketing intangibles.

4. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was legally justified in deleting the disallowance on account of brand expenses without appreciating that assessee enjoys an enduring benefit on account of advertisement expenses incurred by treating it as revenue expenditure.

5. That the grounds of appeal are without prejudice to each other.

6. That the appellant craves leave to add, amend, alter or forgo any grounds(s) of appeal either before or at the time hearing of the appeal.

13. After hearing both the sides and considering the fact that these additional grounds are purely legal in nature and no fresh facts are required to be looked into, therefore, following the decision of the Hon'ble Supreme Court in the case of *NTPC Ltd., reported in 229 ITR 383*, the additional grounds raised by the assessee are allowed for adjudication.

14. Ground of appeal No.1 and 2 by the Revenue relate to the order of the CIT(A) in deleting the transfer pricing adjustment made by the TPO on account of advertisement, marketing and the promotional expenditure.

15. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the paper book filed on behalf of the assessee. We have also considered the various decisions cited by both the sides. We find the TPO in the instant case has held that the AMP expenditure incurred by the assessee is international transaction. In the manufacturing segment, he computed an upward adjustment of Rs.57,83,00,000/- by disallowing 50% of the expenditure incurred on products which were sold within the domestic market as well as international market the details of which are already reproduced in the preceding paragraph. We find, the Id.CIT(A) deleted the adjustment on account of AMP expenditure by observing as under:-

ñ5.12 I find that the TPO mainly relied on the TP study report that the appellant is engaged in brand building exercise and hence, the benefit has been drawn by the foreign AE owning such brands. As per the TP Study for AY 2012-13, for the manufacturing segment, it has been mentioned that

"the marketing of the Appellant's products in India were carried out by way of a centralized brand building exercise which entailed brand building campaigns on television channels, print media such as national/ local newspapers and magazines, outdoor media like hoardings, signages and displays, public relation activities like press previews, celebrity placements etc. Regional marketing campaigns/ events involving tie-ups with local clubs and restaurants wherein free product samples, merchandise, gifts etc. were given away to customers to promote the various brands were also undertaken. The Pernod Ricard group ("PR Group"), i.e. the AEs did not assume any significant role in deciding the local branding strategies in respect of the brands licensed to India. The group only provided very broad framework/guidelines within which the PR affiliates were supposed to exercise their discretion for promoting the brand and effecting sales of the

products. PRIPL was almost independent in formulating and executing local brand promotion activities in relation to products manufactured in India."

5.13 TPO held this act of brand promotion on the part of appellant company as "action in concert" with its parent entity based on transfer pricing report. Further, TPO held that the foreign AE owning the brands need to compensate the appellant for the benefit drawn out of the exercise of spending the AMP expenditure. Therefore, the TPO proposed to allocate 50% of such AMP to the foreign AE for the benefit drawn out of the AMP expenditure incurred by the appellant.

5.14 However, there is no observation that the appellant company has been obliged to incur such AMP of a certain level for its parent for the purpose of promoting the brand. The element of obligation is missing in the findings. There is no directive from the parent to spend a particular level of AMP expenditure. The common strategy at group level also cannot be considered as sufficient test to hold it as action in concert and therefore as an international transaction. Common strategy at Group level is for bringing synergy, Merely because the expense resulted in service or benefit to the other party would by itself not constitute the transaction as international transaction This view has been fortified by the decision of Hon'ble Delhi High Court in the case of Maruti Suzuki India Pvt. Ltd. v. CIT: [2016] 3811TR 117(Delhi) which reads as under:

"Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to Section 92F(v) which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means' part and the 'includes' part of Section 92B(1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC "

5.15 It may be relevant to refer to the decision of Hon'ble Delhi High Court in CIT vs. EKL Appliances Ltd., wherein the court held that the very existence of international transaction cannot be a matter for inference or surmise.

5.16 in view of the above discussions, I do not find that TPO is correct in treating AMP expenditure as international transaction in the absence of sufficient evidence towards understanding, arrangement or action in concert in the case of manufacturing segment. The high scale of AMP expenditure year on year basis per se cannot be the yardstick to hold It as International

transaction. It can be the starting point to investigate but It can not be taken as the evidence in itself.

