IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES " K ", MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No. 1928/Mum/2016
Assessment Year : 2011-12

M/s. Celio Future Fashion Private Limited, (Formerly known as Celio Future Fashion), A Wing, Unit No. 301 & 302, Near Graham Firth Compound, Opposite Western Express Highway, Goregaon (East), MUMBAI [PAN : AADCC3844J]	Vs.	The Assistant Commissioner of Income Tax-9(2)(1), MUMBAI
(Appellant)		(Respondent)

Appellant By : Shri Niraj Sheth &
Shri Ketan Ved,

Respondent By : Shri Purushottam Tripuri, CIT-DR

Date of Hearing : 11-03-2019	Date of Pronouncement : 15-03-2019

O R D E R

Per B.R. Baskaran, Accountant Member:

This appeal filed by the assessee is directed against the order passed by the Assessing Officer (AO) u/s 143(3) r.w.s 144C(13) of the Income Tax Act (Act) for assessment year

2011-12, in pursuance to the directions given by the Ld. Dispute Resolution Panel (DRP). The assessee is aggrieved by the Transfer Pricing (TP) adjustment of Rs. 3,47,91,041/- made by the AO.

2. The facts relating to the case are stated in brief. The assessee is the distributor of Celio Brand men's wear. During the year under consideration, the assessee has entered the following international transactions:

a) Purchase of men's wear and
b) reimbursement of technical fees;

3. In respect of reimbursement of technical fees, the Transfer Pricing Officer (TPO) noticed that assessee has failed to furnish the justification and evidences for services received from its Associated Enterprise (AE). The TPO took the view that the services rendered by assessee are of routine nature that are given in the normal course of carrying on of business transactions. Accordingly, the TPO determined the Arm's Length Price (ALP) of the reimbursement of technical fee as NIL. The assessee had paid technical fee of Rs. 104.27 Lakhs and the TPO held that the ALP of the same is NIL.

4. In respect of the transactions of import of finished goods (men's wear) from its AE, the assessee had benchmarked the transaction under Transactional Net Margin Method (TNMM). The assessee initially adopted "cost + mark up" as PLI based on the single year data. The PLI of the comparable companies was arrived at 10.61%. The assessee was importing goods at cost + mark up of 9%. Accordingly, the assessee submitted that the difference falls within (+)/(-) 5% range and hence the transactions of import of goods are at arm's length.

4.1. The TPO noticed that the assessee has incurred loss during the year, i.e., the net margin was negative at (-) 8.21%. The TPO selected certain comparables and the Net Profit margin of those comparable companies was 1.12%.

4.2. Accordingly, the TPO proposed the TP adjustment of Rs.320.52 Lakhs in respect of import of men's wear from the AE.

5. Before the Ld. DRP, the assessee submitted that in the case of distribution of goods, "Re-sale Price Method" is the most appropriate method. However, the Ld. DRP noticed that the assessee has incurred heavy expenses towards branding in the form of Advertisement and Market Promotion Expenses

(AMP). Accordingly, Ld. DRP took the view that the said expenses also need to be taken into account while benchmarking the trading function. Accordingly, it held that TNMM is the most appropriate method to benchmark the transactions. Accordingly, the Ld. DRP upheld the TP adjustment proposed by the AO. While holding so, the Ld. DRP directed the AO to exclude certain disallowances made out of reimbursement of technical fees from the operating cost. The AO passed the order in terms of directions given by the DRP, which is being agitated by the assessee.

6. We have heard the parties and perused the record. *The first issue relates to TP adjustment made in respect of reimbursement of technical fees.*

6.1. Ld. AR placed his reliance on certain case law and contended that the TPO is not entitled to examine the genuineness of the expenses. Accordingly, he contended that the TP adjustment proposed by the TPO and confirmed by the Ld. DRP needs to be deleted.

6.2. On the contrary, Ld. DR submitted that the TPO has not questioned the genuineness of expenses as contended by Ld A.R. He pointed out assessee has failed to furnish any

evidence to show the nature of services rendered by the AE. The Ld. DR submitted that the assessee has furnished only copies of invoices raised by the AE and the same would not demonstrate the nature of services received by the assessee. Since the assessee could not furnish the details of services received by it from AE, the TPO had no other option but to determine the ALP at NIL. The Ld D.R further submitted that the assessee did not furnish any evidences before Ld DRP also and hence, the Ld. DRP also has confirmed the order passed by the TPO.

6.3. In the rejoinder, the Ld A.R submitted that the assessee has prepared a detailed Note on the nature of services rendered by its AE. He prayed the same may kindly be admitted as additional evidence and prayed the same may be admitted and the matter may be restored to the file of AO/TPO. The Ld D.R, however, objected to the same.

6.4. We have heard the parties and perused the material on record. Admittedly, the assessee did not furnish any document to show that the assessee has received any services from its AE. There should not be any dispute that the nature, quality and quantity of services rendered by a person would

determine the quantum of payment to be made for rendering of such services. The purpose of determining ALP of a transaction is to find out as to whether similar kind of payments would have been made to an unrelated party for similar kind of services rendered. Hence the details relating to nature of services that were received by the assessee are, in our view, crucial for determining ALP. Hence we are of the view that the TPO has not questioned the genuineness of transactions. We also agree with the contentions of the Ld. DR that the copies of invoices received by the assessee from its AE would not demonstrate the details of services received by the assessee. From the order of TPO, we noticed that the assessee has given examples of services received by it from its AE. The TPO has described the same as under:

- Assistance/advice in analysis for validation of store locations, organization and management of the stores;
- Assistance/advice in processes for stocks & sales control, control management, procurement scheduling, co-ordination etc;
- Assistance/advice in determining store layouts, controlling visual merchandising of the stores;

- Assistance/advice in preparation and elaboration of creatives (windows, instore) for point of sale initiatives;
- Assistance/advice in preparation of support tools for the sales teams;
- Assistance/advice in organizing retail training seminars;
- Assistance/advice in market survey and price studies specific for the Indian market;

Though the assessee has claimed to have received the above said services, yet it has not furnished any material to demonstrate that the above said services were actually received. Hence, in the absence of any material to prove the details of services actually rendered by the AE, it would be difficult for the tax authorities as well as for the Tribunal to appreciate the contentions of assessee. Before us, the Ld. AR submitted that the assessee has prepared a detailed note explaining the details of services received by it.

6.5. Having regard to the rival contentions on this issue, in the interest of natural justice, we are of the view that the assessee may be provided with one more opportunity in this matter. Accordingly we admit the additional evidences

furnished by the assessee explaining the details of received services provided by its AE. In view of the above, this issue requires fresh examination at the end of AO/TPO. Accordingly, we set aside the order passed by AO on this issue and restore the same to the file of AO/TPO to examine the ALP of the payment of technical fee in accordance with the law by duly considering the additional evidences and also T.P study of the assessee.

7. *The next issue relates to TP adjustment made in respect of import of men's wear from its AE.*

7.1. The Ld. AR submitted that the assessee imports men's wear from its AE and distributes the same as it is without making any value addition. He submitted Re-sale Price Method is the appropriate method for determining the ALP of the above said transactions. He submitted that the Ld DRP has observed that the advertisement and sales promotion expenses incurred by the assessee was huge and hence the net profit margin alone should be considered under TNMM method for determining ALP. He submitted that the Advertisement and Sales Promotion expenses do not increase the inherent value of the products. Further, the provisions of

Rule 10B(1)(b) defines the Re-Sale Price Method and the said definition provides for computing "gross profit margin" in order to determine the ALP under Re-sale Price Method. He submitted that the advertisement and sales promotion expenses are not to be deducted for computing gross profit margin. Accordingly he submitted that the Ld. DRP was not justified in holding that the advertisement and sales promotion expenses should also be taken into account and accordingly holding that TNMM is the most appropriate method. Ld. AR relied on the host of the case law to support its contentions.

7.2. On the contrary, Ld. DR submitted that the advertisement and sales promotion expenses incurred by the assessee huge. He submitted that, since the assessee has incurred these expenses, it should have imported the goods at a lower rate than that the rate that should have been charged to an un-related party, since the unrelated party would not have incurred advertisement expenses at such level. In this view of the matter, the Ld D.R submitted that Ld. DRP was justified in holding that the ALP should be determined under

TNMM method by considering the Net Profit margin of the assessee.

7.3. We have heard the parties on this issue and perused the record. Admittedly, the assessee is a mere distributor of men's wear, imported from its AE. In the following cases, it has been held that Re-sale Price Method is the most appropriate method to benchmark the international transactions when finished goods are purchased by the assessee from its AE, which are ready to be sold in the market without any value addition:

i. Fujitsu India (P) Ltd., Vs. ACIT [101 taxmann.com 322] (Delhi-Trib);
ii. Burberry India Pvt. Ltd., Vs. ACIT in ITA Nos. 758 & 7684/Del/2017, dt. 22-06-2018;
iii. Bose Corporation India (P) Ltd., Vs. ACIT [77 taxmann.com 194] (Delhi-Trib);
iv. CIT Vs. L'Oreal India (P) Ltd., [53 taxmann.com 432] (Bombay);

7.3.i. For the sake of convenience, we extract below the operative portion of the order passed by the Delhi Bench of

this Tribunal in the case of Burberry India Pvt. Ltd., Vs. ACIT in ITA Nos. 758 & 7684/Del/2017, dt. 22-06-2018:

"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 subclause (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 reselling 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 (Delhitrib.) wherein it was held that the incurring of high advertisement and marketing expenses by the assessee vis-avis 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".*

7.3.ii. The facts prevailing in the instant case are also that the assessee is the distributor of men's wear imported from its AE. It does not carry out any value addition. Though the assessee is alleged to have incurred huge expenses on advertisement and market promotion, the same would not increase the inherent value of the products. In the case of simple distribution of products, it has been consistently held in the above said case laws that the "Resale Price method" (RPM) is the most appropriate method. Under the RPM, the profits are

compared at Gross Margin level, in which case, the expenses incurred on Advertisement and Marketing should not be deducted while arriving at the Gross profit margin. Hence the TNMM method adopted by the assessee as well as the TPO is not appropriate method. Since the T.P study requires to be carried out afresh by adopting "RPM", we set aside the order passed by the AO on this issue and restore the same to his file for examining this issue afresh.

8. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 15th day of March, 2019

Sd/-	Sd/-
(AMARJIT SINGH)	(B.R. BASKARAN)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai; दिनांक/Dated : 15th March, 2019

TNMM

Copy of the order forwarded to :

1. Appellant

2. Respondent

3. Dispute Resolution Panel (DRP), Mumbai

4. Director of Income Tax (IT & TP)

5. Addl. Commissioner of Income Tax (Transfer Pricing)

6. D.R. ITAT, Mumbai

7. Guard File.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asst. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai