IN THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai

Before Shri M. Balaganesh, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.1969/Mum/2014
(Assessment Year: 2009-10)

Bristol Myers Squibb India Private Limited, 6th Floor, Tower II, Indiabulls Finance Centre, S.B. Marg Elphinstone (W), Mumbai – 400 013	Vs.	The Office of the Dy. Commissioner of Income Tax-6(1) Aayakar Bhavan, M.K. Road, Mumbai – 400 020
PAN – AACCB4313Q		
(Appellant)		**(Respondent)**

Appellant by: Shri Jehangir D. Mistri, Senior Advocate & S/Shri Ketan Ved & Madhur Agrawal, A.Rs

Respondent by: Shri MC Omi Ningshen, D.R

Date of Hearing: 10.07.2019
Date of Pronouncement: 28.08.2019

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the A.O under Section 144C(13) r.w.s 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 17.01.2014 for A.Y. 2009-10. The assessee has assailed the impugned order on the following grounds of appeal before us:

> "1. On the facts and in the circumstances of the case and in law, the Dy. Commissioner of Income Tax - 6(1), Mumbai ("learned AO") on the directions of the Hon'ble Dispute Resolution Panel ("DRP") has erred in

computing the total income of the appellant at Rs.NIL as against the 'returned income' amounting to Rs.(8,78,65,502).

2. Transfer Pricing Adjustment: Rs.10,31,20,379/-
On the facts and in the circumstances of the case and in law, the learned Transfer Pricing Officer ('TPO') and the learned AO under the directions issued by the Hon'ble DRP, erred in computing the arm's length price of international transaction, and confirming the adjustment of import of goods of Rs.10,31,20,379/- to the appellant's total income based on the provisions of Chapter X of the Act.

3. Erred in rejecting Resale Price Method adopted by the appellant for benchmarking its international transaction of import of formulations for distribution in India and considered The entity level Transactional Net Margin Method for the purpose of determining the arm's length.

On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in rejecting the Resale Price Method adopted by the appellant as the Most Appropriate Method for benchmarking its international transaction of import of formulation for distribution in India. Further the Ld. TPO and Hon'ble DRP rejected the Adjusted Resale Price Margin submitted by the appellant.

4. Without prejudice erred not appreciating the business reasons for losses.

On the facts and in the circumstances of the case and in law, the learned TPO erred in and the Hon'ble DRP further erred in upholding/confirming the legitimate business reasons for increased expenses and resultant losses. Had these expenses (i.e. increase in rent, legal expenses, foreign exchange loss, etc) not occurred, the assessee would have earned a better margin. Which would have favorably compared with the margins of the comparable companies.

5. Without prejudice erred in not accepting bifurcation of segmental financials into Pharma Division &Nutritional Division and basis of allocation.

On the facts and in the circumstances of the case and in law, the Ld. TPO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the TPO by not accepting the bifurcation of segmental financials into Pharma Division & Nutritional Division and not appreciating that the losses are due to the Nutritional Division, being set up only in the previous year relevant to Assessment Year 2009-10.

6. Without prejudice violation of provisions of Rule 10 B(2) and 10B(3) of the Income Tax Rules, 1962 ('the Rules) and arbitrary rejection of comparable selected by the appellant and erred in Rejection of Daga Global Chemicals Ltd as comparable while considering benchmarking for international transaction of import of formulations for distribution in India.

On the facts and in the circumstances of the case and in law, the learned TPO erred in rejecting Daga Global Chemicals Limited as the comparable on the erroneous basis that the results are of different financial year and the Hon'ble DRIP further erred in confirming the action of the id. TPO in rejecting Daga Global Chemicals Limited on the factually incorrect basis that it is not functionally comparable.

On the facts in circumstances of the case and in law, the id. TPO as well as the Hon'ble DRIP erred in not appreciating that the above action is contrary to the provisions of Rule IOB(2) &1 OB(3) of the Rules.

7. Failing to maintain consistency

On the facts and in the circumstances of the case and in the law, the learned Hon'ble DRIP panel has erred in not admitting the evidence produced by the appellant and accepting the action of the Ld. AO and Ld. TPO in not maintaining consistency with regards to selection of RPM as the Most Appropriate Method while benchmarking distribution function of the appellant.

8. Lack of opportunity resulting into hardship

On the facts and in the circumstances of the case and in law, the learned TPO erred in passing the order without issuance of any show cause notice with regards to rejecting the segmental financials of the appellant without giving the appellant reasonable opportunity to submit its justification /contention before making adjustments to the total income.

9. Requisite conditions under Section 92C(3) - Not Satisfied

On the facts and in the circumstances of the case and in law, the learned TPO erred in and the Hon'ble DRIP further erred in violating the provisions of Section 92C(3) of the Act by failing to justify any reasons or conditions mentioned in clause (a) to (d) therein are not satisfied by the appellant for determining the arm's length price.

10. Initiation of Penalty Proceedings

On the facts and in circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under section 271(l)(c) of the Act as there has been no wilful concealment or has furnished inaccurate particulars during the course of assessment proceedings. Accordingly, penalty proceedings ought not to be initiated against the appellant.

The above grounds of appeal are mutually exclusive & without prejudice to each other. The appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.

The appellant craves leave to add, alter, amend and/or rescind any of the above grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at the time of or before the hearing of this appeal as per law."

