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

BEFORE SRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA No. 3166/Del/2013
A.Y. 2007-08

DCIT, Circle 6(1) Room No.413 C.R.Building I.P.Estate New Delhi	**vs**.	Michelin India Tyre Pvt.Ltd. 401-404, 4th Floor Copla Corporate Suits Jasola District Centre New Delhi 110 076 PAN: AADCM8454G

ITA No. 3306/Del/2013
A.Y. 2007-08

Michelin India Tyre Pvt.Ltd. 401-404, 4th Floor Copla Corporate Suits Jasola District Centre New Delhi 110 076 PAN: AADCM8454G	**vs**.	DCIT, Circle 6(1) Room No.413 C.R.Building I.P.Estate New Delhi
(Appellant)		**(Respondent)**

Assessee by	Sh. Nageswar Rao, Adv.
Revenue by	Sh. A. Srinivas Rao, Sr.D.R.
Date of Hearing	21/02/2019
Date of Pronouncement	30/04/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present Cross Appeals have been filed by revenue as well as assessee against order dated 13/03/13 passed by Ld.CIT(A)-20, New Delhi for assessment year 2007-08 on following grounds of appeal:

ITA No. 3166/Del/2013

1. Whether in the facts and circumstances of the case, the ld.CIT(A) erred in deleting TP adjustments of Rs.21,29,85,061/- by rejecting the TP approach of TPO?

2. Whether in the facts and circumstances of the case, the ld.CIT(A) erred in rejecting the TNM method used by the TPO, to reflect the correct functional profile of assessee and accepting the transfer pricing approach of assessee, that did not take into account the relevant adjustments required?

3. Whether in the facts and circumstances of the case, the ld.CIT(A) erred in deleting the amount of Rs.2,22,39,759/- on account of advertising and publicity expenses stating that these expenses are revenue in nature by completely ignoring the detailed reasons given by the AO and without appreciating the fact that the above expenditure was not incurred wholly and exclusively for the purpose of business of the assessee and was also capital in nature.

4. Whether in the facts and circumstances of the case, the ld.CIT(A) erred in deleting the disallowance of Rs.1,38,26,742/- on account of impairment of stock entirely relying on the submission of the assessee by completely ignoring the detailed reasons given by the AO and without appreciating the fact that no evidence filed by the assessee that the above expenditure was an ascertained liability?

5. Whether in the facts and circumstances of the case, the ld.CIT(A) erred in deleting the disallowance of Rs.20,277/- made on account of excess claim of depreciation on printer and UPS @ 60% as computer peripherals are not part of the computer?

6. That the order of Ld.CIT(A) is erroneous and is not tenable on facts and in law.

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

8. That the appellant craves leave to add, alter, amend or forego any grounds of appeal raised above at the time of hearing."

ITA No. 3306/Del/2013

The following grounds of appeal are mutually exclusive and without prejudice to, each another.

1. *That on the facts and in law, the Learned Commissioner of Income Tax - (Appeals) - XX, New Delhi (hereinafter referred to as "the Learned CIT(A)") erred in assessing the income of the Appellant for the relevant assessment year at Rs. 7,551,500 as against the returned income of Rs. (-)84,208,938.*

2. ***Grounds on Principles of Natural Justice***

2.1 *That on facts and in law the order's passed by the learned Assessing Officer ("AO") /Transfer Pricing Officer ("TPO") / Commissioner of Income-tax (Appeals) are bad in law and void ab-initio.*

2.2 *That the order passed by the learned CIT(A) is bad in law as it failed to give cognizance to the fact that the Learned TPO has in the case of the Appellant, accepted the pricing of all international transactions in the subsequent year i.e. AY 2008-09 and hence the Learned CIT(A) should have deleted the adjustment made in the subject year.*

3. ***Grounds pertaining to Corporate Tax***

3.1 *The Learned AO / Learned CIT(A) have erred on facts and in law, in disallowing the management fee amounting to Rs.13,860,565, without giving due management fee amounting to Rs. 13,860,565, without giving due cognizance to the detailed submissions made by the Appellant which demonstrated the nature of services availed, the manner in which these services had been rendered, and the benefit accrued to the Appellant, along with the relevant information and documents. Thereby, the Learned AO / Learned CIT(A) have failed to acknowledge that the management fee paid by the Appellant was "wholly and exclusively'' incurred for the purposes of its business and that these services purely constitute relevant and pertinent support services which helped the Appellant undertake its operations more efficiently.*

3.2 *The Learned AO / Learned CIT(A) have erred in disallowing an amount of Rs. 543,533 related to training expenses on account of non-deduction of TDS. The Learned AO / Learned CIT(A) have both failed to recognize that this amount represents the impact of foreign exchange fluctuation which resulted in a loss while making the payment. Accordingly, the liability to deduct TDS on such an amount does not arise and this erroneous disallowance should be deleted.*

3.3 *The Learned AO has erred in disallowing an amount of Rs. 2,297,795 related to demurrage charges, on account of non crystallization of liability and thereby considering the same as contingent in nature, irrespective of the fact that such amount has been paid in respect of goods lying with the port authorities, in order to keep the goods in the safe custody beyond the lay time. Thus the expenses were in the nature of compensatory rental.*

4. ***Grounds pertaining to Transfer Pricing Matters***

4.1 *That the Learned TPO / Learned CIT(A) have erred both in law and on facts in inappropriately applying Indian Transfer Pricing regulations to determine the arm's length price for amounts paid domestically to independent third parties by the Appellant to fulfill its own business interests. The Learned TPO / Learned CIT(A) have failed to appreciate that such an unilateral action of the Appellant (to incur such expense) cannot be regarded as an "international transaction" as per the provision of Section 92B read with Section 92F of the Act.*