5.17 It may also be relevant to point out here that Hon'ble ITAT, Delhi held in the case of the assessee for AY 2005-06 that no adjustment was warranted on the facts of the present case since the brands for which the AMP expenditure as Incurred were India specific. The court observed that if the product manufactured and sold by the assessee are India specific then it cannot be said that any benefit could have accrued to the AE on account the AMP spend in India in respect of such brands.

5.18 The appellant company is using the brand logo of the foreign AE as economic owner in a commercial sense for the purpose of exploiting it for the business purpose. In the process, the foreign AE, the owner of the brand, would have also got benefitted incidentally due to Brand building as a result of appellant company's spending on AMP in India. However, there is no dispute that such AMP expenditure was very much required by the appellant company for carrying out and growth of its business in India, There is no basis in the finding of TPO that the AMP expenditure is excessive vis-a-vis the requirement of the appellant company in running the business in India. Accordingly, the allocation of 50% of such AMP expenditure to foreign AE (brand legal owner) without any basis is not justified.

16. He, however, taking a cue from the TPO's order for A.Y. 2013-14, applied a distorted version of brightline test while using AMP as a function to benchmark the international transaction of import of raw material. Even the said method, in our opinion, was applied without having any backing of any provision of law. Nevertheless, the CIT(A) allowed relief to the assessee in terms of +/- 5% range and held that the transaction of import of raw material was at arm's length.

16.1 So far as the distribution segment is concerned, we find the TPO, for the year under consideration, held that because the assessee was incurring substantial expenditure, therefore, such expenditure was to be treated as an international transaction. Thereafter, the TPO, applying the methodology as given earlier in the

preceding paragraph, suggested an upward adjustment of Rs.5,03,33,013/- after using comparables engaged in marketing support functions.

17. We find, the Id.CIT(A) upheld the order of the TPO to the extent of existence of international transaction, after placing reliance on the decision of the Hon'ble Delhi High Court in the case of Sony Ericson (supra). We find the Id.CIT(A) considered the amount of Rs.31,76,79,386/- received by the assessee as business performance guarantee under the distribution segment to be the international transaction for AMP purpose. However, given that the TPO had used BLT to come to the conclusion that there existed an international transaction on account of AMP expenses, he disregarded his methodology while following the decision of the Hon'ble Delhi High Court in the case of Maruti Suzuki (supra). He noted that the TPO's methodology was incorrect since there was no justification provided by the TPO to de-bundle the transaction of AMP expenditure from the remaining distribution segment and the TPO had not segregated the routine and non-routine AMP expenditure. He also observed that the comparability analysis carried out by the TPO using marketing support companies was without any basis and in that manner, he eventually rejected the methodology adopted by the TPO. Thereafter, the CIT(A) applied the final methodology as per the manufacturing segment by using his version of BLT to benchmark the international transaction of business performance guarantee and purchase of finished goods. However, since

using such method the value of the said transaction was found to be at arm's length, no adjustment was directed by the ld.CIT(A).

18. It is the submission of the ld. Counsel for the assessee that the use of BLT to determine the existence of international transaction has been specifically disregarded by the Hon'ble Delhi High Court in the case of *Sony Ericsson Mobile Communications India Pvt. Ltd. (supra)*, *Maruti Suzuki India Ltd. (supra)* and *Valvoline Cummins (P) Ltd. vs DCIT (supra)* vide *ITA No.158/2016 of Hon'ble Delhi High Court*. It is his submission that there is no question of existence of international transaction even in the distribution segment since the onus to prove such existence has not been discharged by the Department. Furthermore, the CIT(A) has wrongly applied the existence of international transaction on account of AMP expenditure while following *Sony Ericsson Mobile Communications (supra)* whereas in that case, it was specifically admitted and conceded that international transaction on account of AMP expenditure actually existed. However, no such admission or concession has been made in assessee's own case here and, therefore, the reliance of CIT(A) on that account is completely unwarranted.