2. Briefly stated, the assessee company which is engaged in the business of trading in pharmaceuticals products & healthcare products, life saving drugs and nutritional products had e-filed its return of income for A.Y. 2009-10 on 27.09.2009, declaring its total loss at Rs.7,07,50,392/-. The return of income filed by the assessee company was processed as such under Sec.143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec.143(2).

3. Observing, that the international transactions of the assessee were in excess of the Rs.15 crore, the A.O in the course of the

assessment proceedings made a reference to the Transfer Pricing Officer (for short 'TPO') under Sec. 92CA of the Act for determining the Arm's Length Price (for short 'ALP') of the said transactions.

4. The TPO in the course of the proceedings observed that the assessee had during the year entered into following international transactions with its Associated Enterprises (for short 'AEs'):

Sr. No.	Transaction	Amount (Rs.)	Method adopted
1.	Purchase of formulations (trading)	186,130,632	RPM
2.	Co-ordination and back – office support services rendered (related to the global biometrics and clinical trial activities)	65,456,858	TNMM
3.	Fee for office & administrative expenses incurred towards deputation of staff	72,074,866	TNMM
4.	Payment of Financial Shared Services charges	6,994,851	TNMM
5.	Reimbursement of expenses (Receipts)	206,795,808	CUP
6.	Reimbursement of Expenses (Payments)	24,009,161	CUP

As regards the purchase of formulation (trading) by the assessee from its AEs, it was observed by the TPO, that the assessee had during the year imported Oncology, Hepatitis B, Virology, critical care and infant nutrition products for distribution in India. As per the functional analysis submitted by the assessee, it was noticed by the TPO, that the assessee had claimed that it was as a distributor buying goods and selling it in the domestic market without adding any significant amount of value to the products. As per the TP study report the assessee had selected "Resale Price Method" (RPM) as the most appropriate method for benchmarking its purchase transactions with the AEs. It was observed by the TPO that the assessee had identified 6 comparables on the basis of search conducted, namely (i) Abbott India Ltd.; (ii) Daga Global Chemicals Ltd.; (iii) Duchem Laboratories Ltd.;

(iv) Lyka Exports Ltd.; (v) Om Chemicals Industries; and (vi) Priya International Ltd. The assessee had used the gross profit margin of the aforementioned 6 comparables for three financial years i.e Financial years: 2006-07, 2007-08 and 2008-09 and computed their weighted average mean of gross profit margin at 25.34%. Against that, the assessee company had shown its gross profit margin at 65.34%. Accordingly, the assessee in its TP study report had on the basis of its aforesaid workings stated that its AE transactions were at ALP. However, the TPO was not persuaded to accept RPM that was adopted by the assessee for benchmarking the international transactions of purchase of formulation (trading) from its AEs as the most appropriate method. It was observed by the TPO that under RPM for comparability analysis adjustment for all the differences between the international transactions and the comparable uncontrolled transactions which may have material effect on the amount of gross profit was indispensably required to be made. Accordingly, it was observed by the TPO that in order to facilitate the aforesaid feasible comparison one has to ascertain the functions performed by the tested parties before it resold the property or the services, and also the cost incurred for performing these functions. To sum up, it was observed by him that the gross profit margin earned by the tested party can only be compared with the gross margin of a comparable which had performed similar functions and had calculated the gross margin after considering the gross costs of those functions. It was observed by the TPO that the resale price margin would be influenced by the level of activities performed by the reseller, which could vary from the minimal services rendered as that of a forwarding agent to those in a case where the reseller would undertake the full risks of ownership together with the full responsibility for and the risks involved in advertising, marketing, distributing and guaranteeing goods, financing stocks and

other connected services. Accordingly, the TPO held a conviction that the functions performed, which affected the resale price margin should either be similar or it should be possible to make adjustment for such differences. It was observed by him that the resale price margin would be easiest to determine where the reseller does not add substantially to the value of the product. On the basis of his aforesaid observations, the TPO was of the view that while making a comparison the presence of such functions and risks in the case of the comparables and the availability of data for costs of such functions would be required for computing its gross margin. Further, it was noticed by the TPO, that the functions which are generally performed by the reseller included viz. (i) advertising; (ii) marketing; (iii) distribution and guaranteeing risks; (iv). financing the stocks; and (v). warranty risk. Apart therefrom, it was also observed by him that it has also to be seen as to whether the costs attributable to the aforesaid functions were accounted for by the reseller as the costs of the goods or not. In case, if the costs were accounted for as part of the costs of goods, then no separate adjustment was required as the gross profit worked out would also include the costs of the said functions. On the contrary, if the cost of the aforesaid functions were accounted for as part of the operating expenses then there would be distortion in the G.P margin which would be required to be corrected. In the backdrop of his aforesaid deliberations the TPO held a conviction that for achieving proper comparability in light of the abovementioned aspects of the business of a distributor the complete information about the business profile and financial data should be available in respect of all the parties which were examined as comparables. Observing, that as in the case of the assessee the aforesaid information pertaining to the comparables selected by it were not available in the public domain, therefore, RPM was to be rejected and substituted by TNMM as the

most appropriate method. As for the reply that was filed by the assessee in its attempt to persuade the TPO that RPM had correctly been selected as the most appropriate method for benchmarking the international transactions, the same did not find favour with him. The TPO while rejecting the RPM as the most appropriate method in the case of the assessee, observed as under:

> "11. While less product comparability may be required in using the resale price method, it remains the case that closer comparabiht3 of products v. ill produce a better result For example, where there is a high value or relatively unique intangible involved in the transaction, product similarity may assume greater importance and particular attention should be paid to it to ensure that the comparison is valid.
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> 12. When the resale price margin used is that of an independent enterprise in a comparable transaction, the reliability of the resale price method may be affected if there are material differences in the ways the associated enterprises and independent enterprises carry out their businesses. Such differences could include those that affect the level of costs taken into account (e.g. the differences could include the effect of management efficiency on levels and ranges of inventory maintenance, which may well have an impact on the profitability of an enterprise but which may not necessarily affect the price at which it buys or sells its goods or services in the open market. These types of Characteristics should be analyzed in determining whether an uncontrolled transaction is comparable for purposes of applying the resale price method. In the case of branded products distribution, marketing expenses play a major role. Thus the price charged for branded products includes the premium for marketing These marketing expenses differ from product to product within the products, also a depends on market share of the product etc. These differences in marketing efforts among the comparables as well as with the taxpayer distorts the gross margins as these margins also include the marketing effort which is in built in the sale price.
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> 13. A resale price margin is more accurate where it is realized within a short time of the reseller's purchase of the goods. The more time that elapses between the original purchase and; resale the more likely it is that other factors - changes in the market, in rates of exchange, in costs, etc - will need to be taken into account in any comparison Thus levels of inventories and cost involved in keeping inventories have to be adjusted which may not be possible based on the information available in the public domain.
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> 14. It should be expected that the amount of the resale price margin will be influenced by the level of activities performed by the reseller This level of activities can range widely from the case where the reseller performs only minimal services as a forwarding agent to the case where there seller takes on the full risk of ownership together with the full responsibility for and the risks involved in advertising,

marketing, distributing and guaranteeing the goods, financing stocks, and other connected services. Thus making adjustments for these differences becomes difficult in the case of comparable companies considered by the TPO based on the information available in the public domain.

15. The resale price margin should also be expected to vary according to whether the reseller has the exclusive right to resell the goods .The value to be attributed to such an exclusive right will depend to some extent upon its geographical scope and the existence and relative competitiveness of possible substitute goods. The arrangement may be valuable to both the supplier and the reseller in an arm's length transaction. For instance, it may stimulate the reseller to greater efforts to sell the supplier particular line of goods On the other hand, such an arrangement may provide the reseller with a kind of monopoly with the result that the reseller possibly can realize a substantial turn over without great effort Accordingly, the effect of this factor upon the appropriate resale price margin must be examined with care in each case. In the instant case, the taxpayer is the exclusive right to resell the goods in India whereas most of the comparable companies are resellers wi[t]hout exclusivity Thus making adjustments for these differences becomes difficult in the case of comparable companies considered by the TPO based on the information available in the public domain.

16. If the tested party is dealing in branded goods, the comparables should also be dealing in branded goods. In this case, the tested party is dealing in highly sophisticated filed of pharmaceuticals and other health related product. The same may not be true with the comparables considered by the TPO.

17. The functions performed, which affect the resale price margin, should also be similar or it should be possible to make adjustments for such differences An appropriate resale price margin is easiest to determine where the reseller does not add substantially to the value of the p[r]oduct Thus while making a comparison the presence of such functions and risks in the case of the comparables and the availability of data for costs of such functions is required for computation of the gross margin. Where there is a chain of distribution of goods, it needs to ascertain exactly which functions are being performed by each entity in that chain.

Advertising;
Marketing;
Distribution and guaranteeing the goods;
Financing the stocks and
Warranty risk.

18. It is also to be seen whether the costs of these functions are accounted for as the cost of goods or not. If the costs are accounted for as part of the cost of goods, no separate adjustments are required as the gross profit worked out would include the cost of functions also However, if the costs of aforesaid functions are accounted for as part of operating expenses, there will be a distortion in the G.P. margin and it is to be corrected.

19. The accounting treatment of the taxpayer and the comparable companies in respect of certain direct expenses may distort the gross margin For example, discount given to the customer or discount availed from suppliers may be shown separately or sales/purchases may be reduced directly. In such cases, discounts in the case of comparable companies, which may be shown some times under the head "selling expenses" have to be reduced from the purchases Such information may not be available in the public domain.

20. It is also likely in some cases that a function is performed by the supplier and not by the distributor and in such a case, the purchase price will get enhanced in comparison to a case where the distributor is performing that function. So, the functional profile of the supplier is also important.

21. Apart from costs of the functions, there are certain costs like discount and insurance which are related to the resale and which may or may not be accounted for as cost of goods sold. The treatment of such costs is therefore, also material in the computation of the gross profit Accounting consistency is, therefore, to be ensured for computing the gross profit margins and it must be shown that same types of costs have been considered for computing the gross profit.

22. For achieving proper comparability in the light of above mentioned aspects of business of a distributor, it is amply clear that complete information about business profile and financial data is available in respect of all the parties which are examine as comparables The same is not found in public domain, Resale Price method is rejected as the most appropriate method and TNMM is considered as the most appropriate method as other methods like CUP, CPM are not applicable to the facts of the case.