4.2 *That the Learned TPO / Learned CIT(A) have grossly erred both in law and on facts while benchmarking the impugned transaction of the Appellant without following the scientific process prescribed under the Indian transfer pricing regulations. The Learned TPO / Learned CIT(A) did not conclusively determine a most appropriate method prescribed under the Act and instead arbitrarily used a 'Brightline' approach, which is not a method under the Act.*

4.3 *That the Learned TPO / Learned CIT(A) have grossly erred in adopting a myopic view of the expense / profitability of the Appellant in the subject year, and has deliberately not given any credence to the fact that the Appellant (being the sole distributor of Michelin products in India) is the primary and only direct beneficiary of the Advertisement, Marketing and Promotion ('AMP') expenses incurred locally, and any benefit what-so-ever which may have been derived by the AEs is purely incidental and indirect.*

4.4 *Without prejudice, the Learned TPO / Learned CIT(A) have grossly failed to understand and apply the international guidance as espoused in the case of M/s DHL Incorporated and in the decision of the Hon'ble Special Bench of Delhi*

Tribunal in the case of M/s L.G. Electronics India Private Limited providing specific guidelines on the manner in which 'Bright line' approach may be applied.

4.5 *That the Learned TPO / Learned CIT(A) has grossly erred on facts by incorrectly classifying incentives and discount to dealers (such as discounts and rebates to dealers, dealer incentives, commission etc.) as "brand related expenses" and hence included these expenses in the computation of AMP. The Learned TPO / Learned CIT(A) have grossly erred in including such expenses for the purpose of determining the AMP expense of the Appellant and thereby assuming that such expenses benefit the "brand-owning" entities by way of enhancing value of brands owned by them. In doing so, the Learned TPO / Learned CIT(A) have completely ignored the judgements passed by the Hon'ble ITAT in this matter.*

4.6 *Without prejudice to the above grounds, the Learned TPO / Learned CIT(A) have grossly erred in drawing a arbitrary and subjective comparison of the Appellant's AMP to sales ratio with AMP to sales ratio with inexact and highly inappropriate comparables for the purposes of drawing a comparison. The Learned TPO / Learned CIT(A) has chosen to completely ignore the guidance on the issue of choice of appropriate comparable companies for 'Brightline' analysis, as has been laid out in the decision of Hon'ble Special Bench in the case of M/s L.G. Electronics India Private Limited.*

4.7 *Without prejudice, That the Learned TPO / Learned CIT(A) have erred on facts and in circumstances of the case by conveniently ignoring that the Appellant has received voluntary reimbursement to the extent of Rs 35,121,600 for such impugned AMP expenses incurred for the subject year, and which has been duly offered to tax in the return of income for FY 2010-11 i.e. the year in which it is received.*

• *Thereby Learned TPO / Learned CIT(A) failed to grant much required relief to the extent of Rs 35,121,060 while computing the adjustment on AMP expense. In this regard, the application seeking rectification under section 154 of the Act has been already filed before the learned CIT(A) to effect for.*

4.8 *Without prejudice to the above grounds, the Learned TPO / Learned CIT(A) have erred in facts and circumstances of the case in alleging that the Appellant has effectively provided brand building services to its AEs thereby seeking additional compensation for the assumed intra-group services provided by the Appellant. The Learned TPO / Learned CIT(A) have extended the absurdity of the analysis by applying a mark-up of 13.04% using highly inappropriate comparable companies.*

The Appellant craves leave to add, amend, vary, omit or substitute, any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal and consider each of the grounds as without prejudice to the other grounds of appeal."

Additional ground: As per Application dated 11.06.2018

4.9. *Without prejudice to any other ground and also to our contention that no addition on account of advertisement, marketing and promotion (AMP) expenses is justified in appellant's case, authorities have failed to adopt similar methodology as applied by Hon'ble CIT(A) for AY 2010-11."*

2. Brief facts of case are as under:

The Michelin Group is one of the three leading global tyre manufacturers. The Michelin Group has nearly 80 production sites located in 18 countries and has sales operations in more than 170 countries. The Michelin Group employs more than 120,000 persons world wide. The Michelin Group primarily caters to following segments: passenger cars/vans, truck, agriculture vehicle, aircraft, two wheelers.

Michelin India Tyres Private Limited is a wholly owned subsidiary of Compagnie Financiere Michelin. According to assessee, Michelin India was established with objective to carry on business to manufacture and trade all sorts and varieties of tyres and tubes. The Company is currently engaged in import and resale (or trading) of tyres for passengers trucks and buses under India under the brand name of "Michelin".

2.1. Assessee had entered into following international transactions:

S.No.	Description of transaction	Value (in Rs.)
1	Import of finished goods (tyres and tubes) for resale in India	551,081,890
2	Availing of managerial service from AEs	13,860,565
3	Reimbursement of expenses by AE	1,701,198
4	Reimbursement of expenses to AEs	12,040,655

2.2. The assessee had justified the Arm's Length Price (ALP) of international transaction under Resale Price Method (RPM) as most appropriate method and used Gross Profit / Sales (GP/ Sales) as Profit Level Indicator (PLI). The management services were justified under Transactional Net Margin Method (TNMM) using foreign comparables. Assessee had not treated Advertisement, Marketing and sales Promotion expenses (AMP) expenditure as international transaction.