19. So far as the order of the CIT(A) in case of manufacturing segment is concerned, it is the submission of the ld. Counsel that the Hon'ble Delhi High Court in the case of *Maruti Suzuki (supra)*, *Whirlpool India Pvt. Ltd. vs. CIT*, 381 ITR 154, *Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. ACIT*, 381 ITR 227,

Volvoline Cummins Pvt. Ltd. (supra) and Honda Siel Power Products Ltd. vs. DCIT, 283 CTR 322, has held that the expenditure on account of AMP expenditure is not an international transaction. He also relied on the decision of the Tribunal in the case of *Pepsico India Holdings Pvt. Ltd. vs. ACIT reported in 100 taxmann.com 159* to the above proposition.

20. The ld. DR on the other hand heavily relied on the order of the AO/TPO and relied on the decision of the Tribunal in the case of *Toshiba India (P) Ltd. vs. DCIT, vide ITA No.1357/Del/2017, order dated 01.09.2017 for A.Y. 2012-13* and the decision of Hon'ble Delhi High Court in the case of *Sony Ericsson Mobile Communications India (P) Ltd., vide ITA No.16/2014, order dated 16.03.2015*.

21. We find identical issue had come up before the Tribunal in assessee's own case for A.Y. 2007-08. The Tribunal in ITA No.910/Del/2015, order dated 15th March, 2009, has discussed the issue and has deleted the addition on account of AMP expenditure by observing as under:-

¶20. We have given a thoughtful consideration to the orders of the authorities below qua the issue. The co-ordinate bench in the case of *L.G. Electronics India Pvt. Ltd ITA No. 6253/DEL/2012* has held as under:

"10. At the outset, we have to state that the Hon'ble High Court of Delhi in the case of [Sony Ericsson Mobile Communications India Pvt Ltd vs CIT](#) 374 ITR 118 has discarded the BLT. The Hon'ble High Court, at para 120 held as under:

"120. Notwithstanding the above position, the argument of the Revenue goes beyond adequate and fair compensation and the ratio of the majority decision mandates that in each case where an Indian subsidiary of a foreign AE incurs AMP expenditure should be subjected to the bright line test on the basis of comparables mentioned in paragraph 17.4. Any excess expenditure beyond the bright line should be regarded as a separate international transaction of brand building. Such a broad-brush universal

approach is unwarranted and would amount to judicial legislation. During the course of arguments, it was accepted by the Revenue ITA Nos. 910 to 914/Del./2015 that the TPOs/Assessing Officers have universally applied bright line test to decipher and compute value of international transaction and thereafter applied Cost Plus Method or Cost Method to compute the arm's length price. The said approach is not mandated and stipulated in the Act or the Rules. The list of parameters for ascertaining the comparables for applying bright line test in paragraph 17.4 and, thereafter, the assertion in paragraph 17.6 that comparison can be only made by choosing comparable of domestic cases not using any foreign brand, is contrary to the Rules. It amounts to writing and prescribing a mandatory procedure or test which is not stipulated in the Act or the Rules. This is beyond what the statute in Chapter X postulates. Rules also do not so stipulate."

11. Respectfully following the judgment of the Hon'ble High Court of Delhi [supra], we hold that BLT has no mandate under the Act and accordingly, the same cannot be resorted to for the purpose of ascertaining if there exists an international transaction of brand promotion services between the assessee and the AE.

12. In our considered opinion, while dealing with the issue of bench marking of AMP expenses, the Revenue needs to establish the existence of international transaction before undertaking bench marking of AMP expenses and such transaction cannot be inferred merely on the basis of BLT. For this proposition, we draw support from the judgment of the Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd 381 ITR 117.

13. In this case, the Hon'ble High Court held that existence of an international transaction needs to be established de hors the Bright Line Test. The relevant finding of the Hon'ble High Court reads as under:

"43. Secondly, the cases which were disposed of by the judgment, i.e. of the three Assesseees Canon, Reebok and Sony Ericsson were all of distributors of products manufactured by foreign AEs. The said Assesseees were themselves not manufacturers. In any event, none of them appeared to have questioned the existence of an international transaction involving the concerned foreign AE. It was also not disputed that the said international transaction of incurring of AMP expenses could be made subject matter of transfer pricing adjustment in terms of [Section 92](#) of the Act.