23. TNMM is described in Rule 10B (1)(e). The provisions of the rule are broadly based on the OECD guidelines in this regard which are reproduced below:

> "ii,) Transactional net margin method
> a) In general
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> 3.26 The transactional net margin method examines the net profit margin relative to an appropriate base (e.g. costs, sales, and assets) that a taxpayer realizes from a controlled transaction (or transactions that are appropriate to aggregate under the principles of Chapter I) Thus a transactional net margin method operates in a manner similar to the cost plus and resale price methods This similarity means that in order to be applied reliably, the transactional net margin method must be applied in a manner consistent with the manner in which the resale price or cost plus method is applied This means in particular that the net margin of the taxpayer from the controlled ···transaction ('or transactions that are appropriate to aggregate under the principles of Chapter I) should ideally be established by reference to the net margin that the same taxpayer earns in comparable uncontrolled transactions Where this is not possible the net margin that would have been earned in comparable transactions by an independent

> enterprise may serve as a guide A functional analysis of the associated enterprise and in the latter case the independent enterprise is required to determine whether the transactions are comparable and what adjustments may be necessary to obtain reliable results. Further the other requirements for comparability, and in particular those of paragraphs 3.34-3.40, must be applied.
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> b) Strengths and weaknesses
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> 3.27 One strength of the transactional net margin method is that net margins (i.e return on assets operating income to sales and possibly other measures of net profit) are less affected by transactional differences than is the case with price as used in the CPM Method The net margins also may be more tolerant to some functional differences between the controlled and uncontrolled transactions than gross profit margins. Differences in the functions performed between enterprises are often reflected in variations in operating expenses. Consequently enterprises may have a wide range of gross profit margins but still earn broadly similar levels of net profits."

On the basis of his aforesaid observations, the TPO rejected RPM and applied TNMM as the most appropriate method. Further, the operating profit to operating revenue was taken as the Profit Level Indicator (PLI).

5. The assessee in the course of the proceedings submitted segmental 'profit and loss account' therein dividing the distribution segment into two divisions viz. (i) Pharmaceutical Division; and (ii) Mead Johnson Division. It was the claim of the assessee that the losses suffered during the year were mainly due to Mead Johnson Division. However, the TPO pointing out certain factual discrepancies/defects in the segmental accounts of Pharmaceuticals Division and Mead Johnson segment declined to accept the same. Accordingly, the TPO benchmarked the entire trading segment and worked out the PLI as under:

Sr. No.	Description	Amount (Rs.)
1.	Operating revenue	63,79,22,689
2.	Operating cost	69,21,14,398
3.	Operating Profit	5,41,91,709

4.	OP/OR	-8.5%

Insofar the 6 comparables selected by the assessee company were concerned, the TPO observed that the assessee had worked out the PLI of the said comparables by considering the weighted margin of three years data i.e F.Y 2006-07, F.Y. 2007-08 and F.Y. 2008-09. The TPO taking support of Rule 10B(4) concluded that only the current year data i.e financial year 2008-09 could have been considered. Also, it was observed by him, that the assessee had failed to demonstrate the existence of the circumstances as envisaged in the *proviso* to Rule 10B(4), as per which, the earlier two years data could be used for working out the PLI. Further, the TPO rejected 4 comparables (out of the 6 comparables) which were selected by the assessee in its TP study report for the reason that they had a different year ending and hence the results emerging therefrom were not contemporaneous. The TPO after rejecting the multiyear data applied the single year data for Financial year 2008-09 and worked out the Mean PLI (OP/OR) of the remaining two comparables viz. (i) Om Chemical Industries Ltd; and (ii) Priya International Ltd, as under:

Sr. No.	Name of the company	Operating Revenue (Cr.)	Operating Profit (Cr.)	OP/OR
1.	Abbott India Ltd.	The companies are rejected because of different year ending.		
2.	Daga Global Chemicals Ltd.			
3.	Duchem Laboratories ltd.			
4.	Lyka Exports Ltd.			
5.	Om Chemical Inds. Ltd.	14.19	.74	5.18%
6.	Priya International Ltd.	6.89	0.70	10.15%
ARITHMETICAL MEAN				7.67%

It was observed by the TPO that as the business model and other organisational management factors of the assessee and the comparables was substantially different, therefore, the RPM could not be applied for benchmarking the international transactions. It was observed by him that as the requisite information viz. inventory maintenance, services provided by the reseller, exclusive rights to resell, brand and trademark of the goods etc. of the comparables which were relevant for application of RPM was neither available in the public domain nor furnished by the assessee, therefore, RPM could not be applied. Accordingly, the TPO applied TNMM for benchmarking the international transactions of the assessee. After taking the ALP at 7.67% the TPO proposed a TP adjustment of Rs.10,31,20,379/- in the hands of the assessee, as under:

Sr. No.	Description	Amount (in Rs.)
1.	Operating Revenue of the Taxpayer	637,922,689
2.	Operating Expenses of taxpayer	692,114,398
3.	Operating Profit of the assessee	-54,191,709
4.	ALP of Operating Profit @ 7.67%	48,928,670
5.	Purchase of finished goods from AE	186,130,632
6.	ALP of Purchase of finished goods from AEs	83,010,253
7.	Excess being adjustments under Sec.92CA	103,120,379

6. The A.O after receiving the order passed by the TPO under Sec. 92CA(3), dated 29.01.2013 passed a draft assessment order under Sec. 144C r.w.s 143(3), dated 28.03.2013 therein inter alia proposing a TP adjustment of Rs.10,31,21,379/-.