2.3. The Transfer Pricing Officer (TPO) determined (ALP) of international transaction involved in import of finished goods and other activities mentioned in item 1 to 4 in above table by using TNMM as most appropriate method and Operating Profit/ Operating Revenue (OP/ OR) as (PLI) at entity level. He has taken 5 comparables selected by assessee for this exercise. They are as follows:

Table-2:

Company Name	% of Adv exp to sales
Falcon Tyres Limited	6.39%
India tyre and Rubber Company (India) Limited	3.93%
Kesoram Indsutries Limited	1.19%
Monotona Tyres	2.26%
TVS Srichakra Limited	4.07%
Arithmetic mean	**3.57%**

2.4. It is important to note that TPO rejected 2 companies, namely, Krypton Industries Ltd. and Ecowheels Pvt. Ltd. which were appearing in TP documentation for the reason that first company was not trading in tyre and for second company profit and loss account was not available in public

domain. The appellant has not pressed for acceptance of these companies. TPO selected 1 comparable by name Monotona Tyres from TP study for subsequent year as comparable for this year also. However, all comparables were selected by assessee itself.

The comparables, at entity level under TNMM had mean OP/OR of 3.69%. As a result, an addition of Rs.21,29,85,061/- was proposed in TP order. Subsequently, TPO also undertook determination of ALP of international transaction involved in AMP separately and determined ALP at Rs.6,70,57,184/-. However, TPO restricted addition only to mark up at 13.04% which was calculated at Rs.77,35,542/-. While doing assessment u/s 143(3), A.O. independently examined the issue of AMP and disallowed 50% of advertisement expenses and 100% of management support services expenses incurred by assessee. As a result, assessee has stated that this has resulted into double addition.

3. Aggrieved by adjustment made by Ld. TPO, assessee preferred appeal before Ld.CIT(A). Ld.CIT(A) accepted RPM as most appropriate method to determine arm's length price of imported finished goods (Thailand troops) for resale in India. Ld.CIT(A] also allowed impairment of stock, 50% of advertisement and publicity expenses, depreciation of computer accessories. Ld. CIT(A) however confirmed additions made by Ld. AO towards AMP expenses, management fees, advanced rates and taxes and disallowance made relating to training expenses on account of non-deduction of TDs.

4. Aggrieved by disallowances made by Ld. CIT (A) and additions deleted, revenue as well as assessee are in appeal before us. We shall first take up revenue's appeal in ITA No. 3166/Del/2013.

5. Ground No. 1 is general in nature and therefore do not require any separate adjudication.

6. Ground No. 2 is in respect of rejecting TNMM as most appropriate method for determining arm's length price of international transaction being import of furnished goods for resale in India.

7. Ld.Sr.DR submitted that assessee has applied resale price method on purchase of goods, enterprise purchases a property or services from associated enterprise and then resells property or services to an unrelated enterprises without there being any value addition. He submitted that adjustment of all differences between international transactions and comparable uncontrolled transactions which may have a material effect on account of gross profit should be made and, for applicability of this method one should ascertain, functional similarity performed by tested party before it resold the property or services and also the cost incurred for performing these functions to be similar and identical to the comparable uncontrolled transactions. Ld.Sr.DR submitted that gross profit margin earned by the tested party can then be compared with gross profit margin of comparable which has performed similar functions and has calculated gross margin after considering cost of those functions. Ld.Sr. DR also pointed out that assessee is maintaining a very high inventory which is evident from scheduled 12 of profit and loss account which indicates that products are not moving fast for correct applicability of RPM. He submitted that RPM is more accurate where it is realised within a short time of reseller's purchase of goods, as more time that lapses between the original purchase and resale more likely it is that other factors like changes in the market in rates of exchange in cost etc will need to be taken into account in any comparison. It has been emphasised by Ld.Sr.DR that the level of inventory and cost involved in keeping inventory have to be adjusted which may not be possible based on the information available in the public domain.

8. Another factor which Ld.Sr.DR emphasised for non-applicability of RPM is functions that are generally performed by a reseller like advertising, marketing, distribution and guaranteeing goods, financing stocks and warranty risks. One would have to look into whether cost of these functions are accounted for as cost of goods or not. He submitted that if costs are accounted for as a part of cost of goods, no separate adjustment can be made as gross profit worked out would include cost of functions also. Ld.Sr.DR

further submitted that if cost of aforesaid functions are accounted for as part of operating expenses, there will be a distortion in GP margins and it is to be corrected. Ld.Sr.DR submitted that from scheduled 14 to profit and loss account there are certain expenses like salary, wages, travelling and conveyance, fright outward expenses etc which are directly connected with selling and distribution functions. However, neither in case of assessee nor in case of comparables the same have been considered for compatibility. He submitted that therefore in such circumstances RPM cannot give the true picture of compatibility analysis and if at all RPM is to be adopted these factors cannot be ignored at all.

9. Ld.Sr.DR thus submitted that under such circumstances for year under consideration TNMM is most suitable since comparison under TNMM is on net margin which subsumes all differences noted hereinabove.

10. On the contrary Ld.Counsel submitted that Coordinate Bench of this Tribunal for assessment year 2006-07 being immediately preceding assessment year has held RPM to be most appropriate method for determining arm's length price of transaction of purchase and resale of products by assessee as against TNMM. It is further submitted that Ld.TPO has accepted RPM as most appropriate method in assessee's case for assessment year 2005-06, 2008-09 and 2009-10.

11. We have perused submissions advanced by both sides in light of records placed before us.

12. For year under consideration assessee has compared gross profit margin earned by comparables with that of assessee to come to a conclusion that transaction of purchase and sale is at arm's length. Ld.CIT (A), by relying upon decision of *L'Oreal India Pvt. Ltd vs ITO* in *ITA No. 5423/Mum/2009*, agreed for RPM to be most appropriate method to determine ALP in case of assessee.

12.1. Section 92C(1) of the Income-tax Act, 1961 provides that arm's length price in relation to international transaction shall be determined by any of methods, being, the most appropriate method, having regard to nature of transaction or class of transactions or class of associated persons or functions

performed by such persons or such other relevant factors. Amongst five specific methods, include, RPM and TNMM. Sub-section (2) of section 92C provides that most appropriate method referred to in sub-section (1) shall be applied for determination of ALP in the manner as may be prescribed. Rule 10B sets out the procedure under above referred five methods. Rule 10B(1) states that ALP of an international transaction shall be determined by any of the prescribed methods being most appropriate method, given in section 92C(1) at the material time and such computation can be done only in the manner as is prescribed under the rule. The instant controversy narrows down to examining and deciding as to whether, RPM or TNMM is the most appropriate method in present circumstances.

12.2. Before ascertaining most appropriate method as may be applicable in present factual scenario, it is *sine qua non* to look at the functions performed and nature of activity undertaken by assessee under this segment.

13. Functions performed by assessee under the segment import of finished goods (tyres and tubes) for resale in India:

As per TP study report placed at page 26-83 of paper book, it is observed that during year under consideration, assessee sold certain tyres being finished goods to its associated enterprise being Micheline Asia (Singapore) Company PTE Ltd., worth Rs.7,30,455/-. The international transaction has been closely linked to international transaction involving the import of finished goods which is tyres and tubes for resale in India. It has been submitted in TP study that resale of tyres to its AE is without any substantial value addition and only direct cost involved which is relevant for computation of gross margin is payment made for purchase is also commonly referred to as cost of sales.

13.1. Rule 10B(1)(b)(i) deals with identifying the price at which goods purchased from AE is resold, sub clause (ii) talks of reducing amount of normal gross profit margin of comparable uncontrolled transactions from such resale price of the assessee, Sub-clause (iii) states that result of sub-clause (ii) is further reduced by expenses incurred in connection with purchase of goods and sub-clause (iv) provides that amount so deduced under sub-clause (iii) is

adjusted on account of differences in international transaction, and comparable uncontrolled transactions which materially affect gross profit margin in open market. Finally, sub-clause (v) provides that 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 methodology given under RPM more specifically sub-clauses (i) and (v), it becomes patent that sub-clause (i) refers to property purchased by assessee is resold and sub-clause (v) refers to arm's length price in respect of purchase of property by assessee.

13.2. A close scrutiny of above Clauses of rule 10B(1)(b) makes it clear that RPM is best suited for determining ALP of an international transaction in nature of purchase of goods from AE, which is resold. Ordinarily, this method pre-supposes, no or insignificant value addition to goods purchased from foreign AE. In case 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 proper method for benchmarking international transaction of purchase of goods by assessee from its AE.

13.3. Further on facts of present case it is observed that assessee has used 6 comparables and the PLI chosen was gross profit margin being GP/sales.

13.4. Ld. CIT (A) while dealing with the issue has observed as under:

"4.4. I have carefully examined the issue. The debate regarding RPM vs. TNMM has been settled by the decision of the Hon'ble ITAT in the case of L'oreal (supra) when the underlying international transaction is resale of imported goods. The facts of the case of the appellant are similar to the case of L'oreal because the appellant is a reseller of tyres without any value addition. Therefore, I hold that the ratio of L'oreal is applicable to the facts of the present case. Further, it is not the case of the TPO that appellant is doing any value addition before selling the tyres in India. The functions of advertising, marketing, distribution etc. are not the functions directly related to reselling of goods to be captured while arriving at the gross margin as per the Indian accounting standard as quoted in the earlier

paragraphs. It is also a fact that there is no gradation of the most appropriate method to be applied as per law. They are fact specific to each case.

4.5. The factual reason for rejecting RPM is that the expenses like salary, wages, travelling and conveyance etc. are not taken into account while considering the gross profit margin of the appellant as well as the comparables. Rule 10B(l)(b)(ii) specifies "a normal gross profit margin". The term "normal gross profit margin" is not defined in the Rules nor in the Act. Therefore, the accounting standards as prescribed by Institute of Chartered Accountants of India - which is a statutory body - is only applicable to arrive at a "normal gross profit margin". As per this guideline, the gross profit is defined as "The excess of the purchases of goods sold and services rendered during a period over the cost, before taking into account administration, selling and distribution, and financing expenses. When the result of this computation is negative it is referred to as gross loss."

4.6. It is seen that the transfer pricing study conducted by the appellant had taken from the notes to accounts the physical quantities of tyres and tubes traded by the 5 comparable companies. At the cost of repetition, it has to be stated that the TPO has accepted the comparable companies in this case as proposed by the taxpayer. However, the TPO did not pay attention to the actual calculation of gross profit margin earned by the comparables and the workings of the gross profit margin in the TP documentation. The appellant had taken 3 year average of the financial. However, the 3 year financial included the year ending 31 March 2007 also (except in three cases). For the detailed reasons given in subsequent paragraphs, single year data should be used for the determination of ALP of the international transaction. The appellant had provided the updated margin of the comparables to the TPO during the course of the TP proceedings. TPO had rejected 2 comparables out of 6 comparables in the TP study and had accepted 1 comparable from the TP study for the subsequent AY i.e. AY 2008-09. The gross profit of the 5 comparables taken by the TPO is given in the following table:

Table-3:

Name of the Company	***Gross Margin***
Falcon Tyres Limited	*-4.98%*
India tyre and Rubber Company (India) Limited	*Not available*
Kesoram Industries Limited	*Not available*
Monotona Tyres Limited	*8.95%*
TVS Srichakra Limited	*-17.69%*
Arithmetic mean	***-4.57%***

Further, the appellant has calculated its gross margin as below (which is extracted from Annexure-5 of TP study):

Table-4: Working of gross margin of the appellant for AY 2007-08

(in Rs.)

Sales (excluding sales tax)		*935,844,603*
Add: Change in Stock		
Opening Stock	*114,945,031*	
Closing Stock	*191,585,098*	
Inventory Written Off	*-*	
Warrantee expenses reclassified	*-*	*(76,640,067)*
Less: Purchase value of traded		
Purchase Value of traded products	*500,161,378*	
Custom Duty	*253,552,099*	
		753,713,477
Cost of Sales		*677,073,410*
Gross Profit		*258,771,193*
Gross Margin		***27.65%***

4.7. The appellant had submitted the notes to accounts of all these comparables in the paper book. I have verified the same with the help of these notes to accounts. The gross profit margin is arrived at in the same way as given in ICAI guidelines i.e. the excess of purchases of goods sold over the cost of goods sold before taking into account administration, selling and financial expenses. This principle is applied to both to the comparables as well as the financials of the appellant. In the case of Kesoram Industries Limited and India tyre and Rubber Company (India) Limited, quantitative details of the sales were not available. As

a result, even though they are comparables, their margin could not be worked out. Therefore, I hold that there is no infirmity either in application of gross profit or in using RPM as most appropriate method.

4.8. It was also brought to the notice that the TPO has accepted RPM as the most appropriate method in the case of the appellant for the AY 2005-06 and subsequently in the AY 2008-09 and 2009-10. The appellant continues to be a reseller of tyres and tubes in all these years.

4.9. As the gross margin earned by the appellant is more than the mean gross margin of the comparables using single year data, the international transaction of import of tyres and tubes for resale is considered to be at arm's length. The AO/ TPO is directed to delete the addition of Rs. 21,29,85,061/- made under TNMM."

13.5. It is observed that Ld.CIT(A) upon verification of accounts of comparables approved comparables being Falcon Tyres Ltd, Monotona Tyres Ltd and TVS Srichakra Ltd. Ld.CIT (A) compared accounts of comparables. He rejected Kesoram Industries Ltd. and India Tyres and Rubber Company Ltd., as quantitative details of sales were not available. From the order of Ld.TPO, it is observed that Ld.TPO has considered India Tyre and Rubber company, to be best comparable. Under such circumstances it is desirable to set aside this issue to Ld.AO/TPO, with a direction to determine ALP of subject transaction with RPM as most appropriate method. Assessee is directed to provide gross profit of comparables Kesoram Industries Ltd and India Tyres and Rubber Company Ltd. and then ALP should be determined by considering GP/sales of comparable companies as discussed above.

Accordingly, this ground raised by revenue stands dismissed.

14. Ground No. 3 has been raised by revenue against disallowance of Rs.2,22,39,759/-, being deleted on account of advertising and publicity expenses stating that these expenses are revenue in nature.

15. Ld.Sr.DR submitted that Ld.CIT (A) has not considered the detailed reasons given by Assessing Officer. He submitted that the Ld.CIT (A) failed to

appreciate that expenses were not incurred wholly and exclusively for purposes of business of assessee and therefore should be considered as capital expenditure.

16. On the other hand Ld.Counsel submitted that assessee incurred expenditure on sponsorship of events, advertisement and newspaper, magazine, electronic media, banners, wall paintings etc to promote and sale of tyres in India. He submitted that Ld.AO disallowed 50% of advertisement expenses on ad hoc basis by holding that such expenditure are towards brand building of entities owning the grant without giving due cognizance to the fact that the direct beneficiaries of these expenses are assessee itself.

17. We have perused submissions advanced by both sides in light of records placed before us.

17.1. We have perused observations of Ld. CIT (A) which is as under:

"14.4. I have considered the issue. There is a double addition in the order of the AO. If the AMP expenditure is disallowed in totality, there can be no question of TP addition. Since, the matter was referred to the TPO and TPO has given his considered view on AMP expenditure, which has resulted into addition in this case. I see no reason why AO should disallow the same expenditure all over again. The addition on account of determination of ALP of international transaction under AMP is sustained in this order as well.

14.5. Further, the AO has stated that half of the expenditure incurred towards AMP is capital in nature. The reason given by the AO is that these expenditures go to the benefit of the AE who is the owner of the brand 'Michelin'. This is the very issue considered by the TPO. Except quoting the judgments of various Courts – which are of no relevance to the present case – the AO has not brought any facts on record. The disallowance of AMP expenses u/s 37 of IT Act was not upheld by the jurisdictional High Court. The Hon'ble High Court of Delhi has upheld the order of Hon'ble ITAT in the case of Nestle India Ltd. Vs DCIT (2009) 27 SOT 9 (Del)(URO) which has treated advertisement expenses as revenue expenses. There are several decision of High Courts and Supreme Court allowing the advertisement expenses as business expenses."

17.2. It is observed that Ld.AO disallowed 50% of expenditure incurred for advertising and publicity expenses without any basis. There is nothing brought on record by Ld.AO or Ld.Sr.D.R. to show that the expenditure incurred are bogus. Further the disallowance has been made by Ld.AO for two reasons: (i) that these expenditure incurred by assessee is towards establishment and Promotion of the 'International Brand' which is not the property of assessee and (ii) that it has not been incurred wholly and exclusively for assessee's business.

In our considered opinion, the reason given by ld.AO for making disallowance has already been considered by Ld.TPO while proposing djustment under the head 'AMP expenditure'. Further such addition cannot be based on presumptions. We are therefore in conformity with the view taken by Ld. CIT (A).