44. However, in the present appeals, the very existence of an international transaction is in issue. The specific case of MSIL is that the Revenue has failed to show the existence of any agreement, understanding or arrangement between MSIL and SMC regarding the AMP spend of MSIL. It is pointed out that the BLT has been applied to the AMP spend by MSIL to (a) deduce the existence of an international transaction involving SMC and (b) to make a quantitative 'adjustment' to the ALP to the extent that the expenditure exceeds the expenditure by comparable entities. It is submitted that with the decision in Sony Ericsson having disapproved of BLT as a legitimate means of determining the ALP of an international transaction involving AMP expenses, the very basis of the Revenue's case is negated.

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51. The result of the above discussion is that in the considered view of the Court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL. Secondly, the Court is of the view that the decision in Sony Ericsson holding that there is an international transaction as a result of the AMP expenses cannot be held to have answered the issue as far as the present Assessee MSIL is concerned since finding in Sony Ericsson to the above effect is in the context of those Assesseees whose cases have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding AMP expenses.

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60. As far as clause (a) is concerned, SMC is a non-resident. It has, since 2002, a substantial share holding in MSIL and can, therefore, be construed to be a non-resident AE of MSIL. While it does have a number of 'transactions' with MSIL on the issue of licensing of IPRs, supply of raw materials, etc. the question remains whether it has any 'transaction' concerning the AMP expenditure. That brings us to clauses (b) and (c). They cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of MSIL is "any other transaction having a bearing" on its "profits, incomes or losses", for a 'transaction' there has to be two parties. Therefore for the purposes of the 'means' part of clause (b) and the 'includes' part of clause (c), the Revenue has to show that there exists an 'agreement' or 'arrangement' or 'understanding' between MSIL and SMC whereby MSIL is obliged to spend excessively on AMP in order to promote the brand of SMC. As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i) (a) to (e) to [Section 92B](#) are described as 'international transaction'. This might be only an illustrative list, but significantly it does not list AMP spending as one such transaction.

61. The submission of the Revenue in this regard is: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for the same has been paid or remains payable or there is a mutual agreement to not charge any compensation for the service or benefit." Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to [Section 92F](#) (v) which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means' part and the 'includes' part of [Section 92B](#) (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC.

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68.....In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly in light of the fact that the BLT has been expressly negated

by the Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT."

14. In the light of the aforesaid finding of the Hon'ble High Court, before embarking upon a benchmarking analysis, the Revenue needs to demonstrate on the basis of tangible material or evidence that there exists an international transaction between the assessee and the AE. Needless to mention, that the existence of such a transaction cannot be a matter of inference.

15. The Hon'ble Delhi High Court in case of [Whirlpool of India Ltd vs DCIT](#) 381 ITR 154 has held that there should be some tangible evidence on record to demonstrate that there exists an international transaction in relation with incurring of AMP expenses for development of brand owned by the AE. In our considered opinion, in the absence of such demonstration, there is no question of undertaking any benchmarking of AMP expenses. The relevant findings of the Hon'ble High Court in the case of Whirlpool of India Ltd [supra] read as under:

"32. Under [Sections 92B](#) to [92F](#), the pre-requisite for commencing the TP exercise is to show the existence of an international transaction. The next step is to determine the price of such transaction. The third step would be to determine the ALP by applying one of the five price discovery methods specified in [Section 92C](#). The fourth step would be to compare the price of the transaction that is shown to exist with that of the ALP and make the TP adjustment by substituting the ALP for the contract price.

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34. The TP adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceed to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred for the AE.

35. It is for the above reason that the BLT has been rejected as a valid method for either determining the existence of international transaction or for the determination of ALP of such transaction. Although, under [Section 92B](#) read with [Section 92F](#) (v), an international transaction could include an arrangement, understanding or action in concert, this cannot be a matter of inference. There has to be some tangible evidence on record to show that two parties have "acted in concert".

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37. The provisions under Chapter X do envisage a 'separate entity concept'. In other words, there cannot be a presumption that in the present case since WOIL is a subsidiary of Whirlpool USA, all the activities of WOIL are in fact dictated by Whirlpool USA. Merely because Whirlpool USA has a financial interest, it cannot be presumed that AMP expense incurred by the WOIL are at the instance or on behalf of Whirlpool USA. There is merit in the contention of the Assessee that the initial onus is on the Revenue to demonstrate through some tangible material that the two

parties acted in concert and further that there was an agreement to enter into an international transaction concerning AMP expenses.