7. Aggrieved, the assessee filed objections before the Dispute Resolution Panel-1 (for short 'DRP'). The DRP after deliberating at length on the contentions advanced by the assessee was however not persuaded to subscribe to its claim that the TPO was in error in rejecting RPM for benchmarking its international transactions and substituting the same by TNMM. Accordingly, the DRP upheld the benchmarking of the international transactions by the TPO by

applying TNMM. Further, it was observed by the DRP that the TPO had computed PLI (OP/OR) of the assessee at (-) 8.5% after considering the entire business of distribution of pharma products and nutritional products. It was observed by the DRP that as the comparison of operating profit in TNMM would take care of all the variables, therefore, the objection of the assessee against application of TNMM did not merit acceptance. Also, the DRP was not inclined to accept the contention advanced by the assessee that the TPO was in error in not taking cognizance of the sub divided accounts of pharma division and nutrition division, which revealed that while for the pharma division had shown an operating profit margin of 4.66% the nutrition division had accounted for a loss of (Rs.8.09 crores). It was observed by the DRP, that the aforesaid claim of the assessee was irrelevant insofar the comparability analysis by applying TNMM was concerned, since both the divisions pertained to the distribution of products which were sold through the same network of distributors and retailers. As regards the rejection of the 4 comparables of the assessee by the TPO, the DRP did not find favour with the contentions advanced by the assessee. As regards the claim of the assessee that one of its comparable viz. M/s Daga Global Chemicals Ltd. had wrongly been rejected by the TPO as the financials of the said company for the period ending March, 2009 were available, the same did not find favour with the DRP. It was observed by the DRP that the aforesaid company viz. M/s Daga Global Chemicals Ltd. had 50% of purchases from imports in respect of trading good, unlike the assessee which had 100% imports from it AEs. Also, the DRP observed that while for the assessee was into trading of ready to sell/use pharma products, the aforementioned company viz. M/s Daga Global Chemical Ltd. was into trading in bulk chemicals and solvents. Apart there from, it was observed by the DRP that the aforementioned comparable

had overseas subsidiaries in Dubai and China. Accordingly, on the basis of its aforesaid observations, it was concluded by the DRP that as M/s Daga Global Chemical Ltd. was functionally dissimilar, therefore, the same for the said reason could not be included as a comparable for benchmarking the international transactions of the assessee. As regards the claim of the assessee that as the TPO in its case for the preceding year had after necessary deliberations applied RPM as the most appropriate method, therefore, it was not permissible on its part to adopt an inconsistent approach and reject the said method during the year under consideration, the same did not find favour with the DRP. It was observed by the DRP, that the assessee had not placed on record any documentary evidence which would support its claim that the TPO in its case for the immediately preceding year had accepted RPM as the most appropriate method. Apart there from, it was observed by the DRP that consistency would be applicable only if there was no shift in the facts and the A.O had applied a rule in the past which cannot be held to be incorrect on the basis of facts and in law. On the basis of his aforesaid observations the DRP rejected the contentions advanced by the assessee as regards the inconsistent approach adopted by the TPO during the year under consideration.

8. The A.O after receiving the order of the DRP under Sec. 144C(5), dated 20.12.2013 framed the assessment under Sec.144C(13) r.w.s 143(3), dated 17.01.2014. The A.O while framing the assessment made a TP adjustment under Sec.92CA(4) of Rs.10,31,20,379/- and assessed the income of the assessee at Rs.3,03,69,990/-.

9. The assessee being aggrieved with the order passed by the A.O under Sec.144C(13) r.w.s 143(3) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the

assessee at the very outset of the hearing of the appeal took us through the facts of the case. It was submitted by the ld. A.R that the assessee was engaged in distribution of oncology, hepatitis B, virology, critical care and infant nutrition products in India. It was the claim of the ld. A.R, that the assessee imported the formulations from its AE, and without making any value addition distributed the same to unrelated parties in India. The ld. A.R submitted that the assessee in order to benchmark its international transactions had adopted RPM as the most appropriate method. It was the claim of the ld. A.R that in case of a distributor importing goods from its AE and reselling the same without any value addition RPM was recognised as the most appropriate method for benchmarking the international transactions. Further, it was submitted by the ld. A.R, that now when the TPO had in the immediately preceding year accepted RPM as the most appropriate method, therefore, in the absence of any change in the facts he was not justified in rejecting the said method during the year under consideration. Apart therefrom, it was submitted by the ld. A.R that no cogent reasoning was given by the TPO for rejecting RPM and substituting the same by TNMM. The ld. A.R took us through the observations of the DRP and submitted that it had summarily dealt with the objections of the assessee and had most arbitrarily upheld the rejection of RPM and substitution of the same by TNMM by the TPO. In support of his contention that RPM is accepted as the most appropriate method for benchmarking the international transactions in a case of an assessee who is into distribution and marketing activities, reliance was placed on the orders of the coordinate benches of the Tribunal viz. (i) M/s Videojet Technology (I) Pvt. ltd. Vs. ACIT, Circle 10(3), Mumbai (ITA No. 6956/Mum/2012, dated 28.05.2019); and (ii) ITO-6(3)(1), Mumbai Vs. L'Oreal India Pvt. Ltd. It was submitted by the ld. A.R that in case RPM is adopted as the most

appropriate method, then no adjustment would be called for in the hands of the assessee.

10. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the ld. D.R that as the requisite details about the business profile and financial data in respect of the comparables selected by the assessee were neither available in the public domain nor furnished by the assessee, therefore, in the absence of the said requisite details RPM could not be accepted for benchmarking purposes. It was the claim of the ld. D.R that in the backdrop of the facts of the case, the lower authorities had rightly concluded that TNMM was the most appropriate method for benchmarking the international transactions of the assessee.

11. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. Admittedly, the assessee is engaged in the business of importing formulations from its AEs and distributing them to unrelated parties in India. Apart therefrom, it was also engaged in providing coordination and back office support services to its AEs viz. Bristol Myers Squibb Company, USA. As observed by us hereinabove, the TPO had proposed TP adjustment of Rs.10,31,20,379/- only as regards the purchase of formulations (trading) by the assessee from its AEs. The aforesaid TP adjustment was upheld by the DRP vide its order passed under Sec.144C(5), dated 20.12.2013. As observed by us hereinabove, the assessee had in its TP study report benchmarked the aforesaid transactions of purchase of formulations from its AE by adopting resale price method (RPM) as the most appropriate method. The core controversy involved in the present appeal hinges around the

view taken by the lower authorities that RPM adopted by the assessee for benchmarking its international transactions, in the absence of complete information about business profile and financial data of the comparables selected by the assessee could not be accepted as the most appropriate method. As is discernible from the order of the TPO, he had after rejecting RPM adopted TNMM at entity level as the most appropriate method for benchmarking the international transactions of the assessee. In fact, the TPO while rejecting the RPM had observed that as the amount of the resale price margin would be influenced by the level of activities performed by the reseller, therefore, the functions performed, which affects the resale price margin should either be similar or it should be possible to make adjustments for such differences. Also, the TPO after rejecting the RPM method had declined to accept 4 comparables (out of 6 comparables) selected by the assessee, for the reason, that they had a different year ending. It was observed by the TPO that as per Rule 10B(4) the companies whose accounts are prepared for the same period are most suitable for comparison than the companies whose accounts cover a different period. On the basis of his aforesaid deliberations, the TPO computed the ALP as per the TNMM after adopting operating profit/operating revenue as the PLI by confining himself to two comparables (out of 6 comparables) selected by the assessee, namely (i) M/s Om Chemical Industries ltd.; and (ii) M/s Priya International ltd. We find that the DRP while disposing off the objections of the assessee as regards the rejection of the comparables did not find any infirmity in the view taken by the TPO, and concurred with his view that as per Rule 10B(4) companies having a different year ending could not have been selected as comparables. Also, the specific claim of the assessee that one of the comparable viz. M/s Daga Global Chemicals ltd. was erroneously rejected by the TPO on the ground that it had a different year ending,

despite the fact that the latters financials clearly revealed that it had a similar year ending on 31.03.2009, had not found favour with the DRP. It was observed by the DRP, that the said company viz. M/s Daga Global Chemical Ltd could not be selected as a comparable for three reasons viz. (i) that, the company had about 50% purchases from imports in respect of trading goods whereas the assessee has 100%, imports from its AE; (ii) that, the company was into trading in bulk chemicals and solvents whereas the assessee was into ready to sell/use pharma products; and (iii) that, the company had subsidiaries in Dubai & China. Further, as had been observed by us hereinabove, the DRP also upheld the rejection of segmentation of the distribution segment by the assessee into two parts viz. (i) Pharma division; and (ii) Mead Johnson division.

12. As observed by us hereinabove, the assessee company is engaged in the business of import of oncology, hepatitis B, virology critical care and infant nutrition products from its foreign affiliates, for the purpose of sale in the domestic market. Admittedly, the assessee does not carry out any value addition to the goods purchased from its AE and sells it in the same form in the domestic market. Before deliberating on the issue as to whether the assessee had rightly benchmarked its international transactions with its AEs in its TP study report by adopting RPM as the most appropriate method, or not, we feel that it would be relevant to cull out Rule 10B(1)(b) of the Income Tax Rules, 1962, which contemplates the determination of ALP under Sec.92C of the Act as per RPM, as under:

> "Determination of arm's length price under section 92C.
>
> 10B. (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :-
>
> (a) xxxxxxxx

(b) resale price method, by which-

(i) the price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise, is identified,'

(ii) such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions;

(iii) the price so arrived at is further reduced by the expenses incurred by the enterprise in connection with the purchase of property or obtaining of services;

(iv) the price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;

(v) the adjusted price arrived at under sub-clause (iv) is taken to be an arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise."

As is discernible from a perusal of Rule 10B(1)(b) of the Income Tax Rules, 1962, it can safely be gathered that RPM is the best suited method for determining the ALP of an international transaction, in a case where the goods purchased by an assessee from its AE are thereafter resold without any value addition to unrelated parties. Our aforesaid view is supported by the order of the coordinate benches of the Tribunal viz. **(i) M/s Videojet Technologies India Pvt. Ltd. Vs. ACIT, Circle-10(3), Mumbai (ITA No. 6956/Mum/2012, dated 28.05.2019; (ii) Burberry India Pvt. ltd. Vs. ACIT, Circle-5(1), new Delhi ITA No.758/Del/2017, dated 22.06.2018;** and **(iii) Nokia India Pvt. Ltd. Vs. DCIT, Circle-13(1), new Delhi (2014) taxmann.com 492 (Delhi-Trib**).In the aforementioned cases, it was observed by the Tribunals that a close scrutiny of sub-clause (i) and (v) along with the remaining sub-clauses of Rule 10B(1)(b) of the Income Tax Rules, 1962, makes it clear beyond any doubt that RPM is best suited for determining the ALP of an international transaction in the nature of purchases made from the AE which are resold as such to