Accordingly this ground raised by revenue stands dismissed.

18. Ground No. 4 has been raised by revenue against the deletion of Rs.1,38,26,742/-on account of provision for impairment of stock.

19. Ld.Sr.DR submitted that impairment in the value of stocks under ascertained liability and no evidence has been brought on record to demonstrate provision was created on scientific basis. He submitted that such provision can be allowed only if same are relating to ascertained liability and have been worked out on actual basis. Ld.Sr.DR contended that in case of trading concerns debit notes are issued to suppliers as inferior manufacture tyres should be liability of the manufacturer and not the trader.

20. Ld.Counsel submitted that assessee while making provision for impairment of stock has followed Accounting Standard 2. He submitted that these stocks cannot be treated as an ascertained liability merely for the purposes of making a disallowance. He submitted that the valuation has been as per the Accounting Standard and therefore the disallowance has been wrongly made by Ld.AO on assumptions and surmises. Placing reliance upon view of Ld. CIT(A), Ld.Counsel submitted that the valuation has been provided

for as per the provisions of Accounting Standard and therefore should not be held as under ascertained liability.

21. We have perused submissions advanced by both sides in the light of the records placed before us.

22. From submissions filed by assessee before authorities below, it is observed that assessee has valued at inventory based on accounting standard 2 after reducing recorded value of closing stock. The net value of closing stock was then taken to the balance sheet. In our considered opinion this is a recognised method of valuation prescribed under the Companies Act and also recognised under section 145 of the Income Tax Act.

We are therefore in conformity with the view taken by Ld. CIT (A).

Accordingly this ground raised by revenue stands dismissed.

23. Ground No. 5 has been raised by revenue against deleting Rs. 20, 277/- made on account of excess claim of depreciation on printer and UPS at 60% of computer peripherals.

24. Both the sides admit to the fact that the issue now stands squarely covered by the decision of *Hon'ble Delhi High Court* in case of *CIT vs BSESE Yamuna Power Ltd* reported in 358 ITR 47.

In lieu of the above submissions, we are inclined to uphold the view of Ld. CIT (A).

Accordingly this ground raised by revenue stands dismissed.

25. Ground No. 6-8 are general in nature and therefore do not require any adjudication.

26. In the result appeal raised by revenue stands dismissed.

27. ITA No. 03/03/06/del/2013 (assessee's appeal)

28. Ground No. 1-2 are general in nature and therefore do not require any adjudication.

29. Ground No. 3.1 has been raised by assessee against the disallowance of management fee of Rs.1,38,60,565/-

30. Ld.Counsel submitted that assessee entered into service agreement with its associated enterprise for availing managerial services in the field of- :-

- General business and administration services: Assistance in the field of general business and corporate affairs and facilitates internal and external contacts.
- Economic planning and accounting services: Assistance in economic plans, accounting and results analysis. As an enterprise functioning in the highly competitive tyre industry, the Appellant requires external assistance to meet its goals, and improve profitability.
- Industrial assessment services other than technical assistance: Management of the creation, modification and maintenance of industrial tools.
- Marketing training and planning: Assistance in developing marketing strategy and determining actions to be taken.
- Training and personnel services: Assistance in ensuring proper recruitment, training and human resources management.
- Financial advisory services: Expertise in all the financial aspects of the business of the Beneficiary.
- Economic and investment research and analysis: Assistance in financial and economic analysis.
- Credit control and administration: Assistance in the selection of sources of funds.
- Product distribution planning and logistics services: Assistance in the management of products flows, determine resources necessary to ensure the efficient supply of products in a timely manner.
- Quality control services: Expertise on quality assurance in all the fields of activity from the development of products to the service to final client.

» Legal services: Legal services in all matters including but not limited to corporate, tax, intellectual property, commerce, finance, partnership, all legal aspects of business.

- Information and Telecommunication services: Assistance in technical definition, implementation and maintenance of computers and

telecommunications systems. Support operations management in identifying process evolution requirements and in implementing organizational changes.

31. He submitted that assessee received variety of services to enhance its commercial capabilities and compete against market competitors. Ld.Counsel submitted that services availed during the year are purely genuine business assistance needed by assessee to conduct its business operations in more efficient manner.

32. Ld.Counsel submitted that for purpose of allowability of expenses under section 37 only requirement is to establish that expenses has been incurred for purposes of business. Further it has been submitted that there is no denial by authorities below that these are not business expenses.

33. On the contrary Ld.Sr.DR submitted that expenses in the form of management fee incurred by assessee is not a genuine claim but a diversion of taxable income to avoid taxability. He submitted that assessee being a trading company without there being any manufacturing plant in India, operating expenses exceed more than 50% of total turnover. He submitted that these expenses has been incurred by assessee in the form of management fee paid to an associate thus cannot be held to be genuine.

34. We have perused submissions advanced by both sides in light of records placed before us.

34.1. Ld. CIT (A) decided this issue by observing as under:

"15.4. I have carefully gone through the submission of the appellant as well as the order of the AO. The management services availed by the appellant are in the form of online services through e-mail or online access and workshop/conferences organized by the AE for the Indian entity. The appellant also claims that they were of benefit to the company in India to increase its competitiveness. In a multinational enterprise setup, these kinds of services are available to the subsidiaries by the group companies. Some of the sample e-mails which were produced are perused. It is really difficult to ascertain the usefulness or the value of these e-mails in terms of benefit to the business. For example,

'providing assistance on how to foster creativity', is a purported service provided by the group entity through presentations and e-mails and research materials as claimed by the appellant. The value of such services per se cannot be quantified. However, it is a business decision to avail such services which cannot be questioned by the taxing authorities. The only relevant point is whether the appellant has really availed these services? If appellant had not availed these services and still paid for such things, then it is within the power of the AO to disallow such claims.