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39. It is in this context that it is submitted, and rightly, by the Assessee that there must be a machinery provision in the Act to bring an international transaction involving AMP expense under the tax radar. In the absence of any clear statutory provision giving guidance as to how the existence of an international transaction involving AMP expense, in the absence of an express agreement in that behalf, should be ascertained and further how the ALP of such a transaction should be ascertained, it cannot be left entirely to surmises and conjectures of the TPO.

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47. For the aforementioned reasons, the Court is of the view that as far as the present appeals are concerned, the Revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between WOIL and Whirlpool USA. In the absence of that first step, the question of determining the ALP of such a transaction does not arise. In any event, in the absence of a machinery provision it would be hazardous for any TPO to proceed to determine the ALP of such a transaction since BLT has been negatived by this Court as a valid method of determining the existence of an international transaction and thereafter its ALP."

19. We do not find any force in the aforesaid contentions of the Id. DR. As mentioned elsewhere, the Revenue needs to establish on the basis of some tangible material or evidence that there exists an international transaction of provisions of brand building service between the assessee and the AE. We find support from the decision of the Hon'ble Delhi High Court in the case of Honda Seil Power Products Ltd vs DCIT ITA No 346/2015.

20. The Hon'ble Delhi Court in its recent decision in the case of CIT vs Mary Kay Cosmetic Pvt Ltd (ITA No.1010/2018), too, dismissed the Revenue's appeal, following the law laid down in its earlier decision (supra) and held as under:

"We have examined the assessment order and do not find any good ground and reason given therein to treat advertisement and sales promotion expenses as a separate and independent international transaction and not to regard and treat the said activity as a function performed by the respondent-assessee, who was engaged in marketing and distribution. Further, while segregating / debundling and treating advertisement and sales promotion as an independent and separate international transaction, the assessing officer did not apportion the operating profit/ income as declared and accepted in respect of the international transactions."

21. In our understanding of the facts and law, mere agreement or arrangement for allowing use of their brand name by the AE on products does not lead to an inference that there is an "action in concert" or the parties were acting together to incur higher expenditure on AMP in order to render a service of brand building. Such inference

would be in the realm of assumption/surmise. In our considered opinion, for assumption of jurisdiction u/s 92 of the Act, the condition precedent is an international transaction has to exist in the first place. The TPO is not permitted to embark upon the bench marking analysis of allocating AMP expenses as attributed to the AE without there being an 'agreement' or 'arrangement' for incurring such AMP expenses.

22. The aforesaid view that existence of an international transaction is a sine qua non for invoking the transfer pricing provisions contained in Chapter X of the Act, can be further supported by analysis of [section 92\(1\)](#) of the Act, which seeks to benchmark income / expenditure arising from an international transaction, having regard to the arm's length price. The income / expenditure must arise qua an international transaction, meaning thereby that the (i) income has accrued to the Indian tax payer under an international transaction entered into with an associated enterprise; or (ii) expenditure payable by the Indian enterprise has accrued / arisen under an international transaction with the foreign AE. The scheme of Chapter X of the Act is not to benchmark transactions between the Indian enterprise and unrelated third parties in India, where there is no income arising to the Indian enterprise from the foreign payee or there is no payment of expense by the Indian enterprise to the associated enterprise. Conversely, transfer pricing provisions enshrined in Chapter X of the Act do not seek to benchmark transactions between two Indian enterprises.

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

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

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

Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible."

21. In light of the aforementioned discussion, we find that the TPO has considered this at length and has submitted a report dated 26.2.2019. The said report can be summarised in the following chart:

.no Asst Year		Assessee			Comparables		
S N	A.Y.	Operating Margins including all operating expenses	Operating margins excluding AMP Expenses	Operating margins excluding AMP & Selling and distribution expenses	Operating margins including all operating expenses	Operating margins excluding AMP expenses	Operating margins excluding AMP & Selling and distribution expenses
1	2007-08	7.04%	27.04%	28.03%	5.11%	6.63%	10.60
2	2008-09	23.56%	42.08%	42.90%	5.83%	9.64%	12.75
3	2009-10	19.31%	34.05%	34.04%	3.65%	5.86%	8.10
4	2010-11	17.57%	23.50%	31.23%	6.73%	8.40%	11.49
5	2011-12	15.08%	20.37%	28.14%	3.31%	5.60%	8.19

22. The aforesaid chart clearly decides the quarrel in favour of the assessee and against the revenue. It can be seen that the operating margin excluding AMP and selling and distribution expenses of the assessee for the year under consideration is 28.03% whereas that of the comparables is 10.60% which is much higher and if the operating margin including all the operating expenses is taken, the same is 7.04% in the case of the appellant and 5.11% in the case of comparables. The margin excluding AMP expenses only is 27.04% in the case of the appellant and 6.63% in the case of comparables. In the light of the recisions of the Hon'ble High Court discussed elsewhere and in the of the factual matrix exhibited hereinabove, we are of the considered opinion that the impugned addition on account of AMP expenditure is uncalled for and deserves to be deleted. Ground Nos. 7 to 8.8, taken together, are allowed."

22. We find the Tribunal, following the above order, vide ITA No.910 to 914/Del/2015, order dated 10th July, 2019 has again deleted the addition on account of AMP expenditure. Since the issue stands decided in favour of the assessee by the decision of the Tribunal in assessee's own case for the preceding

assessment years i.e., A.Y. 2007-08 and 2008-09, therefore, we are of the considered opinion that no addition on account of AMP expenditure is warranted. Accordingly, the grounds raised by the Revenue are dismissed.

23. Identical grounds have been raised by the Revenue for A.Y.s 2013-14 and 2014-15. Since the facts for the impugned years are identical to the facts of the case for A.Y. 2012-13, therefore, following the similar reasonings, the grounds raised by the Revenue are dismissed.

24. So far as grounds of appeal No.3 and 4 raised by the Revenue are concerned, these relate to the disallowance of Rs.50,38,72,290/- u/s 37(1) of the Act being 20% of the brand expenses.

25. After hearing both the sides, we find the AO made an addition of Rs.58,38,72,290/- being 20% of the brand expenses debited by the assessee in the books of account at Rs.3144,29,462/- While doing so, he followed the order of his predecessor for the preceding assessment years. We find, the Id.CIT(A) deleted the addition by following the order of his predecessor for A.Y.s 2004-05 and 2005-06 and the decision of the Hon'ble Delhi High Court in the case of Seagram Manufacturing (P) Ltd. (Now merged with the assessee). We do not find any infirmity in the order of the CIT(A) on this issue. We find identical issue had come up before the Tribunal in assessee's own case for A.Y. 2007-08. We find,

the Tribunal, vide ITA No.910/Del/2015, order dated 15th March, 2019, has decided the issue and deleted the addition by observing as under:-

ñ28. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. We find force in the ITA Nos. 910 to 914/Del./2015 contention of the ld. counsel for the assessee. The Hon'ble High Court in ITA No. 885/2016 was, inter alia, seized with the following substantial question of law:

"Whether advertisement and promotion expenses incurred by the assessee have an enduring benefit to the assessee as it creates tangible asset being goodwill, reputation and credibility and if yes, whether it s be treated as capital expenditure."

29. The Hon'ble High Court answered as under:

"So far as Question No. 3 - Advertising and Promotion Expenditure is concerned, the issue has been concluded in an identical case in the case in the matter of another group company in [Principal CIT vs. M/s Seagram Distilleries Pvt Ltd ITA Nos. 224-225/2016](#) decided on 6.4.2016. Therefore, question No. 3 does not arise for consideration."

30. The Tribunal in assessee's own case for assessment year 2004-05 and 2005-06 in ITA No. 3525/DEL/2009 and 2770/DEL/2011 has held as under:

"8.0 The last issue involved in the present batch of appeals raised by the revenue pertains to deletion of addition of Rs. 3,89,55,070/- in AY 2004-05 and Rs. 4,67,32,266/- being 10% of brand expenses made by the AO treating the same as being capital in nature.