unrelated parties. Apart therefrom, we also find that the said aspect has also been looked into by the **Hon'ble High Court of Delhi** in the case of **PCIT Vs. Matrix Cellular International Services (P) Ltd. (2018) 90 taxman.com 54 (Del)**. In the aforementioned case, it was observed by the Hon'ble High Court that in case of a pure trader where there was no value addition before selling the products RPM was the most appropriate method for benchmarking the said transactions. Also, the **Hon'ble High Court of Bombay** in the case of **CIT Vs. L'Oreal India Pvt. ltd., (ITA No.1046/Mum/2012)** had upheld the order of the Tribunal, wherein it was observed that RPM was the most appropriate method in the case of distribution or marketing activities, specifically when goods which were purchased from AEs were thereafter sold by the assessee to unrelated parties without any further processing. Also, a similar view had been taken by the coordinate benches of the Tribunal viz. **(i) Horiba India (P) Ltd. Vs. DCIT, 81 taxmann.com 209 (Delhi); (ii) Fresenius Kabi India Pvt. Ltd. Vs. DCIT (ITA No. 235/PUN/2013);** and **(iii) ACIT Vs. Kobelco Construction Equipment India Pvt. ltd., ITA No. 6401/Del/2012 (Delhi)**. On the basis of our aforesaid observations, we are of a strong conviction that in the case of a pure distributor RPM is the most appropriate method for benchmarking its international transactions. On the other hand, under the TNMM, the ALP is determined by comparing the operating profit related to an appropriate base i.e. cost or sale or assets of the "tested party" with the operating profit of an uncontrolled party engaged in comparable transactions. As such, under the TNMM, the net margin or operating profit achieved in related party transactions is compared with those entered into between the independent entities. Accordingly, under the TNMM the major thrust is to derive the operating profit at the transactional level and to identify the operating expenses of both the tested party as well

as the independent parties, which, thus, requires a lot of adjustments to arrive at the actual operating profit. Thus, if the ALP of a transaction can be determined by applying any of the direct methods like CUP, RPM, CPM then they should be given a preference, and it is only where the said traditional methods have been rendered inapplicable that under such circumstances TNMM should be resorted to. Accordingly, in the backdrop of the aforesaid facts of the case before us, we are of the considered view that the assessee had rightly selected RPM for benchmarking its transactions of importing of formulations from its AEs, as against TNMM.

13. We shall now advert to the observations of the TPO/DRP on the basis of which the application of RPM by the assessee for benchmarking its transactions with the AE had been rejected by them. As is discernible from the orders of the lower authorities, the core issue that had weighed in the mind of the lower authorities while rejecting the RPM as the most appropriate method was that neither the complete information about the business profile and financial data of the comparables selected by the assessee was available in the public domain, nor the same was furnished by the assessee. We have given a thoughtful consideration to the aforesaid observations of the TPO/DRP and are unable to persuade ourselves to subscribe to the view taken by them. We are of the considered view that in case the A.O was of the view that the complete information about the business profile and financial data in respect of the aforesaid comparables was not available, then the remedy available with him was to search for fresh comparables. However, merely for the reason that the comparable selected by the assessee were not found to be appropriate could not have by any means justified rejection of the aforesaid method adopted by the assessee for benchmarking the ALP of its international transactions. Our aforesaid view is fortified by the order

of the **ITAT, Bangalore bench** in the case of **CIT Vs. Sanyo India Pvt. Ltd. (2015) 45 CCH 98 (Bang)** and also the order of the **ITAT, Delhi Bench** in the case of **Burberry India Pvt. Ltd. Vs. ACIT Circle-5(1), New Delhi (ITA No. 758/Del/2017, dated 22.06.2018)**. Also, a similar view had been taken by the **ITAT "J" bench, Mumbai**, in the case of **M/s Videojet Technology (I) Pvt. Ltd. Vs. ACIT, Circle-10(3), Mumbai (ITA No.6956/Mum/2012, dated 28.05.2019)**. We are of the considered view that for the purpose of application of RPM what is relevant is that as to whether there is any value addition or not to the goods purchased by the assessee for resale or not. In case, there is no significant value addition and the finished goods which are purchased from the AE are resold in the domestic market in the same form, then the gross profit margin earned on such transactions becomes the determinative factor for benchmarking the international transactions of the assessee with its AE by taking RPM as the most appropriate method. Our aforesaid view is supported by the order of the **ITAT Pune, Bench** in the case of **Fresenious Kabi India (P) Ltd. Vs. DCIT (ITA No. 235/Mum/2013)**, wherein it was held that in case of distribution activity the selling and marketing expenses which are borne by the assessee would not lead to any value addition to the product in question. In the backdrop of our aforesaid deliberations, we find substantial force in the contention advanced by the ld. A.R that as per Rule 10B(1)(b) in the Income Tax Rules, 1962, the RPM can safely be taken as the best suited method for determining the ALP of the international transactions in the case of the assessee before us, which as observed by us hereinabove had imported formulations from its AE and resold the same without making any value addition to unrelated parties in the domestic market. Our aforesaid view is further fortified by the orders of the various coordinate benches of the Tribunal viz.(i) Burberry India Pvt. Ltd. Vs. ACIT, Circle-5(1), New

Delhi, ITA No.758/Del/2017, dated 22.06.2018;(ii) Horiba India (P.) Ltd. vs. DCIT (81 taxmann.com 209 (Delhi - Trib); (iii)Fresenius Kabi India Pvt. Ltd. vs. DCIT(ITA No. 235/Pun/2013); (iv). ACIT vis. Kobelco Construction Equipment India Ltd (ITA No.6401/Del/2012);(v)Systems Pvt. Ltd. vs. DCIT & vice versa (ITA No. 683/Hyd/2014); and (vi). Frigoglass India (P.) Ltd. vs. DCIT(2014) 149 ITD 429 (Delhi). In terms of our aforesaid observations, we are of the considered view that the TPO/DRP while dislodging the RPM adopted by the assessee for benchmarking its international transactions, had lost sight of the fact that only the transaction of import of goods by the assessee from its AEs was to be benchmarked and all other functions carried out by the assessee having no nexus with the said import transactions were thus not relevant for the said benchmarking analysis. Be that as it may, we are unable to subscribe to the view taken by the TPO/DRP that merely for the reason that complete information about the business profile and financial data in respect of companies selected by the assessee as comparables in its TP study report was not available in the public domain or furnished by the assessee, therefore, for the said reason the application of the said method for benchmarking the international transactions of the assessee was to be rejected.

14. We shall now advert to the rejection of the comparables which were selected by the assessee in its TP study report. As regards the three companies which were rejected by the TPO as comparables viz. (i) Abbott India Ltd; (ii) Duchem Laboratories Ltd.; and (iii) Lyka Exports Ltd., we are in agreement with the view taken by the TPO/DRP that as the said companies had a different year ending, therefore, the results emerging therefrom was not contemporaneous, and hence as per Rule10B(4) they were not suitable for being considered for arriving at a feasible comparison. However, at the same time, we are unable to persuade ourselves to accept the rejection of

one of the comparable selected by the assessee company viz. M/s Daga Global Chemicals Ltd. As is discernible from the orders of the lower authorities, the aforesaid company was rejected by the TPO as a comparable for the reason that it had a different year ending as in comparison to the assessee. Objecting to the aforesaid observation of the TPO, it was submitted by the assessee before the DRP that as the said company had a similar period ending on 31.03.2009, therefore, the same on the basis of a misconceived view had wrongly been excluded from the final list of comparables. As observed by us hereinabove, the DRP sustained the exclusion of the aforesaid company from the final list of comparables by assigning three fresh reasons viz. (i) that, the company had about 50% of purchases from imports in respect of trading goods, whereas the assessee had 100% imports from its AE; (ii) that, the company was into trading in bulk chemicals and solvents whereas the assessee was into ready to sell/use pharma product; and (iii) that, the company had overseas subsidiaries in Dubai & China. Insofar, the observation of the DRP that as the aforesaid company was importing goods different from the assessee, therefore, it could not be selected as a comparable, we are afraid that the same does not find favour with us. In our considered view, in case of RPM the functions performed by the assessee as in comparison to the comparables are more important than the similarity of products. Also, we find that the DRP had concluded that the assessee during the year had overseas subsidiaries in Dubai and China. It is the claim of the assessee that the aforesaid company viz. M/s Daga Global Chemicals ltd. during the year under consideration i.e financial year 2008-09 had only one subsidiary viz. Daga Global Chemical FZCO. It is stated by the assessee that the subsidiaries in Dubai & China viz. Daga Global Chemicals DMCC and Zhangjiagang FTZ Daga Chemical Tr. Co. Ltd., had came into existence only in the

F.Y. 2009-10. Accordingly, it is the claim of the ld. A.R that as the aforementioned subsidiaries were not existing during the year under consideration i.e Financial year 2008-09, therefore, the DRP had erroneously drawn adverse inferences in the hands of the assessee on the basis of the aforesaid misconceived facts. Apart therefrom, we find that it is the claim of the assessee that the import content of Daga Global Chemicals Ltd. in the purchases during the year under consideration worked out at 53.67%. On the basis of the aforesaid facts, it is the claim of the assessee that as the aforementioned company viz. Daga Global Chemicals Ltd. alike the assessee was engaged in the business of distribution, therefore, it was rightly selected as a comparable for benchmarking analysis. We have given a thoughtful consideration to the aforesaid contentions advanced by the ld. A.R and find substantial force in the same. In our considered view, as the DRP had declined to include the aforementioned company i.e Daga Global Chemicals Ltd. as a comparable, apparently on the basis of misconceived facts as had been canvassed by the ld. A.R before us, therefore, in all fairness the matter requires to be restored to the file of the TPO for fresh adjudication. The TPO after considering the aforesaid claim of the assessee in respect of the aforementioned company, viz. Daga Global Chemical ltd, is directed to readjudicate the issue as regards inclusion of the same in the final list of comparables for benchmarking the international transactions of the assessee as per RPM.

15. Accordingly, on the basis of our aforesaid observations we set aside the view taken by the TPO/DRP as regards the rejection of RPM as the most appropriate method for benchmarking the international transactions of the assessee and substituting the same by applying TNMM. The matter is restored to the file of the TPO, who is directed to re-determine the ALP of the international transactions of the assessee

after accepting RPM as the most appropriate method. The assessee shall in the course of the 'set aside' proceedings file with the TPO the details as regards the business profile and financial data of its aforesaid comparables viz. (i).Om Chemical Industries ltd.; (ii) Priya International ltd.; and (iii).Daga Global Chemicals Ltd. (subject to inclusion of the same in the final list of comparables by the TPO), which shall be considered by the TPO for benchmarking the ALP of its international transactions as per RPM. In case, the assessee fails to file the requisite details, then the TPO shall be at a liberty to search for fresh comparables for benchmarking the ALP of the international transactions of the assessee as per RPM. Needless to say, the TPO shall in the course of the 'set aside' proceedings afford a reasonable opportunity of being heard to the assessee. In terms of our aforesaid observations the matter is restored to the file of the TPO.

16. The appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 28.08.2019

Sd/-	Sd/-
(M. Balaganesh)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 28.08.2019
Ps. Rohit

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/
   DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt. Registrar)

आयकरअपीलीयअधिकरण, मुंबई **/ ITAT, Mumbai**