The reason given by the AO that the appellant has suffered losses due to these payments is not a justification for disallowance of such claims. But the evidence shown by the appellant for availing these services are also not adequate. For the sake of argument, it is possible that all the above cited services (in para 15.1 above) may be made available by the parent company or group companies. That itself does not justify the payment made by the appellant unless and until it has availed such benefits. These management services are apparently from a common pool of expertise. The liability to pay for these services occurs only when the appellant draws from such 'pool'. The mere existence of the 'pool' of expertise elsewhere does not justify the payments.

I have gone through the limited evidence produced by the appellant. The e- mails are perused. These e-mails are so routine in nature that it is hard to believe that the same justifies the payments made by the appellant to its AE. For example, the e-mail dated 12.19.2006 along with its chain e-mails talks about a quarterly board meeting and circulation of the resolutions for confirmation and issue of power of attorney in this regard. The e-mail dated 12.26.2006 talks about copy of the Income Tax statement of Mr. Harve Richart and Mr. Harve Coyco. The e-mail dated 12.19.2006 from Katherine Chia talks about tenancy agreement. The e-mail dated 17.11.2006 from Vinod A. Bidkar talks about HDFC bank account and how this bank account is beneficial. Handpicked evidence produced in the so called samples - show that it has no evidentiary potential to help the appellant's case. The onus of proof to show the money spent 'wholly and exclusively' for the purpose of business is not discharged by the appellant. In

view of this, I am of the considered view that the evidence for availing these benefits are not supported by sufficient documents. Therefore, the AO was justified in disallowing the entire amount of management services in his order. Therefore, Ground No.3 is dismissed. The order of the AO is sustained."

34.2. Ld.AO has observed that assessee has provided inadequate proof/evidences for availing services from its associate. It has been observed that assessee has only provided e-mails or online access to workshop/conferences organised by associated enterprises for Indian entity. Ld.CIT (A) records that certain hand-picked evidences produced does not sufficiently show that expenses has been incurred by assessee for purposes of business. However there is no denial by Ld. CIT (A) that services has been rendered by associate to assessee in India.

34.3. In the present case revenue alleges no details were filed by assessee in support of availing of services.

From order passed by Ld.CIT(A) it is noticed that assessee placed before authorities below, e-mail, or online access to workshop/conference, records etc. which do not have any evidentiary value. In our considered opinion for considering expenses to be revenue in nature, one has to produce evidence to support and substantiate receipt of such services like copies of argument, bills, vouchers etc. for the payments made, kinds of managerial services received by assessee. In the present facts of case assessee has neither produced any such evidences before authorities below, nor before us to substantiate its claim. We therefore do not find any infirmity in view taken by Ld.CIT(A).

Accordingly this ground raised by assessee stands dismissed.

35. Ground No. 3.2 has been raised by assessee for the disallowance of Rs.5,43,533/-, relating to training expenses on account of non-deduction of TDS.

36. Ld.Counsel placed reliance upon the following table:

S. No.	Date	Party name	Currency type	Amount (Rs.)	Nature of expenses
1.	19/09/06	Michelin Tyres PLC 405	EURO	4,806,214.00	Amount payable against Invoice 028940/20.6.2005 for Euro 107,457 for training of truck road staff & TDS deducted @ 15% as per treaty with UK (Total invoice amount 5,654,369.07 Less TDS 848,155)
2.	19/09/06	Michelin Tyres PLC 405	EURO	543,533.98	Amount incurred for training of Michelin Road Staff
			Total	5,349,748	

36.1. Ld.Counsel submitted that, amount represents impact of foreign exchange fluctuation which resulted in a loss, while making payment, on which TDS was not to be deducted.

37. Ld.Sr.DR on the contrary submitted that as per Rule 26, read with Section 195 of the Act, assessee is to deduct TDS at the time of credit of income to the account of payee or actual payment, whichever is earlier.

38. We have perused submission advanced by both sides and records placed before us.

39. It is observed that amount payable as on 19/09/2006 as per Invoice dated 20.06.2005 was Rs.4,806,214/-. But assessee deposited Rs.5,43,533.98 on 19/09/2006. It is also observed that assessee deducted 15% TDS on Rs.56,54,369.07 which Ld.TPO accepted and did not deduct TDS on Rs.5,43,533.98. There is nothing on record produced by assessee prove that Rs.5,43,533.98 represent the foreign exchange loss, neither before authorities below nor before us. We therefore do not find any infirmity in the view taken by ld.CIT(A) and the same is upheld.

Accordingly this ground raised by assessee stands dismissed.

40. **Ground no. 3.3.**

It has been submitted by Ld.Counsel that this issue was not raised before Ld.CIT(A). He further submitted that the issue may be set aside for verification of facts to ld.AO.

41. Ld.Sr.D.R. did not object for re-verification of facts relating to this issue.

42. We have perused submissions advanced by both sides and records placed before us. On perusal of order passed by Ld.AO, it is observed that assessee was called upon to produce proof of liability being incurred by assessee which Ld.Counsel submitted needs verification. We accordingly set aside this issue to ld.AO for verification and to consider the claim of assessee as per law.

Accordingly this ground stands allowed for statistical purposes.

43. Ground no.4

Assessee during year debited following expenses in P&L a/c.

Advt. & Publicity exp. Rs.44,479,518/-

Incentive & Discounts to Dealers : Rs.48,251,776/-

43.1. Ld.TPO observed that expenditure of Rs.9,27,31,294/- incurred on selling includes expenditure on Advertisement & Sales Promotion, business meeting and conferences and other expenditure (Dealer Commission). Ld.TPO was of the opinion that the expenses has been incurred for promoting Trade Name which has been owned by Compagnie Financiere Michelin.

He thus held that AMP expenditure by assessee to be an international transaction u/s 92B(1) r.w. Clause (v) of Section 92F.

He thus selected comparables for determining adjustment by applying Bright Line method and computed adjustment of Rs.77,35,524/-.

43.2. Aggrieved by Ld.TPO assessee preferred appeal before Ld.CIT(A) who confirmed adjustment made.

43.3. Aggrieved by Ld.CIT(A) assessee is in appeal before us.

44. Ld.Counsel submitted that revenue failed to establish existence of separate international transaction of AMP. All material necessary for the same is on record and it will kindly be noticed that rightly there is not even a whisper about any lack of information. He submitted that Bright Line test (BLT) is no longer acceptable method for bench marking an international transaction pertaining to AMP expenditure, hence, qualification of adjustment is also not in accordance with law. Impugned expenditure resulted in increase of sales in

India is not even disputed. It cannot be denied that such expenditure is "directly linked to pushing sales of MIPL" and bring direct benefit to MIPL and hence bring no direct benefit to the brand of the AE. It was submitted that on this premise itself the entire adjustment deserves to be deleted.

44.1. Ld.Sr.D.R. placed reliance on revised application dated 10.06.2018 filed by assessee on 21.2.19 wherein assessee at page 4 below the computation of Gross Margin of assessee has submitted as under.

"In this reference, the Appellant also wishes to submit the audited financial statements for FY 2010-11 (as Annexure I), evidencing the reimbursement amounting to Rs.3,51,21,060/- received by the Appellant for advertisement and marketing expenses incurred for FY 2006-07."

45. We have perused submissions advanced by both sides in light of records placed before us.

45.1. The submission by assessee reproduced hereinabove shows that entire AMP expenditure raised in the present appeal has been reimbursed by AE during F.Y. 2010-11. This itself makes it an international transaction.

45.2. We therefore do not find any merit in the argument advanced by Ld.Counsel regarding AMP spent not being an international transaction. However we do not agree with application of BCT by Ld.TPO for computing the ALP.

45.3. Accordingly we dismiss ground nos. 4.1 to 4.5 and allow ground no. 4.6.

46. In **ground no.4.7** assessee has raised alternate plea regarding the AMP reimbursement received during F.Y. 2010-11 being subjected to Tax and accordingly filed rectification application u/s 154 before Ld.CIT(A).

46.1. In our considered opinion offering of reimbursement received during F.Y. 2010-11 cannot be a reason not to determine the ALP of the international transaction. In present facts conduct of assessee and AE has already established that AMP is an International Transaction. Once a transaction has been held to be an international transaction, ALP needs to be determined.

46.2. Assessee in **Ground no.4.8** has raised the issue that comparables selected by ldTPO to arrive at a mark-up of 13.04% is inappropriate.

46.3. It is observed from order passed by Ld.TPO that following companies were chosen with margin of 13.04% to determine mark-up.

Sl. No.	Company Name	OP/Cost
1.	Rockman Advertising & Mktg.(India)Ltd.	35.13%
2.	Cybermedia India Online Ltd.	22.70%
3.	Goldmine Advertising Ltd.	3.56%
4.	Marketing Consultants & Agencies Ltd.	14.96%
5.	Needwise Advertising Pvt.Ltd.	1.59%
6.	Adbut Pvt.Ltd.	0.30%
	M e a n :	13.04%

46.4. Ld.TPO has not analysed functional similarity/dis-similarity of these comparables vis-à-vis that of assessee.

46.5. Further assessee had suggested following comparables with average margin of 3.57%.

Company Name	% of Adv exp to sales
Falcon Tyres Limited	6.39%
India tyre and Rubber Co.(India) Ltd.	3.93%
Kesoram Industries Ltd.	1.19%
Monotona Tyres	2.26%
TVS Srichakra Limited	4.07%
Arithmetic mean	3.57%

47. Under such circumstances, we are of considered opinion that, computation of ALP needs to be revisited by Ld.TPO. Ld.TPO is directed to compute ALP by not applying Bright Line Test. Further it is also directed that trade/sales discount given to sub distributors/retailers may be excluded as these cannot be linked to brand building of AE. Ld.TPO is also directed to exclude freight expenses on import of goods.

48. Accordingly we allow Ground No.4.8 and additional ground raised by assessee vide application dated 11/06/2018 stands allowed for statistical purposes.

49. In the result appeal filed by assessee stands partly allowed.

50. In the result, Revenue's appeal in ITA 3166/Del/2013 stands dismissed and assessee's appeal in ITA 3306/Del/2013 stands partly allowed.

Order pronounced in the Open Court on 30th April, 2019.

Sd/-	**Sd/-**
(R.K.PANDA)	**(BEENA A PILLAI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

- GMV

Dt. 30th April, 2019.

Copy forwarded to: -

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

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By Order,

Asst. Registrar
ITAT, Delhi Bench, New Delhi

S.No.	Details	Date
1	Draft dictated on Dragon	23/04/19 26/04/19 30/04/19
2	Draft placed before author	25/04/2019 30/04/19
3	Draft proposed & placed before the Second Member	
4	Draft discussed/approved by Second Member	
5	Approved Draft comes to the Sr. PS/PS	
6	Kept for pronouncement Order uploaded on:	30/04/19
7	File sent to Bench Clerk	
8	Date on which the file goes to Head Clerk	
9	Date on which file goes to A.R.	
10	Date of Dispatch of order	