8.1 The brief facts involved therein are that the assessee company had claimed brand expenses amounting to Rs. 38,95,50,709/- for AY 2004-05 and Rs. 46,73,42,660/- for AY 2005-06. These expenses comprised of expenditure on event management, business promotion, merchandising, printing of brochures/mailers, market research etc. to determine the consumer reaction to company's products. The AO vide order dated 28.12.2006 for AY 2004-05 and vide order dated 08.12.2008 for AY 2005-06 disallowed 10% of such expenditure as being capital in nature on the premise that the benefit of such expenditure is enduring in nature and available to the assessee over a period of time than being restricted to the relevant previous year alone in which it was incurred, thereby leading to creation of a tangible asset being goodwill, reputation and credibility. However, the Ld. CIT (A) vide order dated 29.06.2009 for AY 2004-05 and vide order dated 28.02.2011 for AY 2005-06 deleted the said disallowance while relying upon his predecessor's order in

earlier years and noting that expenditure on sales and marketing was required to refresh the memory of the consumer of the products manufactured by the assessee and hence there was no enduring benefit. The Revenue is aggrieved by this finding of the Ld. CIT (A).

8.2 During the course of proceedings, the Ld. AR. pointed out that the issue was squarely covered in favour of the assessee vide this Tribunal's order dated 14.03.2016 passed in Assessee's own case for the immediately preceding years, i.e., AY 2002-03 and 2003-04. It was further pointed out that the aforesaid issue had also been decided in favour of the assessee by Hon'ble High Court of Delhi vide order dated 6.04.2016 passed in ITA No. 224/2016 and 225/2016 in the case of assessee's sister concern, viz., M/s Seagram Distilleries Pvt Ltd.. The Ld. AR also cited [Hindustan Aluminium Corporation Limited v. CIT](#): 159 ITR 673, [CIT v. Berger Paints \(India\) Ltd.](#) (254 ITR 503), [CIT v. Salora International](#) (308 ITR 199) (Del.), [CIT v. Casio India Ltd.](#) (335 ITR 196) (Del) and [CIT v. Adidas India Marketing Ltd.](#) (195 Taxman 256) (Del.) to support his contentions.

8.3 The Ld. CIT (DR) supported the order of the Ld. TPO/AO.

8.4 We have heard the rival contentions and perused the orders of the jurisdictional High Court and that of the co-ordinate benches. We find force in the arguments of the Ld. Counsel that the issue is squarely covered in favour of the assessee as there is a clear finding that such expenditure does not result in any enduring benefit. Hence, these grounds of the revenue are dismissed and the order of the Ld. CIT (A) is confirmed."

31. Respectfully following the findings of the Hon'ble High Court and the co-ordinate bench, we direct for deletion of addition of Rs. 8,21,29,536/-."

26. We further find, following the above decision of the Tribunal, the Tribunal in assessee's own case for A.Y. 2008-09 to 2011-12 copy of which is placed in the paper book, has also deleted the addition. Since the issue stands decided in favour of the assessee by the decision of the Tribunal in assessee's own case, therefore, in absence of any distinguishable features brought before us by the Revenue on this issue, we do not find any infirmity in the order of the CIT(A)

deleting the addition made by the AO. Accordingly, the grounds raised by the Revenue on this issue is dismissed.

27. Identical grounds have been raised by the assessee for A.Y.s 2013-14 and 2014-15. Following the reasonings given in the preceding paragraphs, the grounds raised by the Revenue are dismissed.

28. Grounds of appeal No.5 and 6 being general in nature are dismissed.

29. So far as the grounds raised by the assessee are concerned, Ground No.1 being general in nature is dismissed. Grounds of appeal No.2 to 3.7 including the additional grounds relate to the transfer pricing adjustment made on account of AMP expenses.

30. We have heard both the sides on this issue. Since the CIT(A) himself has deleted the benchmarking on account of AMP expenses in both the manufacturing and distribution segment and has not computed any adjustment under both the manufacturing and distribution segments using AMP as a function and distorted BLT, these grounds are not pressed by the Id. Counsel being academic in nature. In view of the above, grounds No.2 to 3.7 and the additional grounds filed by the assessee being academic in nature are not being adjudicated.

