

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'I-2' : NEW DELHI)**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
and  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1674/Del./2016  
(ASSESSMENT YEAR : 2011-12)**

**ITA No.1982/Del./2017  
(ASSESSMENT YEAR : 2012-13)**

**ITA No.7088/Del./2017  
(ASSESSMENT YEAR : 2013-14)**

M/s. Fujitsu India Private Ltd., vs. ACIT, Circle 9 (2),  
3<sup>rd</sup> Floor, Building No.9B, New Delhi.  
DLF Cyber City Phase – III,  
Gurgaon – 122 002 (Haryana).

**(PAN : AAACF4170D)**

**(APPELLANT)**

**(RESPONDENT)**

ASSESSEE BY : Shri K.M. Gupta, Advocate  
Shri Anubhav Rastogi, Advocate  
REVENUE BY : Shri H.K. Choudhary, CIT DR

Date of Hearing : 07.05.2018

Date of Order : 03.07.2018

**ORDER**

**PER BENCH :**

Since facts and issues involved in all the aforesaid appeals qua Assessment Years 2011-12, 2012-13 & 2013-14 are identical, the same are being disposed of by way of consolidated order for the sake of brevity and to avoid repetition of discussion.

2. Appellant, M/s. Fujitsu India Private Ltd.. (for short 'the taxpayer'), by filing the present appeal sought to set aside the impugned order dated 30.01.2016, 30.01.2017 & 30.10.2017 passed by the AO under section 144C read with section 143 (3) of the Income-tax Act, 1961 (for short 'the Act') qua the assessment years 2011-12, 2012-13 & 2013-14 respectively in consonance with the orders passed by the Id. CIT (A)/TPO on the grounds inter alia that :-

**ITA No.1674/Del./2016 (AY : 2011-12)**

*1. That on the facts and circumstances of the case and in law, the order passed by the Learned Assessing Officer (Ld. AO) under section 143(3) read with section 144C of the Act, in pursuance of the directions issued by the Honorable Dispute Resolution Panel (Hon. DRP), is bad in law to the extent of adjustment of INR 59,552,876 made in the impugned assessment order.*

*2. That on the facts and circumstances of the case and in law, the Ld. AO/Transfer Pricing Officer (TPO) following the directions of Hon'ble DRP, erred in assessing the total income of the Appellant of INR 7,96,25,548 at INR 13,91,78,424.*

*3. That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP erred in disregarding multiple year/ prior years' data as used by the Appellant in the TP documentation and holding that current year (i.e. FY 2010-11) data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of preparing its Transfer Pricing ("TP") documentation.*

*4. That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP grossly erred in enhancing the income of the Appellant by INR 58,724,008 on account of rejecting Resale Price Method CRPM) as the Most Appropriate method and substituting the same with Transactional Net Margin Method (TNMM) and correspondingly rejecting Gross profit/*

*Sales (GP /Sales) as the relevant Profit Level Indicator ('PLI') and substituting the same with Operating Profit/ Sales (OP /Sales) to ascertain the arm's length price in the Appellant's case based on several subjective presumptions.*

5. *That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP grossly erred in disregarding the principle of consistency and not following the similar benchmarking approach i.e. RPM as the most appropriate method which had been accepted in previous assessment years viz. for assessment year CAY') 2008-09 to AY 2010-11 without giving any cogent reasons of changing the benchmarking approach in the captioned assessment year as compared to previous years.*

6. *That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP grossly erred in not appreciating the functional profile of the Appellant and incorrectly characterizing the Appellant to be akin to a super normal! high risk distributor.*

7. *That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP erred in arbitrarily rejecting ACI Infocom Limited to be a comparable company in the final comparable set/benchmarking analysis.*

8. *That on the facts and circumstances of the case and in law, the Ld. AO/TPO/ Hon'ble DRP erred in alleging that the Appellant is rendering a service to its Associated Enterprise CAE') for creation of marketing intangibles in India.*

9. *That on the facts and circumstances of the case and in law, the Ld. AO/TPO/ Hon'ble DRP erred in alleging that the Advertising, Marketing and Promotion (AMP') expenses incurred by the Appellant results in international transaction and consequently benchmarked the same separately.*

10. *That on the facts and circumstances of the case and in law, the Ld. AO/TPO/ Hon'ble DRP grossly erred in enhancing the income of the Appellant by INR 828,868 on account of non-receipt of the reimbursement for "allegedly excessive" AMP expenses incurred by the Appellant and in doing so have grossly erred in:*

*10.1. disregarding the nature of AMP expenses incurred by the Appellant and incorrectly holding that such expenses results in developing marketing intangibles for the AEs;*

*10.2. disregarding the fact that the gross profit earned by the Appellant more than compensate the allegedly excessive AMP spends, if any, incurred by it;*

