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

BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
AND
SHRI.T.S.KAPOOR, ACCOUNTANT MEMBER

I.T.A .No.-5178/Del/2011 & 263/Del/2013
(ASSESSMENT YEARs-2007-08 & 2008-09)

M/s Bose Corporation India Pvt. Ltd., 3rd Floor, Salcon Aurum, Plot No.-4, Jasola District Centre, New Delhi-110025 **PAN-AAACB3260A** **(APPELLANT)**	**vs**	ACIT, Circle-3(1), New Delhi **(RESPONDENT)**

Appellant by:	**Sh.Tarandeep Singh, CA**
Respondent by:	**Sh. Peeyush Jain, CIT DR &** **Sh. Yogesh Kumar Verma, CIT DR**

ORDER

PER DIVA SINGH, JM

These are two appeals filed by the assessee against the orders u/s 143(3) r.w.s 144C of the Income Tax Act, 1961pertaining to 2007-08 & 2008-09 assessment years on various grounds. Since the arguments on facts and law qua the grounds raised in ITA No.-263/Del/2013, are similar to the grounds raised in ITA No-5178/Del/2011 as facts and circumstances remained identical, it was a common stand of the parties that the arguments advanced in ITA No-5178/Del/2011 would cover the grounds raised in ITA No-263/Del/2013.

2. For ready-reference, we reproduce the grounds from ITA No-5178/Del/2011:-

> *1."That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("Ld. AO") under section 143(3) read with section 144C of the Act is bad in law.*
> *2.That on the facts and in circumstances of the case and in law, the Ld. AO erred in assessing the returned income of the appellant of Rs. 5,22,98,469 at*

Rs. 16,06,44,060 on the directions of Learned Dispute Resolution Panel ("Ld.DRP") under section 144C of the Act.

3.That the Ld. AO/Transfer Pricing Officer ('TPO') grossly erred on facts and in law in making the Transfer Pricing adjustment of Rs. 5,66,19,363 under section 92CA of the Act on alleged ground that the appellant company incurred expenditure on Advertisement, marketing and promotional expenses excessively on the basis of applying the "bright line limit" and in doing so:

3.1 The Ld. TPO/AO erred in holding that AMP expenses incurred by the appellant are covered under the purview of Section 92B of the Act on surmises and conjectures.

3.2 The Ld. TPO/AO erred in concluding that the associated enterprise ('AE'),being the legal owner of the brand, should have compensated the appellant for Advertising, Marketing and Promotion ('AMP') expense as AE derives benefit from such expenses incurred by the appellant and it also results in creation of marketing intangible.

3.3 The Ld. TPO/AO erred in disregarding the correct characterisation of the appellant's business i.e. being a routine distributor undertaking all the risks relating to its business of distribution and instead, wrongly characterizing the appellant as a limited risk distributor.

3.4 The Ld. TPO/AO erred in disregarding that all the key decisions and functions with respect to AMP expenses incurred by the appellant for sale are taken by appellant and all related risks and reward, are to be borne by the appellant and not by the AE.

3.5 That the Ld. AO/TPO on the facts and the circumstances of the case erred in not adhering to the principles of comparability and in using inappropriate comparables to determine the bright line limit.

3.6 That Ld. AO/TPO erred on the facts and circumstances of the case in characterising the appellant as a services provider and in applying a mark-up on the excess AMP spend, and also failed to take cognizance of the disallowance of AMP expenditure made under the normal provisions of the Act.

4. The Ld. AO (following the directions of the Ld. DRP), erred on facts and in law disallowing the provision for warranty amounting to Rs. 31,00,166/- on the ground that same was a contingent liability.

4.1. While making the aforesaid disallowance, the Ld. AO erred on facts in observing that provision for warranty is not based on actuarial or scientific method,

4.2. While confirming above disallowance, the Ld. DRP erred on facts in observing that the addition had not reached finality and the department is at various stages of appeal without considering that the revenue appeal in the matter for Assessment Years 2001-2002 and 2005-2006 has been dismissed by the Hon'ble Delhi High Court.

5. That the Ld. AO erred in disallowing an amount of Rs. 4,70,24,396 (being 4/5th of the total expenditure) paid towards advertisement charges by treating the same as deferred revenue expenditure.

5.1. That the Ld. AO erred in alleging that the benefit of incurring such expenditure is stretched over a number of years and accordingly the expenditure needs to be amortized over a number of years.

5.2. While confirming above disallowance, the Ld. DRP and the Ld. AO (following the directions of the Ld. DRP) erred on facts in not taking cognizance that the matter has been allowed in favour of the appellant by this Hon'ble Tribunal for the Assessment Year 2003-2004.

6. That the Ld. AO erred in proposing to treat the amount of advance service charges received of Rs. 16,01,663/ -as income for the year under consideration.

6.1. That the Ld. AO erred in not appreciating that as per mercantile system of accounting, the amount of 'service charges- accrued but not due' has not accrued and thus does not represent income for the year under consideration.

7. On The acts and in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 271(1)(c) read with section 274 of the Act."

3. Right at the outset Ld.AR addressing the facts of the case submitted that since the assessee is a distributor, as such the assessee's case should be decided following the precedent laid down in the order dated 16.08.2013 in BMW India Pvt. Ltd. in ITA No.-5354/Del/2012 as opposed to the decision of the Special Bench in L.G. Electronics which was principally deciding the case where the assessee was a licensed manufacturer. The Ld. CIT DR on the other hand contended that the Special Bench should prevail over the decision of the Division Bench as the Special Bench was a decision rendered by a larger Bench. A careful reading of the entire order in both the cases would disclose that the precedents laid down by the majority view in the 3 Member Special Bench have been followed in BMW India Pvt. Ltd. (cited supra). The mere fact that arguments of the Ld. AR were recorded therein, namely that the assessee being a distributor

who had withdrawn as an intervenor from L.G. Electronics case, as such should not be bound by a decision where the principal applicant was a licensed manufacturer and a contrary view in the circumstances was canvassed, does not mean that all arguments recorded have been accepted.

3.1. The needless controversy appears to have arisen apparently due to certain observations made in order dated 13.12.2013 in ITA No.-6135 & 5611/Del/2011 in ACIT vs M/s Casio India Company wherein in para 5 and 6, the Co-ordinate Bench appears to be guided by the arguments addressed by the Ld. AR in that case who, relying upon the order in the case of BMW India Pvt. Ltd., advanced arguments apparently on the basis of headnotes of the order in BMW India Pvt. Ltd instead of reading the complete order and submitted that BMW India Pvt. Ltd. be followed in preference to the Special Bench in L.G. Electronics. The observations in para 5 and 6 of the order appears to completely overlook the fact that the material finding in BMW India Pvt. Ltd. actually considered and followed wherever applicable the principles laid down by the Special bench in L.G. Electronics. Hence the surprising observation in para 6 that *"there is no prize for guessing that Special Bench order has more force and binding effect over the Division Bench order on the same issue. This contention raised by the Ld. AR, therefore, fails"* appears to be the result of the mistaken submissions which could not have been based on reading the entire order and appears to be based only on a reading of the headnotes. The fact that headnotes can at times be misleading is a well known fact as they are only the reporting done for the convenience of the professionals and it is imperative therefore to read the entire order. Be it as it may, we would not be out of place to sound a caution that hasty conclusions based on arguments advanced on the basis of the headnotes in the reporting of the orders may not be advisable and it may lead to misleading

conclusions. Reference may be made to the decision rendered by the Apex Court in Nahar Industrial Enterprises Ltd. US. Hongkong and Shanghai Banking Corporation (2009) 12 SCR 54 the Hon'ble Court wherein their Lordships held in paras 94 and 95:-

> ***"94……..***
> ***It must in this context be noted that Headnotes by the editors of a Reports are not a conclusive guide to the text of the judgement reported. They are made only for the convenience of the readers as a short summary to the text and for easy reference and at times they are misleading.***
> ***95. The United States Supreme Court in United States vs. Detroit Timber and Lumber Co., 200U.S.321, 337.***
> ***"In the first place, the headnote is not the work of the court, nor does it state its decision. ……It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports."***

3.2. The advancing of arguments that a distributor remuneration model is separate and distinct is accepted in L.G. Electronics case also as would be borne out from parameter one of para 17.4 of L.G. Electronics. Accordingly taking cognizance of this decision rendered in BMW India Pvt. Ltd. does not run contrary to the decision of L.G. Electronics case. The fact that in L.G. Electronics case there was no occasion to analyze, consider in detail and consequently adjudicate only on a distributor's case is self evident since all possible manner of business models were considered together for which purposes acknowledging its humane limitations the Special Bench was constrained and candid to admit the obvious fact that it is not possible to have a straight jacket formula for all eventualities. The fact remains that in parameter one of para 17.4 the distinction in business models of distributorship and licensed manufacturer was considered to be a necessary factor requiring examination. In BMW India Pvt. Ltd. this examination qua the assessee was done the decision is fact specific and it is a well accepted fact that the decisions in transfer pricing are fact strewn

and fact specific. The view taken in BMW India Pvt. Ltd. was that a distributor remuneration model is distinct and peculiar. Thus the view taken was in conformity with the decision of the Special bench and concurring with the view taken, we hold that this view does not override the Special Bench. The fact that the distributor remuneration model is distinct is a well accepted fact for which no authority need be cited, however for the sake of addressing lingering doubts if any we refer to the order dated 30.08.2013 in ITA No-6283/Del/2012 in Nokia India Pvt. Ltd., though not in the context of AMP expenses but in the context of allowable expenses of a distributor. In the facts of that case on consideration it was again recognized that a distributor's model of remuneration has peculiar and unique characteristics which are distinct and separate from the remuneration model of a licensed manufacturer. The assessee therein was engaged in providing services in the industry of installation, commissioning and erection of tele-communication equipment, selling (trading) of mobile phones networks and accessories, research & development services to the Nokia Group of company whose claim of expenses based on price protection to its dealers was denied. In the facts of that case the dealers were offered apart from discounts based on the incentives to the distributor on goods sold but also promotional schemes for achieving sales target. Over and above this price protection was also offered for the handsets which were not sold. The assessee sought to justify its claim for price protection on the ground that the assessee was operating in a highly competitive and price sensitive market which was dependent on the prices and varieties of handsets launched by its competitors. The price protection policy, as per the arguments was necessitated to ensure that Nokia's distributors do not suffer loss on account of stock lying with them as the distributors, at times, are required to sell the handsets at a price lower than the cost at which the same were

purchased from the assessee. Considering the ground in Nokia India Pvt. Ltd. the following conclusion was drawn:-

> *"4.8. "We have heard the rival submission and perused the material available on record. On a consideration of the issues, we are of the view that the evidence filed before the DRP should be sent back to the AO for considering the same. The arguments advanced on behalf of the assessee that the confirmations filed in similar format are the result of guidance given to the distributors/dealers by the assessee to show how the confirmation should be filed. This fact does not necessarily lead to the conclusion that the statements in the confirmations are not true. However the correctness/genuineness of the same needs to be enquired into. We also hold that the fresh evidences which the assessee is now seeking to file should be admitted as the arguments that they could not be filed before the DRP in the absence of any fact on record cannot be disbelieved especially since the evidences filed before the DRP itself were filed during the fag end of the proceedings. However while doing so, we are inclined to agree with the arguments advanced on behalf of the Ld. CIT DR that the evidences sought to be placed on record are not sufficient and complete to justify the claim of expenditure wholly and exclusively for business purposes as justification for the book entry by way of Price Protection policy of the assessee by way of agreements with the distributors/dealers accepting liability for the said purposes by the assessee needs to be filed. The amounts claimed qua the distributors/dealers need to be supported by details of dates/period and models for which price protection is calculated which needs to demonstrated by some internal audit of stocks lying unsold whose prices have dropped due to competition. The necessary evidences need to be made available to justify the claim especially since discounts and commissions are anyway stated to be made available and paid to the distributors/dealers. Accordingly while admitting fresh evidences filed before us the AO is directed to consider them alongwith the evidence which had been filed before the DRP. We further direct the assessee to place necessary and relevant evidences as brought out above and also find mentioned in the assessment order to justify its claim. Liberty to file fresh evidences before the AO is granted and the AO shall be duty-bound to consider the same before the passing of his order. Needless to say that a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard shall be passed by the AO."*

3.3. Hence though it may appear to be intellectually sound to precede or follow up ones main argument with judicial decisions that purport to support or explain the main arguments one needs always to keep in mind the well recognized and accepted proposition that a judgement should be read as a whole and practice of picking stray sentences and words should be avoided as the language used in a decision cannot be treated with the same level of rigorous interpretation as is given to the words in a statue. In support of the above, we rely on order dated 30.08.2014 in ITA No.-6410/Del/2012 in Sony Mobile Communication India Pvt. Ltd. as under:-

> ***6.5.*** *"While considering the language used in a judgement/decision, it is necessary to be borne in mind that it is to be interpreted plainly and unambiguously and artificial construction is to be avoided. The importance of reading the entire judgement/decision can never be over-emphasized especially if there is a doubt cast by any of the parties about the precedent laid down in the judgement. The approach to refer to a stray sentence or a casual remark has frequently been frowned upon by Courts and a word or a sentence by itself cannot be treated as a binding precedent.* ***A case is a precedent for what it actually decides and nothing more. It is equally well-settled that for considering the applicability of rules of interpretation to the words used in the judgements and decisions vis-à-vis the Acts of Parliament, the words used by the Judges are not to be read as if they are words used in an Act of the Parliament. Statutes lay down rules "in fixed verbal form" precedents do not. It has to be borne in mind that the particular words are not necessarily used by precedent Courts after weighting the pros and cons of all conceivable situations that may arise. They constitute just the reasoning of the judges in the particular case, tailored to a given set of facts and circumstances, and only the proposition of law which constitutes ratio decidendi is binding on the same set of facts. The words used in the Acts of Parliament as is well known on the other hand on account of the careful drafting-presumably with reference to analogous statutes; the multiple readings to which it is subjected in the legislature and the discussions which go behind the making of a statute inject a degree of sanctity and defiteness to the meaning of the words used by the Legislature. The same cannot necessarily be always said of a decision which deals with a certain given set of facts for answering the specific question posed to the Judges.*** *The Judges while deciding the same may dwell on various possibilities without the*

> *benefit of the facts in those cases and consequently arguments thereon which they may deliberate and at times without the benefit of specific arguments on those facts. The observations which may have been made in passing in these deliberations do not form the ratio decidendi of the decision. It would be too much to ascribe and read precise meaning to words in a decision which the judges who wrote them may not have had in mind.* ***In support of the above legal position, we may make specific reference to CWT vs Dr. Karan Singh and Others. (1993) 200 ITR 614 (SC); CIT vs K. Ramakrishnan (1993) 202 ITR 997 (Kerala) and KTMTM Adbul Kayoom & another vs. CIT (1962) 44 ITR 689. The observations of the Hon'ble Apex Court in the case of CIT vs. Sun Engineering Works Pvt. Ltd. (1992) 198 ITR 297 (SC) specifically observed that it is neither desirable nor permissible to pick out a word or a sentence from the judgement of the Hon'ble Supreme Court divorced from the context of the question under consideration and treat it to be the complete law declared."***
>
> ***(Emphasis provided herein)***

3.4. Accordingly reverting to the controversy on the issue at hand we hold that there is no conflict between the decision in BMW India Pvt. Ltd. with L.G. Electronics. Hence in view of the above the parties were directed to address the issues on the basis of facts available on record keeping in mind that there is no divergence of views on the principles to be applied while deciding the issues, as the principles laid down in L.G. Electronics (Special Bench) have been applied in BMW India Pvt. Ltd.

3.5. The relevant facts of the case are that the assessee in the year under consideration filed a return on 27.10.2007 declaring an income of Rs.5,22,98,469/- which was processed u/s 143(1). Subsequently after issuance of notice u/s 143(2) & 142(1) the assessment order dated Nil/Oct/2011 was passed u/s 143(3) r.w.s. 144C of the Income Tax Act.

4. Aggrieved by this the assessee is in appeal before the Tribunal. The facts relatable to Ground No-2 & 3 raised by the assessee are that the assessee company incorporated in 1995 is a wholly owned subsidiary of Bose Corporation USA. The assessee at the relevant point of time has been engaged in the business

of reselling of high end Bose audio products. The business of the assessee as per the profile of the company is divided into two major business lines namely:

(i) Retail sales division (retail customers);

(ii) Professional sales division (large premises customers, such as hotels, show rooms, auditorium etc.)

4.1. The assessee is sole distributor of Bose products in India and for retail customers it primarily purchases only Bose products while for professional sales division, it purchases non-Bose products also to provide complete audio video solutions to the customers.

4.2. Based on the detailed functional, asset and risk profile of the company documented in the Transfer Pricing study the assessee has been characterized as "buy sale distributor" which assumes normal risk associated with such business. The assessee has selected Resale Price Method (hereinafter referred to as "RPM") to benchmark its transactions of support services income and purchase of finished goods and parts. The AMP expenses of Rs.58,77,80,494/- were not bench marked.

5. Considering the TP documentation and the submissions on behalf of the assessee, following conclusions were arrived at by the TPO:-

i) "The AMP/Sales of the company was much higher than the AMP/Sales of companies selected as comparables in the TP study.

ii) The company was a limited risk distributor:

iii) Based on the above, the AMP spend of the company was for benefitting the AEs by developing marketing intangible for the AE for which it should have obtained some compensation. Accordingly, this was an international transaction, no reported by the assessee in its Form 3CEB. This was based on the 'substance' of the transaction than the form.

iv) The Ld. TPO determined the 'bright line' (i.e. AMP) expenditure or AMP/Sales of routine distributors) of AMP expenses by looking at the AMP/Sales of the comparables submitted by the assessee in its TP study and during the course of the assessment proceedings. However, in order to determine the bright line, the TPO rejected all companies

which were engaged in any brand promotion activities.

v) Further, the brand promotion and marketing activities were actually intra-group services being rendered by the company for its AEs and so it should also be earning a mark up on such services. Based on analysis of certain marketing and advertising companies, the TPO determined a mark up of 14.93% for the marketing activities.

v) Accordingly, based on the bright line AMP/Sales, the excessive AMP expenses (based on Traded sales value (exclusive of support service income; installation income and service income) were determined and mark-up was applied to the same.

Based on the above, the TPO enhanced the income of the assessee by Rs.56,619,363/- on account of AMP expenditure vide his order dated October 15, 2010."

5.1. On the other hand the following contentions of the assessee were not accepted:-

- *"The details of the AMP expenses of Rs.58,780,494 were submitted of which actual advertising and promotion expenses were Rs.58,393,183 and the ratio of AMP over Sales was 9.42%.*
- *These AMP expenses were undertaken by the Assessee on its own accord as an independent, sole and exclusive distributor of Bose products and solutions in Indian undertaking all the risks like normal distributor managing its own market.*
- *The advertising and marketing decisions and functions were performed by Bose India itself. It was undertaken with third parties and had not bearing on the international transactions which are subject to TP Regulations hence are outside the purview of the TP Regulations.*
- *The assessee has been consistently earning high gross margins in line with its characterization of an independent distributor responsible for its own market and for the efficiency of its third expenses.*
- *Any return for its allegedly excessive marketing activities was already being compensated through the consistently high gross margins.*
- *Comparable companies that are also working as normal distributors, having similar functional, asset and risk profile as that of the assessee, were analyzed for a similar extent and intensity of value added activities. Based on the above analysis, the assessee presented a list of comparable during the assessment proceedings that are engaged in distribution activities similar FAR profile as that of the assessee, using data available in the databases as on date."*

5.2. The DRP upheld the draft assessment order pursuant to which the order under challenge was passed.

5.3. The Ld. AR in the light of the submissions advanced inviting attention to the chart of issues filed submitted that incurring of excessive AMP expenses has been held as an international transaction and qua the jurisdiction of the TPO in considering the same suo moto the issues are covered in favour of the Revenue. Similarly the applicability of bright line as a tool of methodology also has been upheld by the Special Bench as such the assessee would not be arguing those grounds. However it was his submission that the TPO may be directed to consider the issue afresh in the light of the decisions relied upon as various aspects have not been taken into consideration namely:

a) Appellant is having a long-term distributorship arrangement with AE;
b) Appellant is otherwise being compensated by good distributorship margins; and
c) Gross and net margins earned by the appellant are much higher than that earned by the comparable companies.

5.4. Similarly qua the calculation of AMP wherein selling expenses are required to be reduced as held in the decision of the Special Bench in L.G. Electronics case it was requested that the TPO may be directed to exclude the same.

5.5. Apart from that it was also requested that qua the comparables used by the TPO to compute the AMP/sales it was his submission that the TPO may be directed to comply with the decision of the Special Bench while selecting the comparable companies to apply the factors set out in para 17.4 and make necessary adjustments. It was his submission that the Special Bench has held that the comparables also need to be appropriately selected.

6. We have heard the rival submissions and perused the material available on record. On a consideration thereof taking note of the fact that the assessee is a distributor whose remuneration model necessarily is different from a licensed manufacturer as has been held in BMW India Pvt. Ltd. which differentiation has been taken note of in parameter 1 of para 17.4 also by the Special Bench we direct the TPO to examine the claim of the assessee de novo on facts in the light of the decisions relied upon.

6.1. Further in view of the ratio of the Special Bench order in L.G. Electronics, we dismiss the ground/arguments raised by the assessee challenging the issue of jurisdiction of the TPO and uphold the same. We further hold the transaction to be an international transaction. Similarly the applicability of the bright line as a methodology for calculating the AMP is also decided in Revenue's favour and the action is upheld and the issue is covered against the assessee. However as far as calculation of "bright line" is concerned we direct the TPO to correctly calculate the "bright line" keeping in mind that a fresh search of comparables be done following the directions of the Special Bench. Thus the TPO needs to carry out a fresh search for selecting the comparables after a proper FAR analysis making such adjustments which are warranted on facts, keeping the 14 parameters set out in para 17.4 of the order of the Special Bench.

6.2. We further direct the TPO to correctly calculate the AMP expenses by excluding the selling expenses as they do not from part of AMP basket of expenses as has been hold by a catena of decisions following the decision of L.G. Electronics (Special Bench).

6.3. The TPO shall also decide the application of mark-up by way of a speaking order in accordance with law following the precedent laid down in L.G. Electronics case where principally the issue of mark up has been upheld.

6.4. Accordingly in terms of the above directions the issues are restored back to the TPO with the direction to decide the same in accordance with law by way of a speaking order after giving the assessee a reasonable opportunity of being heard.

7. Ground No.-2 & 3 of the assessee are partly allowed for statistical purposes.

8. Addressing Ground No-4, 5 & 6, Ld. AR invited attention to the synopsis filed on the corporate tax issues addressing these grounds. Addressing ground No-4 it was submitted that the DRP has considered the same at page 8 para 5. It was submitted that the issue has been considered by the ITAT in its order dated 01.10.2012 in ITA No-83/Del/2011 alongwith C.O- 35/Del/2011 filed by the department and the assessee respectively in 2006-07 A.Year as such covered in assessee's favour. Copy of the said order it is seen is available on record. Referring to the DRP's order it was further sought to be argued that the assessee had placed reliance on the decision on identical issue arising it in 2005-06 and 2006-07 assessment years. Referring to the same it was his submission that the assessee had made a provision in accordance with its global policy, keeping in view its past experience on technical evaluation and best estimates. However the AO proceeded to hold the same as contingent liability and held that it was not an allowable expenditure. Following the view taken in the earlier years, he held the calculation is based on neither actuarial valuation nor any other scientific method. Addressing the past history it was submitted that consistently the view of the AO had been reversed over the years. Reliance was placed on order dated 04.02.2010 in ITA No-4554 & 4555/Del/2009 in 2001-02 & 2005-06 assessment years (copy of pages 518 to 522) wherein following the order dated 17.04.2009 in ITA No.-2009/Del/2009 pertaining to 2003-04 assessment years similar issue was decided in assessee's favour. Attention was also invited to order dated

01.10.2012 in ITA No-83/Del/2011 alongwith C.O-35 No-35/del/2011 wherein following the orders of the Tribunal, Ground No-1 raised by the Revenue were dismissed in para 5.

8.1. The Ld. AR also submitted that the Hon'ble High Court had dismissed the appeals of the Revenue against the order of the Tribunal in 2001-02 & 2005-06 assessment years, copies filed in the Paper Book. Ld. DR places reliance upon the assessment order.

8.2. On a consideration of the rival submissions and material available on record, we are of the view that the issue is no longer res-integra. In the absence of any distinguishable facts, circumstance or position of law brought to our notice by the Revenue respectfully following the orders of the Tribunal which have also been upheld by the Hon'ble High Court, Ground No.-4 of the assessee is allowed.

9. The facts relatable to Ground No-5 are found discussed at page 8 to 10 of the assessment order. It is seen that the assessee was required to explain the incurring of expenses amounting to Rs.5,87,80,494/-. The assessee explained that these have been incurred for advertising its products through print and electronic media. On the said issue it is seen from a reading of paras 7 to 7.2 of the DRP the assessee assailing the action of the AO in allowing 1/5 of the expenses claimed and maintaining addition to the extent of Rs.4,70,24,396 (4/5th of the expenditure claimed) had placed reliance on the order dated 29.09.2009 in ITA No-297/Del/2009 for 2003-04 A.Year wherein the Tribunal had dismissed the appeal of the Revenue holding the expenditure to be revenue in nature. However the claim was not allowed by the DRP as the issue was challenged by the Revenue before the Hon'ble High Court. Still aggrieved the assessee is in appeal.

9.1. Ld. AR referring to the aforementioned order of the Tribunal in 2006-07 assessment year and in particular to specific para 13 submitted that following the order of the Tribunal in assessee's own case wherein the Tribunal was pleased to dismiss the Revenue's ground. Reliance was also placed upon the aforesaid order of the Tribunal pertaining to 2003-04 assessment year specific para 7 and it was submitted the said orders had been confirmed by the Hon'ble High Court.

9.2. Ld. CIT DR places reliance on the orders of the authorities below. Herein also no distinguishing fact, circumstance or position of law contrary to the view taken was brought to our notice.

9.3. On hearing the rival submissions, the material available on record and the peculiar facts and circumstances of the case and the orders of the Tribunal in the assessee's own case, we are of the view that in the facts of the present case it is not clear as to on what basis the AO has held the expenditure to be deferred Revenue expense. The factum of incurring the expenditure has not been doubted by the Revenue. In the aforesaid peculiar facts and circumstances of the case following the past history of the assessee on this issue, we direct the AO to allow the expense as a Revenue expenditure in the year under consideration Ground No-5 raised by the assessee as such is allowed.

10. The facts relatable to Ground No-6 raised by the assessee are found discussed at pages 10 to 18 of the assessment order. A perusal of the same shows that the assessee was required to explain vide order sheet entry why service charges accrued but due shown at Rs.16,01,163/- be not taken as income taken of the assessee. It is seen that disregarding the submissions made on behalf of the assessee following the order of the DRP which held that since the issue of similar additions made in 2006-07 assessment year was pending before the ITAT, the addition was confirmed. The Ld. AR placed reliance upon the aforesaid order in

its own case pertaining to 2006-07 assessment year specific para 17 thereof so as to point out that the departmental ground has been dismissed.

10.1. Ld. CIT DR places reliance on the assessment order.

10.2. It is seen that the Co-ordinate Bench in 2006-07 A.Year decided the issue in the following manner:-

> *17. "We have heard both the parties and gone through the facts of the case. Indisputably, the assessee provided annual maintenance service to its customers in respect of their products for a time span of one year or six months and the service charges were received in advance. Since the time span for such service sometimes fell in between two financial years, accordingly, the services charges received were classified between current year fees and the fees received for next year, and the latter were accordingly, shown as income from the relevant financial year. As is apparent from the findings in the impugned order, in UGS India Pvt. Ltd. (supra), ITAT concluded that amount treated as deferred revenue is to be taxed in the year in which services are rendered or recognized as income of the assessee. For income to accrue, it is necessary that the assessee must have contributed to its accruing or arising by rendering services or otherwise, and a debt must have come into existence and he must have acquired a right to receive the payment. In the present case, there is nothing to suggest that the assessee has fully contributed to its accruing by rendering services so as to entitle him to receive the entire amount in the year under consideration. In view of the foregoing, especially when the Revenue have not placed before us any material nor brought to a contrary decision so as to enable us to take a different view in the matter, we are not inclined to interfere. Therefore, ground no.4 in the appeal of the Revenue is dismissed.'*

10.3. On a consideration thereof and taken note of the fact that there is no change in fact, circumstance or law, we find no good reason to deviate from the view taken. The AO is directed to grant necessary relief, respectfully following the order of the Tribunal as facts remain the same, Ground No.-6 of the assessee is accordingly allowed.

11. In the result ITA No.-5178/Del/2011 is partly allowed for statistical purposes.

12. In ITA No-263/Del/2013, the assessee has raised the following grounds:-

> *1. "That on the facts and in the circumstances of the case and in law, the*

order passed by the Ld. Assessing Officer ("Ld. AO") under section 143(3) read with section 144C of the Act is bad in law to the extent of additions/adjustments of Rs.116,185,871 made in the impugned assessment order.

2. *That on the facts and in circumstances of the case and in law, the Ld. AO [following the directions of Learned Dispute Resolution Panel ("Ld. DRP")] erred in assessing the returned income of the appellant of Rs. 111,875,620 at Rs. 228,061.490 .*
3. *The Ld. Transfer Pricing officer (TPO)/ DRP erred on facts and in law in enhancing the income of the assessee by Rs. 63.450,715 on account of non-receipt of the reimbursement for "allegedly excessive" Advertising, Marketing and Promotion CAMP') expenses incurred by the Company and in doing so have grossly erred in:*
   - *3.1 disregarding the correct characterisation of the appellant's business i.e. being a normal risk bearing distributor undertaking all the risks relating to its business of distribution and instead, wrongly characterizing the appellant as a limited/ no risk distributor;*
   - *3.2 disregarding the nature of AMP expenses incurred by the appellant and incorrectly holding that such expenses results in developing marketing intangibles for the AEs;*
   - *3.3 misinterpreting/ placing incorrect reliance on the international guidance from OECD, US TP Regulations and Australian Tax Office C'ATO') and making several erroneous/ factually incorrect and contradictory statements/ observations in the TP order, which are not relevant to the instant case, only in order to justify an otherwise inappropriate and unwarranted TP adjustment;*
   - *3.4 incorrectly holding the AMP expenses incurred by the assessee to be "excessive" on the basis of a "bright line limit" arrived at by, erroneously rejecting companies similar in FAR profile to the assessee on basis of inappropriate reasoning;*
   - *3.5 alleging that the AMP expenses incurred by the assessee need to be reimbursed by the Associated Enterprises (AEs') along with a mark-up on the same by implicating the same as an intra-group marketing service;*
     - *3.5.1 applying the concept of 'intra-group services' without a due understanding thereof and without demonstrating that services has been rendered for the benefit of the AEs or any tangible benefits have been received by the AEs for which a return needs to earned by the assessee;*
     - *3.5.2 in applying a mark-up of 15.00% in respect of the assessee's "alleged excessive" AMP expenses, without any basis for the same whatsoever and without giving the assessee adequate opportunity to analyze, present its contentions on the same;*
   - *3.6 holding a contradictory view that in the absence of specific business*

arrangement between the appellant and the AEs, the contention that the AMP expense has sufficiently been remunerated by AEs through the transfer price of goods purchased.

3.7 not appreciating/ ignoring that the AMP expenses incurred by the appellant represent purely domestic transaction(s) undertaken with third parties, not covered under the purview of Section 92 of the Act.

4. *That the Ld. AO (following the directions of the Ld. DRP) erred in disallowing an amount of Rs. 62,639,528 (being 4/5th of the total expenditure) paid towards advertisement charges by treating the same as deferred revenue expenditure.*

4.1 That the Ld. AO erred in alleging that the benefit of incurring such expenditure is stretched over a number of years and accordingly the expenditure needs to be amortized over a number of years.

4.2 While confirming above disallowance, the Ld. DRP and the Ld. AO (following the directions of the Ld. DRP) erred on facts in not taking cognizance that the matter has been allowed in favour of the appellant by this Hon'ble Tribunal for the Assessment Year 2003-2004.

5. *That the Ld. AO (following the directions of the Ld. DRP) erred in treating the amount of advance service charges received of Rs. 1,851,726 as income for the year under consideration.*

5.1 That the Ld. AO erred in not appreciating that as per mercantile system of accounting, the amount of 'service charges- accrued but not due' has not accrued and thus does not represent income for the year under consideration.

6. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 271(1)(C), 271BA and 271AA of the Act."*

That the above grounds of appeal are independent and without prejudice to each other.

That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal."

12.1. On a perusal of the grounds reproduced above, it is seen that Ground No-1 & 6 require no adjudication. Since qua Ground No-2 & 3 the stand of the parties has been that the arguments advanced in ITA No-5178/Del/2011 would apply herein also, accordingly with identical directions the issue is restored to the file of the TPO/AO to decide the issues afresh by way of a speaking order in accordance with law. Needless to say that the assessee shall be afforded a reasonable opportunity of being heard.

13. The ground No-4 raised in the present appeal is identical to Ground No-5 raised in ITA No-5178/Del/2011. The arguments of the parties herein are also identical. Accordingly, for similar reasons the ground raised is decided in assessee's favour following the past history of the assessee on the issue, Ground No-4 accordingly is allowed.

14. Ground No-5 raised in the present appeal is stated to be identical to Ground No-6. In regard to this also the parties rely on the arguments advanced in ITA No-5178/Del/2011. Since facts and circumstances remain identical except for the difference in amounts and there being no change in law, Ground No-5 filed by the assessee for reasons set out in ITA No.-5178/Del/2011 is allowed.

15. In the result the appeals of the assessee are allowed for statistical purposes.

The order is pronounced in the open court on 31st of July 2014.

Sd/-	**Sd/-**
(T.S.KAPOOR)	**(DIVA SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated:- 31/07/2014
Amit Kumar

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

ASSISTANT REGISTRAR
ITAT NEW DELHI