31. Identical grounds including the additional grounds have been raised by the assessee for A.Y.s 2013-14 and 2014-15. Since the facts for these two assessment years are identical to the facts of the case for A.Y. 2012-13, therefore, these

grounds also being academic in nature were not pressed by the Id. Counsel for which these are not adjudicated being academic in nature.

32. Ground of appeal No.4 to 4.7 by the assessee relate to the disallowance of Rs.63,24,54,323/- u/s 40(a)(ia) on account of non-deduction of tax from reimbursement of trade schemes to the promoters u/s 194H.

33. We have heard the rival arguments made by both the sides and perused the material available on record. We find the AO made addition of Rs.63,24,54,323/- on the ground that the assessee has not deducted tax from payments on account of reimbursement of trade schemes to sales promoters as per the provisions of section 194H. Therefore, following the provisions of section 40(a)(ia), the AO made disallowance of Rs.63,24,54,323/- which has been upheld by the CIT(A). We find, identical issue had come up before the Tribunal in assessee's own case for A.Y. 2007-08. We find, the Tribunal, vide ITA No.910/Del/2015, order dated 15th March, 2019, has discussed the issue and restored the issue to the file of the AO with certain directions by observing as under:-

ñ44. Before us, the Id. counsel for the assessee stated that in assessee's sister concern Seagram Distilleries [supra] for assessment year 2005-06 to 2009-10, the first appellate authority has allowed the ground on principle basis that withholding tax obligations do not arise in the case of pure reimbursements and the matter was set aside to the Assessing Officer to verify whether the payments made by the assessee were in the nature of reimbursements and while giving effect to the order of the first appellate authority and after verification, the Assessing Officer was convinced that the impugned disbursement were in the nature of reimbursements and allowed the entire amount claimed by the assessee.

45. In our considered opinion, verification needs to be done in the case of the appellant. We, accordingly, set aside this issue to the file of the Assessing Officer/TPO with a direction to examine the documentary evidences to be filed by the assessee and verify whether the impugned disbursements are reimbursement and if found so, the same be allowed as deduction. Thus, ground No. 11 to 11.2 is accordingly allowed for statistical purposes."

34. During the course of hearing, the Id. Counsel for the assessee filed certain additional evidence for the assessment years 2012-13 and 2013-14 under Rule 29 of the ITAT Rules and submitted that these additional evidences go to the root of the matter and support the contention of the assessee that the amounts of disbursements that are in question are in the nature of discount and/or reimbursement and, therefore, no deduction of tax u/s 194H is required. We further find that for A.Y. 2014-15, the additional evidences filed by the assessee before the CIT(A) were rejected by him on the ground that despite sufficient opportunity to show cause as to why trade schemes paid to retailers via sales promoters should not be disallowed, the assessee did not avail of the opportunity. Since the Tribunal in assessee's own case has already restored the issue to the file of the AO for adjudication of the issue afresh which has been reproduced in the preceding paragraphs, therefore, we deem it proper to restore the issue to the file of AO/TPO with a direction to decide the issue afresh in the light of the directions of the Tribunal and in accordance with the law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The grounds raised by the assessee for all the three years are accordingly allowed for statistical purposes.

35. Ground No.5 relates to levy of interest u/s 234B. After hearing both the sides, we are of the considered opinion that levy of interest u/s 234B is mandatory and consequential in nature. Accordingly, this ground raised by the assessee is dismissed.

36. Identical grounds have been raised by the assessee for A.Y. 2013-14. Following similar reasonings, these grounds raised by the assessee are dismissed.

37. Ground No.6 relates to initiation of penalty proceedings u/s 271(1)(c) which is premature in nature. Accordingly, the above ground is dismissed.

38. Identical grounds have been raised by the assessee for A.Y. 2012-13. Following similar reasonings, these grounds raised by the assessee are dismissed.

39. In the result, the appeals filed by the Revenue are dismissed and the appeals filed by the assessee are partly allowed for statistical purposes.

The decision was pronounced in the open court on 15.05.2020.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 15th May, 2020

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi