

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

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.N. CHARY, JUDICIAL MEMBER**

**ITA No.-758/Del/2017
(Assessment Year: 2012-13)**

Burberry India Pvt. Ltd. 3-A-1, Taj Apartment, Rao Tula Ram Marg New Delhi. PAN No. AADCB9530G	vs	ACIT Circle 5(1) New Delhi.
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**ITA No.-7684/Del/2017
(Assessment Year: 2013-14)**

Burberry India Pvt. Ltd. 3-A-1, Taj Apartment, Rao Tula Ram Marg New Delhi. PAN No. AADCB9530G	vs	ACIT Circle 5(1) New Delhi.
Assessee by	Sh. Ajay Wadhwa, Adv.	
Revenue by	Sh. Sanjay I. Bara, CIT DR	

Date of Hearing	21.06.2018
Date of Pronouncement	22.06.2018

ORDER

PER K.NARASIMHA CHARY, J.M.

These appeals are filed by the assessee challenging the order dated 30/11/2016 and 19/12/2016 passed by the learned Assessing officer pursuant to the directions dated 18/10/2016 and 15/09/2017 respectively by the learned Dispute resolution panel-1, New Delhi for the assessment years 2012-13 and 2013-14 respectively. Since the assessee

and the facts involved in these matters are identically the same, both the appeals are disposed of by this common order with reference to the facts relevant for the assessment year 2012-13.

2. Brief facts of the case are that the Burberry India Private Limited, the assessee, was incorporated in January 2010 and is engaged in trading of imported luxury goods bearing the Burberry trademark. The assessee distributes these products through retail by way of directly owned and managed outlets. It is a 51:49 joint venture between Burberry International Holdings Ltd UK and Genesis Colours Private Limited, India.

3. For the assessment year 2012-13 the assessee filed their return of income on 30/11/2012 declaring loss of Rs. 1,80,33,018/-. During the course of assessment proceedings, Ld. AO noticed that the assessee had undertaken international transactions with its associated enterprises as such in accordance with the provisions of section 92 CA of the Income Tax Act, 1961 he referred the determination of the arm's length price to the Transfer Pricing Officer (Ld. TPO). The assessee has benchmarked international transaction relating to import of finished goods using CUP corroborated by RPM as the most appropriate method by using the multiple year Data and claimed the transaction to be at arm's length. The gross profit rate of the assessee was 54.96% and the net profit rate was (-)14.73%.

4. Ld. TPO, however, benchmarked the international transaction using TNMM is the most appropriate method and OP/OC as the PLI, and computed the adjustment under

section 92 CA at Rs. 6,94,58,591/-which are subsequently rectified to Rs. 6,80,36,113/-. When the assessee filed objections before the Ld. DRP, Ld. DRP after considering the decisions reported in while following editions reported in Abott Medical Optics Pvt. Ltd. 2016-TII-366-ITAT-BANG-TP, Mattel Toys India Pvt. Ltd. 2015-TII-477-ITAT-MUM-TP, and Kohler India Corp. Pvt. Ltd. 2016-TII-91-ITAT-BANG-TP held that the TNMM is more tolerant of functional differences and since the assessee failed to demonstrate that the requirements of using RPM as most appropriate method found that the reasoning of the Ld. TPO is justified and accordingly upheld the same.

5. Ld. DRP, while upholding the rejection of RPM by stated that,

“The assessee has incurred about Rs. 2.94 Cr. towards ‘advertisement and marketing expenses’ on a turnover of about Rs.69.70 Cr. It is claimed that about Rs. 74.53 Lakhs has been reimbursed towards advertisement and marketing expenses however, it is clear that the assessee has incurred substantial AMP, and other expenses, in relation to its turnover, and is therefore, not a simple distributor in terms of the requirement of using RPM. The assessee has failed to demonstrate that the comparables have also incurred similar expenditure and have a similar functional profile required for RPM analysis.”

6. Hence the assessee preferred this appeal. Though the assessee challenged the reference made by the Ld. Assessing Officer to the Ld. TPO, and the comparability of the companies, Ld. AR confined the challenge to the findings of the authorities below in rejecting the CUP corroborated by RPM and substituting the same with TNMM.

7. It is argued by the Ld. AR that the role of the Assessee does not involve any value addition to the product being sold in the Indian market. Assessee merely purchases from its Principal, Burberry Limited and resells the product, without adding any value to the core product as such RPM is used for cases. Even as per Rule 10B of the Income-tax Rules, 1962, RPM is used in case of a reseller. He further submitted that inasmuch as the Ld. TPO has accepted the characterization of Burberry India as provided in the TP Documentation for FY 2012-13, besides the functional profile of the Assessee or the fact that the Assessee is a routine distributor, it is not open for the Ld. TPO proceeded to apply an indirect method i.e. TNMM as the MAM over the direct method RPM.

8. Ld. AR placed reliance on Bose Corporation India (P.) Ltd. v. ACIT [2017] 77 taxmann.com 194 (Delhi - Trib.), Horiba India Pvt. Ltd. vs. Deputy Commissioner of Income Tax [2017] 81 taxmann.com 209 (Delhi - Trib.), Assistant Commissioner Of Income Tax vs. Kobelco Construction Equipment India Limited [2017] 81 taxmann.com 31 (Delhi - Trib.), Oriflame India (P.) Ltd. v. ACIT [2017] 85 taxmann.com 162 (Delhi - Trib.), DCIT v. Delta Power Solution India (P.) Ltd. [2016] 68 taxmann.com 247 (Delhi - Trib.), Luxottica India Eyewear P.Ltd. vs Department Of Income Tax (ITA No. 1115/Del/2014 and 617/Del/2014), ACIT vs Akzo Nobel Car Refinishes India (P.) Ltd [2017] 84 taxmann.com 199 (Delhi - Trib.), Nokia India Pvt. Ltd. v. Deputy Commissioner of Income-tax, Circle -13(1), New Delhi [2014] 52 taxmann.com 492 (Delhi - Trib.), and Danisco (India) Pvt. Ltd. Vs. ACIT

[2014] 48 taxmann.com 60 (Delhi - Trib.)/[2014] 151 ITD 460 (Delhi - Trib.) for the principle that when the reseller does not add any value to the product of the goods, the RP method would be appropriate for determining the arms' length price.

9. Further by placing reliance on the decisions in Assistant Commissioner Of Income Tax vs. Kobelco Construction Equipment India Limited [2017] 81 taxmann.com 31 (Delhi - Trib.), ACIT vs Akzo Nobel Car Refinishes India (P.) Ltd [2017] 84 taxmann.com 199 (Delhi - Trib.) and MATTEL TOYS (I) PVT. LTD. vs. Deputy Commissioner Of Income Tax (2014) 30 ITR (Trib) 0283 (Mumbai), it is argued by the Ld. AR that if the ALP of any transaction can be determined by applying any of the direct methods like CUP, RPM, CPM then they should be given the preference and once these traditional methods have been rendered inapplicable then only TNMM should be resorted to.

10. Ld. AR submitted that the case law relied upon by the Ld. DRP has no application to the facts of this case because the facts of the case laws quoted by the DRP are different from the facts of the Assessee. He submits that in the case laws quoted by the DRP, the companies have incurred huge expenditure on AMP, and the business model of the company is not comparable with the comparables who are not incurring such expenditure. According to him in one case law quoted by the Ld. DRP, the company undertook building of intangibles and 65% of operating cost was incurred on AMP expense and the company was engaged in manufacturing activity too. He submitted that in Assessee's case, the

Assessee has not incurred such heavy expenditure and the comparables have also incurred similar expense and have similar business model. The Assessee is not engaged in any manufacturing. The wide gap in the GP and NP is due to the heavy rental cost and not due to AMP expenses as given in the case laws cited by the Ld. DRP.

11. Ld. AR placed reliance on the decision in case of Nokia India Pvt. Ltd. v. Deputy Commissioner of Income-tax, Circle -13(1), New Delhi [2014] 52 taxmann.com 492 (Delhi – Trib) wherein it was held that the incurring of high advertisement and marketing expenses by the assessee vis-à-vis the other comparable companies does not in any manner affect the determination of ALP under the RPM and if the assessee has incurred more expenses on advertisement and promotion, which, in the opinion of the department went on to brand building for an AE, then the transfer pricing adjustment on account of such AMP expenses is separately called for and RPM is the most appropriate method in such a situation.

12. Lastly he relied on the decision in the case of Deputy Commissioner Of Income Tax vs. Sanyo India P. Ltd. IT(TP).A No.436/Bang/2015 (2015) 45 CCH 0098 Bang Trib at page 13 where was held that if the comparables are not found appropriate, fresh comparables can be searched, but the method adopted need not be rejected.

13. DR placed reliance on the observations of the Ld. TPO, vide comment of the TPO. He brought to our notice that the Ld. TPO found that certain expenses like salaries and wages,

travelling and conveyance, etc., which are directly connected with selling and distribution functions as could be found from the profit and loss account of the assessee or in the case of the comparables have not been considered a compatibility, as such the manner in which the RPM has been applied was not giving a picture of the compatibility analysis is For application of the RPM method these factors cannot be ignored at all.

14. Ld. DR further submitted that as rightly observed by the Ld. TPO, for achieving proper compatibility in the light of above mentioned aspects of business of a distributor, it is simply clear that complete information about business profile and financial data is available in respect of all the parties which are examined as comparables, which is not found in public domain, as such, RPM is rejected as the most appropriate method and TNMM was rightly considered as the most appropriate method. Other methods like CUP, CPM are not applicable to the facts of the case. On this basis he justified the orders of the authorities below.

15. We have gone through the record in the light of the submissions on either side. It is an admitted fact that in this case the assessee is merely purchasing and selling the products without adding any value to the core product. Further, Ld. TPO did not dispute the characterisation of the assessee as in the TP document and also accepted the functional profile of the assessee as a routine distributor. Ld. DRP, however, recorded that the assessee has incurred substantial AMP, and other expenses, in relation to its

turnover, and is therefore, not a simple distributor in terms of the requirement of using RPM. Now we shall proceed to examine the law applicable these facts.

16. In *Nokia India (P) Ltd. v. Dy. CIT*[2014] 52 taxmann.com 492/153 ITD 508 (Delhi), the Delhi bench of the ITAT held that,-

9. Sub-clause (i) of clause (b) of Rule 10B(1) deals with identifying the price at which the goods purchased from an AE is resold. Sub-clause (ii) of clause (b) of Rule 10B(1) talks of reducing the amount of normal gross profit margin of comparable uncontrolled transactions from such resale price of the assessee. Sub-clause (iii) states that the result of sub-clause (ii) is further reduced by the expenses incurred in connection with the purchase of goods and sub-clause (iv) provides that the amount so deduced under sub-clause (iii) is adjusted on account of differences in the international transaction and comparable uncontrolled transactions which materially affect the amount of gross profit margin in the open market. Finally, sub-clause (v) provides that the adjusted price found under sub-clause (iv) is taken as arm's length price in respect of purchase of goods from the AE. When we consider the methodology given under RPM, more specifically sub-clauses (i) and (v), it becomes patent that sub-clause (i) refers to 'property purchased by the enterprise ... is resold' and sub-clause (v) refers to 'arm's length price in respect of the purchase of the property ... by the enterprise'. A close scrutiny of the above two sub-clauses along with the remaining sub-clauses of rule 10B(1)(b) makes it clear beyond doubt that RPM is best suited for determining ALP of an international transaction in the nature of purchase of from an AE which are resold as such to unrelated parties. Ordinarily, this method pre-supposes no or insignificant value addition to the goods purchased from foreign AE.

17. While noting the above decision also, Hon'ble jurisdictional High Court, in *Principal Commissioner of Income-tax-6 v. Matrix Cellular International Services (P.) Ltd.* [2018] 90 taxmann.com 54 (Delhi) found that, -

8. This Court finds that once the ITAT, on considering the relevant facts as well as the order of the TPO, had concluded that the business of the assessee was merely that of a pure trader, and there was no value addition made before re-selling the particular products (i.e. the SIM cards), its consequent finding that RPM is the Most Appropriate Method, is irreproachable. In *Nokia India (P) Ltd. v. Deputy Commissioner of Income Tax*, (2015) 167 TTJ (Del) 243, the Delhi bench of the ITAT held:

"A close scrutiny of the above two sub-clauses along with the remaining sub-clauses of r. 10B(1)(b) makes it clear beyond doubt that RPM is best suited for determining ALP of an international transaction in the nature of purchase of goods from an AE which are resold as such to unrelated parties. Ordinarily, this method presupposes no or insignificant value addition to the goods purchased from foreign AE. In a case the goods so purchased are used either as raw material for manufacturing finished products or are further subjected to processing before resale, then RPM cannot be characterized as a proper method for benchmarking the international transaction of purchase of goods by the Indian enterprise from the foreign AE."

9. Similarly, in *Swarovski India Pvt. Ltd. v. ACIT*, ITA No. 5621/Del/2014, the ITAT held:

"Adverting to the facts of the instant case, we find that the assessee purchased Crystal goods and Crystal components from its AE. No value addition was made to such imports. The goods were sold as such. In the given circumstances, the RPM is the most appropriate method for determining the ALP of the international transaction of Import of Crystal goods and Crystal components."

10. A similar view has been adopted by the Mumbai bench of the ITAT in *Mattel Toys v. Deputy Commissioner of Income Tax*, (2013) 158 TTJ (Mum) 461:

"Thus, the RPM method identifies the price at which the product purchased from the A.E. is resold to a unrelated party. Such price is reduced by normal gross profit margin i.e., the gross profit margin accruing in a comparable controlled transaction on resale of same or similar property or services. The RPM is mostly applied in a situation in which the reseller purchases tangible property or obtain services from an A.E. and reseller does not physically alter the tangible goods and services"

or use any intangible assets to add substantial value to the property or services i.e., resale is made without any value addition having been made."

11. *This view has also been affirmed by the Bombay High Court in its judgment dated 07.11.2014 in Commissioner of Income Tax v. L'Oreal India Pvt. Ltd. (ITA No. 1046 of 2012), where the Court found that there was no error in law committed by the ITAT when it held that RPM was the Most Appropriate Method in case of distribution or marketing activities especially when goods are purchased from associated entities and there are sales effected to unrelated parties without any further processing. In fact, a Division Bench of this Court in its decision in Bausch & Lomb Eyecare (India) Pvt. Ltd. v. Additional Commissioner of Income Tax, (2016) 381 ITR 227 (Del), while considering the decision of this Court in Sony Ericsson Mobile Communications India Pvt. Ltd. v. Commissioner of Income Tax, (2015) 374 ITR 118 (Del), noted that:*

"The RP Method loses its accuracy and reliability where the reseller adds substantially to the value of the product or the goods are further processed or incorporated into a more sophisticated product or when the product/service is transformed."

12. *Therefore, a contrario, when the reseller does not add any value to the product of the goods, the RP method would be appropriate for determining the arms' length price.*

18. In respect of the observations of the Ld. DRP that the assessee has incurred substantial AMP, and other expenses, in relation to its turnover, and is therefore, not a simple distributor in terms of the requirement of using RPM, Ld. AR has rightly placed reliance on the decision reported in Nokia India Private Limited vs. DCIT (2015) 153 ITD 508 (Delhi-trib.) wherein it was held that the incurring of high advertisement and marketing expenses by the assessee vis-a-vis the other comparable companies does not in any manner affect the determination of ALP under the RPM. In the above decision it was held that, -

The ld. DR vehemently argued against the application of RPM in the given circumstances as the most appropriate method by contending that the assessee incurred huge advertisement and marketing expenses. In view of such incurring of expenses, the ld. DR stated that the better course would be to apply TNMM which would consider operating profit. We are unable to accept the contention advanced on behalf of the Revenue. The obvious reason for this is that the incurring of high advertisement and marketing expenses by the assessee vis-a-vis the other comparable companies does not in any manner affect the determination of ALP under the RPM. When we consider gross profit in numerator and net sales in denominator, all the expenses debited to the Profit & loss account automatically stand excluded. It is but natural that only those expenses can have bearing on the gross profit that are debited to the Trading account. As the amount of advertisement and marketing expenses falls 'below the line' and finds its place in the Profit and loss account, the higher or lower spend on it cannot affect the amount of gross profit and the resultant ALP under the RPM. If the assessee has incurred more expenses on advertisement and promotion, which, in the opinion of the ld. DR went on to brand building for an AE, then, the transfer pricing adjustment on account of such AMP expenses was separately called for. Since the TPO has not made any separate adjustment on account of AMP expenses and has given effect to the same under TNMM, we hold that the incurring of such higher advertisement and marketing spend would not affect the calculation of ALP under the RPM. Ex consequenti, we hold that RPM prima facie appears to be the most appropriate method in the facts and circumstances of the instant case.

19. The above decisions clinch the issue involved in this matter and squarely applicable to the facts of the case. We, therefore, while respectfully following the same hold that the RPM is the most appropriate method in the facts and circumstances of this case and accordingly direct the Ld. TPO to adopt the RPM as the most appropriate method for benchmarking the international transaction.

20. In view of the fact that we have approved the RPM as the most appropriate method for benchmarking the international

transaction relating to the import of finished goods, all other grounds become academic and do not require any adjudication.

21. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 22.06.2018

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(K.N.CHARY)
JUDICIAL MEMBER

Dated: 22.06.2018

*Kavita Arora

Copy forwarded to:

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

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ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	22.06.2018
Date on which the typed draft is placed before the dictating Member	.06.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	22.6.18
Date on which the fair order is placed before the Dictating Member for pronouncement	22.6.18
Date on which the fair order comes back to the Sr. PS/PS	22.6.18
Date on which the final order is uploaded on the website of ITAT	22.6.18
Date on which the file goes to the Bench Clerk	22.6.18
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	