*10.3. alleging that the AMP expenses incurred by the Appellant need to be reimbursed by the AEs along with a mark-up on the same by implicating the same as a service rendered by the Appellant to its AE for which it has not been compensated and in doing so grossly erred in;*

*10.3.1. 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 Appellant;*

*10.3.2. applying a mark-up of 6.55% in respect of the Appellant's "alleged excessive" AMP expenses, which is completely untenable and based on mere surmises and conjectures; and*

*10.3.3. Wrongly computing the adjustment on account of AMP.*

*11. Not providing any opportunity of being heard to the Appellant before making the adjustment on account of non-receipt of the reimbursement for "allegedly excessive" AMP expenses incurred by the Appellant thereby violating the rule of natural justice.*

*12. That on the facts and circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 271(1)(c) of the Act without assigning cogent reasons for the same.*

*13. That on the facts and in the circumstances of the case and in law, the Ld. AO erred in not giving TDS credit of INR 9,712,074 and proposing to withdraw interest paid under section 244A and ”*

**‘ITA No.1982/Del./2017 (AY : 2012-13)**

*1. That on the facts and circumstances of the case and in law, the order passed by the Learned Assessing Officer ('Ld. AO')*

*under section 143(3) read with section 144C of the Act, in pursuance of the directions issued by the Honorable Dispute Resolution Panel ('Hon. DRP'), is bad in law to the extent of adjustment of INR 14,99,41,509 made in the impugned assessment order.*

*3. That on the facts and circumstances of the case and in law, the Ld. AO/Transfer Pricing Officer ('TPO') following the directions of Hon'ble DRP, erred in assessing the total income of the Appellant of INR 11,92,767 at INR 15,11,34,276.*

**Transfer Pricing Adjustment amounting to INR 8,20,07,004 to the Distribution Segment of the Appellant**

*3. That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP erred in disregarding multiple year/ prior years' data as used by the Appellant in the TP documentation and holding that current year (i.e. FY 2011-12) data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of preparing its Transfer Pricing ("TP") documentation.*

*4. That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP grossly erred in not appreciating the functional profile of the Appellant and incorrectly characterizing the Appellant to be akin to a super normal / high risk distributor.*

*5. That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP grossly erred in enhancing the income of the Appellant by INR 8,20,07,004 by rejecting Resale Price Method ('RPM') as the Most Appropriate method and substituting the same with Transactional Net Margin Method ('TNMM') and correspondingly rejecting Gross Profit/ Sales (GP /Sales) as the relevant Profit Level Indicator (PLI) and substituting the same with Operating Profit/ Sales (OP /Sales) to ascertain the arm's length price in the Appellant's case based on several subjective presumptions.*

*6. That on the facts and circumstances of the case and in law, the Ld. AO/ TPO erred in enhancing the income of the appellant from INR 7,92,43,871 to INR 8,20,07,004 with respect to the distribution segment of the Appellant on account of working capital adjustment without providing back up calculations for the same.*

**Transfer Pricing Adjustment amounting to INR 3,96,82,107 on account of Advertisement, Marketing & Promotion ('AMP') expenses incurred by the Appellant**

7. That on the facts and circumstances of the case and in law, the Ld. AO/TPO/ Hon'ble DRP erred in alleging that the Appellant is rendering a service to its Associated Enterprise CAE') for creation of marketing intangibles in India.

8. That on the facts and circumstances of the case and in law, the Ld. AO/TPO (on the directions of the DRP) erred in alleging that the AMP expenses incurred by the Appellant results in an international transaction and consequently benchmarked the same separately.

9. That on the facts and circumstances of the case and in law, the Ld. AO/TPO/ Hon'ble DRP grossly erred In enhancing the income of the Appellant by INR 3,96,82,107 on substantive basis (INR 8,28,54,784 on protective basis) on account of non-receipt of the reimbursement for alleged excessive AMP expenses incurred by the Appellant and in doing so have grossly erred in:

9.1. assuming jurisdiction in respect of the AMP expenditure when such expenditure did not satisfy the requisites of being an international transaction under Section 92B read with Section 92F(V) of the Act

9.2. disregarding the nature of AMP expenses incurred by the Appellant and incorrectly holding that such expenses results in developing marketing intangibles for the AEs;

9.3. disregarding the fact that the gross profit earned by the Appellant compensates the excessive AMP expenses as alleged by the TPO, if any, incurred by it;

9.4. considering the expenditure incurred in the nature of normal business function as a service and erroneously bifurcating the expenditure into routine and non-routine expenditure

9.5. without prejudice, even if the expenditure on AMP were to be considered as an international transaction, the Ld. AO/TPO/ Hon'ble DRP erred in not considering the same to be interlinked and inter-connected to the distribution business of the Appellant and disregarding that it does not warrant a separate benchmarking and hence disregarding the judicial precedence in this regard

**9.6. alleging that the AMP expenses incurred by the Appellant need to be reimbursed by the AEs along with a mark-up on the same by considering the same as a service rendered by the Appellant to its AE for which it has not been compensated and in doing so grossly erred in;**

**9.6.1. applying the concept of 'intra-group services' without due understanding thereof and without demonstrating that services have not been rendered for the benefit of the AEs or any tangible benefits have not been received by the AEs for which a return needs to be earned by the Appellant;**

**9.6.2. applying a mark-up of 9% to the Appellant's alleged excessive AMP expenses, based on mere surmises and conjectures; and**

**9.7. making an adjustment on AMP expenses which has led to double taxation in the hands of the Assessee.**

**10. That on the facts and circumstances of the case and in law, the Ld. AO/TPO/Hon'ble DRP erred in computing the AMP adjustment by considering the AMP expenditure in total, irrespective of the fact that the Appellant has multiple segments including the AE & Non AE Segments. Therefore, considering the entire AMP expenditure for the computation of adjustment is erroneous.**

**11. The Hon'ble DRP erred in law and fact by making a suo moto transfer pricing adjustment amounting to INR 3,96,82,107 on account of AMP expenses incurred by the Appellant and in doing so, completely overlooked the fact that such addition did not arise out of the draft order/TP Order and was not a ground of objection raised before the Hon'ble DRP.**

**12. The Hon'ble DRP erred in law and fact by not giving an opportunity of being heard to the appellant on the issue of AMP (as raised in ground no. n)(supra) thereby violating the rule of natural justice.**

**13. That on the facts and circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 271(1)(C) of the Act without assigning cogent reasons for the same.**

**14. That on the facts and circumstances of the case and in law, the Ld. AO erred in charging interest u/s 234A, 234B & 234C of the Act without assigning cogent reasons for the same.**

*Corporate Tax Ground*

15. *On the facts, in law and in circumstances of the case, the Ld. AO erred in rejecting the claim of brought forward losses made by the assessee, while computing the assessed income.”*

**“ITA No.7088/Del./2017 (AY : 2013-14)**

1. *Than on the facts and circumstances of the case and in law, the order passed by the Asst. Commissioner of Income Tax, Circle 9(2), New Delhi ('Ld. AO') under section 143(3) read with section 144C of the Act, in pursuance of the directions issued by the Honorable Dispute Resolution Panel ('Hon. DRP'), is bad in law to the extent of adjustment of INR 889,841,699 (INR 417,429,552 on account of transactions relating to distribution of goods, INR 423,363,864 on count of Advertisement, Marketing & Promotion CAMP') expenses on substantive basis and INR 49,048,283 on account of protective basis) made in the impugned assessment order.*

2. *That on the facts and circumstances of the case and in law, the Ld. AO/Transfer Pricing Officer ('TPO') following the directions of Hon'ble DRP, erred in assessing the of loss of INR 90,669,840 at an income of INR 799,171,859.*

**Transfer Pricing Adjustment amounting to INR 417,429,552 to the Distribution Segment of the Appellant**

3. *That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP erred in disregarding multiple year/ prior years' data as used by the Appellant in the TP documentation and holding that current year (i.e. FY 2012-13) data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of preparing its Transfer Pricing ("TP") documentation.*

4. *That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP grossly erred in not appreciating the functional profile of the Appellant and incorrectly characterizing the Appellant to be akin to a super normal/ high risk distributor.*

5. *That on the facts and circumstances of the case and in law, the Ld. AO/ TPO/ Hon'ble DRP grossly erred in enhancing the income of the Appellant by INR 417,429,552 by rejecting Resale Price Method 'RPM') as the Most Appropriate method*

*and substituting the same with Transactional Net Margin Method ('TNMM') and correspondingly rejecting Gross Profit/Sales (GP /Sales) as the relevant Profit Level Indicator CPLI') and substituting the same with Operating Profit/ Sales (OP /Sales) to ascertain the arm's length price in the Appellant's case based on several subjective presumptions.*

**Transfer Pricing Adjustment amounting to INR 472,412,147 on account of AMP expenses incurred by the Appellant**

*6. The Ld. AO/TPO/Hon'ble DRP erred in treating a portion of the Appellant's AMP expenses as being excessive. Furthermore, Ld. AO/TPO/Hon'ble DRP erred in treating the alleged excessive AMP expenses as an international transaction under section 92B of the Act. In doing so, the Ld. AO/TPO/Hon'ble DRP have grossly erred in:*

*6.1. assuming jurisdiction in respect of the AMP expenditure when such expenditure did not satisfy the requisites of being international transaction under Section 92B read with Section 92F(V) of the Act;*

*6.2. not considering that there are no machinery provisions in Chapter X of the Act which are applicable to determine the quantum of transfer pricing adjustment made on account of AMP expenses.*

*6.3. alleging that the Appellant is rendering a service to its AEs for creation of marketing intangibles in India.*

*7. That on the facts and circumstances of the case and in law, the Ld. AO/TPO/ Hon'ble DRP grossly erred in enhancing the income of the Appellant by INR 423,363,864 on substantive basis on account of non-receipt of the reimbursement for alleged excessive AMP expenses incurred by the Appellant and in doing so have grossly erred in:*

*8.1. disregarding the nature of AMP expenses incurred by the Appellant and incorrectly holding that such expenses results in developing marketing intangibles for the AEs;*

*8.2. disregarding the fact that the gross profit earned by the Appellant compensates the excessive AMP expenses as alleged by the Ld. TPO, if any, incurred by it;*

*8.3. considering the expenditure incurred in the nature of normal business function as a service and erroneously bifurcating the expenditure into routine and non-routine expenditure;*

**8.4. without prejudice, even if the expenditure on AMP were to be considered as an international transaction, the Ld. AO/TPO/ Hon'ble DRP erred in not considering the same to be interlinked and inter-connected to the distribution business of the Appellant and disregarding that it does not warrant a separate benchmarking and hence disregarding the judicial precedence in this regard;**

**8.5. alleging that the AMP expenses incurred by the Appellant need to be reimbursed by the AEs along with a mark-up on the same by considering the same as a service rendered by the Appellant to its AEs for which it has not been compensated and in doing so grossly erred in;**

**8.5.1. applying the concept of 'intra-group services' without due understanding thereof and without demonstrating that services have not been rendered for the benefit of the AEs or any tangible benefits have not been received by the AEs for which a return needs to be earned by the Appellant;**

**8.5.2. undertaking comparability adjustment by applying TNMM and including the alleged excessive AMP expenses in operating cost and operating revenue along with a mark-up; and**

**8.5.3. arbitrarily determining the mark-up to be earned for performing AMP services;**

**9. That on the facts and circumstances of the case and in law, Ld. AO/TPO/ Hon'ble DRP erred in enhancing the income of the Appellant by INR 49,048,283 on a protective basis and in doing so, have grossly erred in:**

**9.1. holding the AMP expenses incurred by the Appellant to be "excessive" on the basis of a "bright line test";**

**9.2. applying a mark-up of 12.18% in respect of the Appellant's "alleged excessive" AMP expenses;**

**9.3. disregarding the fact that bright line test has no statutory mandate and it is not obligatory to subject AMP expenses to a bright line test**

**10. That on the facts and circumstances of the case and in law, the Ld. Ld. AO/TPO/ Hon'ble DRP has grossly erred in making both substantive and protective adjustment.**

*11. The Hon'ble DRP erred in law and fact by suo mota directing AMP adjustment based on the addition of previous year and not giving an opportunity of being heard to the appellant on the issue of AMP thereby violating the rule of natural justice.*

*12. That on the facts and circumstances of the case and in law, the Ld. AO/TPO has grossly erred in computing adjustment both on account of change in method from RPM to TNMM to the distribution segment of the Appellant and AMP adjustment on substantive basis, which has led to comparability adjustments being made twice to the income of the Appellant leading to double taxation in the hands of the Appellant;*

*13. That on the facts and circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 271(1)(C) of the Act without assigning cogent reasons for the same.*

*14. That on the facts and circumstances of the case and in law, the Ld. AO erred in charging interest u/ s 234A, 234B & 234C of the Act without assigning cogent reasons for the same.”*

**BRIEF FACTS OF**  
**ITA No.1674/Del./2016 (AY : 2011-12)**

3. Briefly stated the facts necessary to adjudicate the issues in controversy are : M/s. Fujitsu India Private Limited, the taxpayer is a wholly owned subsidiary of Fujitsu Technology Solutions, Holding, B.V., Netherlands, incorporated in 1997, engaged in trading of IT solutions and services in India. Portfolio of the taxpayer also includes servers, storage systems, workstations, notebooks, desktops & displays. The taxpayer is also engaged in IT product maintenance and support services. During the years under assessment, the taxpayer entered into international

transactions with its Associated Enterprises (AE) as per Form No.3CEB which are extracted as under :-

S.No.	International Transaction	Method Applied	Amount
1.	Trading of Goods	RPM	7,66,67,772
2.	IT Services	TNMM	11,59,01,055
3.	Business support services	TNMM	14,22,58,233
4.	Purchase of fixed assets	CUP	10,01,83,952
5.	Reimbursement of Expenses	N.A	75,02,235
6.	Recovery of Expenses	N.A	74,44,340

**BRIEF FACTS OF**  
**ITA No.1982/Del./2017 (AY : 2012-13)**

4. International transactions entered into by the taxpayer with its AE during AY 2012-13 are extracted as under :-

S.No.	International Transaction	Method Applied	Amount
1.	Purchase of goods for trading	RPM	247,623,420
2.	Purchase of spare parts	RPM	31,242,767
3.	Receipt of IT Services	TNMM	20,639,907
2.	Provision of IT Services	TNMM	28,499,837
3.	Business support services	TNMM	62,781,183
4.	Purchase of fixed assets	TNMM	29,684,974
5.	Reimbursement of Expenses	CUP	28,853,246
6.	Recovery of Expenses	CUP	15,297,246

**BRIEF FACTS OF**  
**ITA No.7088/Del./2017 (AY : 2013-14)**

4. International transactions entered into by the taxpayer with its AE during AY 2013-14 are extracted as under :-

S.No.	International Transaction	Amount
1.	Purchase of finished goods	645,655,926
2.	Purchase of spare parts	73,570,891
3.	Availing of IT Services	8,226,076
4.	Availing of maintenance support services	7,050,209
4.	Provision of IT Services	29,180,273
5.	Provision of Business support services	281,034,456
6.	Provision of fixed assets	10,426,407
7.	Reimbursement of Expenses	63,758,725
8.	Recovery of Expenses	13,570,867
	Total	1,132,473,830

5. Common/identical issue involved in all the aforesaid appeals is that the taxpayer in its TP analysis has selected Resale Price Method (RPM) as the Most Appropriate Method (MAM) with Gross Profit / Sales (GP/Sales) as the Profit Level Indicator (PLI), selected 16 comparables in AY 2011-12 with GP/Sales margin at 5.51% as against taxpayer's GP/Sales margin at 6.55% and found its international transactions qua AYs 2011-12, 2012-13 and 2013-14 with regard to trading of goods at arm's length.

6. TPO in all the years viz. AY 2011-12, 2012-13 & 2013-14 rejected RPM as the MAM applied by the taxpayer for benchmarking its international transactions for trading Fujitsu products in India i.e. purchase of goods and spares for trading in India, however applied Transactional Net Margin Method

(TNMM) as MAM adopted same comparables as selected by the taxpayer in TP study by applying RPM method and proposed the TP adjustment of Rs.58,724,008, Rs.79,243,871 & Rs.4,49,492,709 for AYs 2011-12, 2012-13 & 2013-14 respectively.

7. The taxpayer carried the matter before the Id. CIT (A) by raising objections who has approved the findings returned by the TPO qua proposed TP Adjustment in all the three years involved. Feeling aggrieved, the taxpayer has come up by way of filing appeals challenging the impugned orders passed by the AO/TPO/DRP.

8. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

**GROUND NO.1 & 2 IN**

**ITA No.1674/Del./2016 (AY : 2011-12)**

**ITA No.1982/Del./2017 (AY : 2012-13)**

**ITA No.7088/Del./2017 (AY : 2013-14)**

9. Grounds No.1 & 2 in ITA No.1674/Del./2016 (AY : 2011-12), ITA No.1982/Del./2017 (AY : 2012-13) and ITA

No.7088/Del./2017 (AY : 2013-14) are general in nature, hence do not require any specific adjudication.

**GROUND NO.3 IN**

**ITA No.1674/Del./2016 (AY : 2011-12)**  
**ITA No.1982/Del./2017 (AY : 2012-13)**

10. Ground No.3 in 1674/Del./2016 (AY : 2011-12) and ITA No.1982/Del./2017 (AY : 2012-13) is dismissed having not been pressed during the course of arguments.

**GROUNDS NO.4, 5 & 6 IN**  
**ITA No.1674/Del./2016 (AY : 2011-12)**  
**ITA No.1982/Del./2017 (AY : 2012-13)**

**GROUNDS NO.3, 4 & 5 IN**  
**ITA No.7088/Del./2017 (AY : 2013-14)**

11. It is also not in dispute that the taxpayer is trading in servers, laptops, notepads, etc. which are hardware equipments of IT segments. It is the case of the TPO that during TP proceedings, the taxpayer accepted that purchase of trading goods includes goods for components of IT support services. So, these two types of goods being intrinsically inter-connected, it is not correct to benchmark trading at gross level and other parts at net level because at the gross level there is a positive income and at the net

level, there is a loss of 75%. It is also not in dispute that the TPO has not proposed TP adjustment on account of Advertisement, Marketing and Promotion (AMP) expenses. However, the AMP adjustments have been made by Id. DRP.

12. In the backdrop of the aforesaid facts and circumstances of the case, the sole question arises for determination in this case is :-

***“as to whether TPO/DRP have erred in substituting RPM as the MAM with TNMM by rejecting the Gross Profit/Sales (GP/Sales) as the Profit Level Indicator (PLI) by substituting the same with OP/Sales to determine the Arm’s Length Price (ALP) of the international transactions entered into between the taxpayer and its Associated Enterprises (AE) during the years under assessment?”***

13. Ld. AR for the taxpayer contended inter alia that the taxpayer is to be treated as a normal distributor even if there are multiple transactions; that the taxpayer is selling servers, laptops and notepads without any value addition; that the taxpayer is incurring a routine normal advertising expenses which cannot increase the value of the product but will certainly increase the sales.

14. However, on the other hand, to repel the arguments of the Id. AR for the taxpayer, the Id. DR for the Revenue contended that in the gross margin level, the taxpayer has not considered all the

relevant cost because the taxpayer has positive gross profit in trading segment but at the net level, there is a loss of 75.26%; that the taxpayer is performing multiple functions including purchase order, warehousing inventory control, quality control, budgets and for casting, pricing and marketing and sales, therefore, the taxpayer is not merely a distributor i.e. sale and purchase of goods, but also performed host of functions such as marketing including brand building.

15. TPO has based his entire findings on the sole ground that the taxpayer is not a normal distributor as he has been performing host of functions including purchase order, warehousing and inventory control, quality control, budgeting and forecasting, pricing and marketing and sales which the taxpayer needs to carry out within its distribution function to ensure that its goods reached the market and ready for actual resale. It is also the case of the TPO that unless the taxpayer has made proper warehousing arrangement or has proper inventory control, its goods will not move to the point of sale which can be said of the marketing efforts of the taxpayer.

16. TPO also proceeded to change the method on the premises that the taxpayer has incurred AMP expenses of Rs.15,425,168/- against the trading revenue of Rs.81,738,810 which is 18.87%

which is definitely much higher than the expenses of a routine distributor. TPO also not entertained the arguments of the taxpayer that the net level loss the taxpayer has suffered is due to failure of the business/ project plans for the financial years on the ground that AE ought to have been supported the taxpayer either by reimbursement of cost or some price support in the international transaction of purchase of finished goods by the taxpayer. So, the TPO proceeded to believe that the net loss of the taxpayer is linked to the transfer price that the taxpayer has agreed with its AE and in these circumstances, TNMM is the most appropriate method.

17. However, when we examine the arguments addressed by both the Id. Representative for the parties to the appeal in the light of the undisputed facts, it goes to prove that the taxpayer has purchased finished goods ready for sale in the market from its AE without making any value addition to the same. The function performed by the taxpayer for issuance of the purchase order, budget control, quality checks, etc. would not change the role of the taxpayer other than a normal distributor.

18. Now, the question arises for determination in this case is as to whether functions performed by the taxpayer with regard to

quality control, warehousing, sales and marketing etc. are required to be captured in the resale price margin.

19. Undisputedly, these costs are qua unrelated parties and to our mind, these activities are not linked to the international transactions entered into between the taxpayer and the AEs as the AEs do not have any control on such activities and the answer to the question is to be found in case law relied upon by the taxpayer as under.

20. Coordinate Bench of the Tribunal in *Horiba India (P.) Ltd. vs. DCIT – (2017) 81 taxmann.com 209 (Delhi-Trib.)* while deciding the identical issue as to whether RPM or TNMM is the most appropriate method to determine ALP of international transactions in case of distribution of marketing activities by relied upon the decision rendered by Hon'ble Mumbai High Court in *L'oreal India Pvt. Ltd. in ITA No.1046 of 2012*, decisions of the Tribunal in *Nokia India (P) Ltd. – (2015) 167 TTJ 243 (Del.) and Mattel Toys (I.) (P.) Ltd. vs. DCIT – (2013) 34 taxmann.com 203* and decided the issue in favour of the assessee by returning following findings :-

***“14. From the aforesaid decision it is quite ostensible that in case of a distributor, wherein the goods are purchased from AE and resold to other independent entities without any value addition, then resale price method should be reckoned as MAM. One of the main reason given by the TPO as well as the DRP is***

*that the assessee is a full-fledged/full risk distributor and performing host of functions, therefore, RPM should not be taken as the MAM, because all these functions required huge cost which may not represent correct gross profit margin. We are unable to appreciate such proposition, because in a comparable uncontrolled transactions scenario, a normal distributor will undertake all kind of functions which are related to sales of the product. The functions like market research, sales and marketing, ware-housing, inventory control, quality control etc. and also risk like market risk, inventory risk, credit risk etc all are undertaken by any distributor for sale of products. No comparable instances have been brought either by the TPO or by the Ld. DRP that the other distributors are not performing such functions. What is important is to see is, whether there is any value addition or not on the goods purchased for resale? If there is no value addition and if the finished goods which are purchased from AE are resold in the market as it is, then gross profit margin earned on such transaction becomes the determinative factor to analyse the gross compensation after the cost of sales. Thus, we hold that under the facts of the present case, RPM should be held as MAM.”*

21. Coordinate Bench of the Tribunal in *ACIT vs. Kobelco Construction Equipment India Ltd. – 186 TTJ 790* also decided the identical issue by relying upon *Mattel Toys (I.)(P.) Ltd. vs. DCIT* (supra) and *L’oreal India P. Ltd. - (2012) 24 taxmann.com 192*, in favour of the assessee by returning following findings :-

*“13. The aforesaid decision clearly clinches the issue that under the RPM, the focus is more on same or similar nature of properties or services rather than similarity of products and functional attribute is a primary factor while undertaking the comparability analysis under RPM. Further, RPM is mostly applied in the case of a distributor where reseller purchases tangible property and obtains services from the AE and without making any value addition, resells the same to third parties. Under these circumstances and looking to the fact that functions performed by the assessee is of distributor only, therefore, RPM should be reckoned as the most appropriate method and accordingly, we agree with the learned CIT(A) that on*

*the facts of the present case, RPM should be the adopted as the most appropriate method for benchmarking assessee's international transactions. So far as the two comparables chosen by the TPO apart from assessee's comparables are concerned, we find that, T & I Global Limited has rightly been rejected by learned CIT(A), because this company was manufacturing machinery, therefore, same cannot be compared 15 ITA-6401/Del/2012 with the assessee which is purely performing the distribution function. Thus, the final list of comparables, i.e., three chosen by the assessee and accepted by the TPO and one as selected by the TPO and upheld by the learned CIT(A), is sustained for comparing the margins under RPM. As a consequence, we hold that the TP adjustment made by the learned TPO has rightly been deleted by Ld CIT(A). Accordingly, the grounds raised by the Revenue are dismissed.”*

22. Keeping in view the facts and circumstances of the case and following the decisions rendered by the Hon'ble Mumbai High Court in *L'oreal India Pvt. Ltd. in ITA No.1046 of 2012* (supra) and the decisions of the Coordinate Bench of the Tribunal in *Horiba India (P.) Ltd. vs. DCIT* , *Nokia India (P) Ltd.*, *Mattel Toys (I.)(P.) Ltd. vs. DCIT*, and *ACIT vs. Kobelco Construction Equipment India Ltd* (supra), we are of the considered view that in case finished goods are purchased by the taxpayer from its AE ready to be sold in the market without any value addition then Resale Price Method (RPM) is the MAM to benchmark the international transactions.

23. So, findings returned by TPO/DRP that the taxpayer being a full-fledged risk bearing distributor performing numerous

functions, RPM is not the MAM, is not sustainable for the reason that in a comparable uncontrolled transaction, normally distributor requires to carry out all the functions necessary to enhance the sales like market research, inventory risk, credit risk etc.. In such circumstances, no comparable instances have been brought on record by the TPO/DRP. So, when finished goods purchased by the taxpayer are resold in the market without any value addition, then gross margin earned on such transaction is the only determinative factor to analyse gross compensation after the cost of sale. So, we are of the considered view that RPM in this case is the MAM to bench mark the international transactions. In these circumstances, addition made by the TPO/AO merely by disputing the method applied by the taxpayer is not sustainable in the eyes of law. Method for benchmarking the international transaction cannot be changed merely because of the fact that the taxpayer has suffered loss at the net level but has positive gross profit in trading segment as it depends on host of circumstances. So, Grounds No.4, 5 & 6 in ITA No.1674/Del./2016 (AY : 2011-12) & ITA No.1982/Del./2017 (AY : 2012-13) and Grounds No.3, 4 & 5 in ITA No.7088/Del./2017 (AY : 2013-14) are determined in favour of the taxpayer.

**GROUND NO.7 IN  
ITA No.1674/Del./2016 (AY : 2011-12)**

24. Ground No.7 in ITA No.1674/Del/2016 for AY 2011-12 is dismissed having not been pressed during the course of arguments.

**GROUNDS NO.8, 9, 10 & 11 IN  
ITA No.1674/Del./2016 (AY : 2011-12)**

**GROUNDS NO.7, 8, 9, 10, 11 & 12 IN  
ITA No.1982/Del./2017 (AY : 2012-13)**

**GROUNDS NO.7, 8, 9, 10, 11 & 12 IN  
ITA No.7088/Del./2017 (AY : 2013-14)**

25. Undisputedly, the TPO has not made any adjustment on account of Advertisement, Marketing & Promotion (AMP) expenses. The Id. DRP directed the TPO to make adjustment on account of AMP expenses by treating the same as separate international transactions. It is the case of the taxpayer that since the AMP expenses incurred by the taxpayer is not international transactions and bright line test cannot be accepted to benchmark the international transactions of AMP, the addition is not sustainable and relied upon the decision of *Maruti Suzuki India Ltd. vs. CIT – ITA No.110 of 2014 & 710 of 2015*, *Yum Restaurants (India) Pvt. Ltd. vs. ITO – ITA No.349 of 2015*, *CIT*

*vs. Whirlpool of India Ltd. – ITA No.610/2014 and Bausch & Lomb Eyecare (India) (P.) Ltd. vs. ACIT – ITA No.643, 675 to 677 of 2014, 165, 166 & 950 of 2015.*

26. However, on the other hand, to repel the arguments of the ld. AR for the taxpayer, the ld. DR for the Revenue contended that since the taxpayer is a distributor, it is covered by the decision of Hon'ble High Court in case of *Sony Ericson – ITA No.16 of 2014*.

27. However, without going into the merits of the case, when we examine letter dated December 29, 2015 written by the taxpayer to the ld. DRP, no opportunity of being heard has been given to the taxpayer before making ALP adjustment on account of AMP expenses. For ready perusal, operative part of the letter (supra) is extracted as under :-

***“The Hon'ble Panel has asked furnish certain information. In this regard, the Assessee submits as follows:***

***Explain as to why ratio of GP/Sales (gross profit/ operating revenue) shall not be used instead PLR for benchmarking the international transaction of advertisement, marketing and promotional ("AMP") in the Assessee's case and explain as to why the advertisement expenses excluded by applying bright-line should not be taken as part of AMP expenses.***

***In this regard, at the outset, the Assessee would like to submit that the Learned Transfer Pricing Officer ('Ld. TPO) in its Order dated January 07, 2015 passed u/s 92CA of the Income-tax Act, 1961 ("the Act"), has not***

*made any adjustment on account of excessive spend by the Assessee on AMP. Further, this issue was also not discussed eluting the hearing held before the Hon'ble Panel on December 14, 2015.*

*However, in case the Hon'ble Panel wishes to analyse the marketing intangible/AMP issue at this stage, the Assessee seeks a reasonable opportunity to present its case in line with the principle of natural justice.*

*In case your honour's require any other information/clarifications, the Assessee would appropriately respond at the earliest.”*

28. Bare perusal of the aforesaid letter dated 29.12.2015, undisputedly received by the Id. DRP, goes to prove that when letter (supra) issued by the taxpayer seeking opportunity to explain the query raised by the Id. DRP but the Id. DRP without affording any opportunity of being heard, Id. DRP has passed the impugned order on 30.12.2015. So, Id. DRP being a quasi-judicial authority is under legal obligation to afford an opportunity of being heard to the taxpayer before passing any order. In these circumstances, TP adjustment made by the Id. DRP/TPO/AO on account of AMP expenses is not sustainable, hence the issue is remitted back to the TPO to decide afresh after providing an opportunity of being heard to the taxpayer.

**GROUNDS NO.12 & 13 IN**  
**ITA No.1674/Del./2016 (AY : 2011-12)**

**GROUNDS NO.13, 14 & 15 IN**  
**ITA No.1982/Del./2017 (AY : 2012-13)**

**GROUNDS NO.13 & 14 IN**  
**ITA No.7088/Del./2017 (AY : 2013-14)**

26. Grounds No.12 & 13 in ITA No.1674/Del./2016 (AY : 2011-12), Grounds No.13, 14 & 15 in ITA No.1982/Del./2017 (AY : 2012-13) and Grounds No.13 & 14 in ITA No.7088/Del./2017 (AY : 2013-14) are premature and consequential in nature, hence do not need any specification adjudication.

27. Resultantly, all the appeals, ITA No.1674/Del./2016 (AY : 2011-12), ITA No.1982/Del./2017 (AY : 2012-13) and ITA No.7088/Del./2017 (AY : 2013-14) are partly allowed for statistical purposes.

**Order pronounced in open court on this 3<sup>rd</sup> day of July, 2018.**

**Sd/-**  
**(CHANDRA POOJARI)**  
**ACCOUNTANT MEMBER**

**sd/-**  
**(KULDIP SINGH)**  
**JUDICIAL MEMBER**

**Dated the 3<sup>rd</sup> day of July, 2018**  
**TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)
- 5.CIT(ITAT), New Delhi.

AR, ITAT  
NEW DELHI.