

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“K” Bench, Mumbai**

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

**ITA No.6528/Mum/2012  
(Assessment Year: 2008-09)**

Huntsman International (India) Private Limited (as successor to 'Huntsman Advanced Materials India Pvt. Ltd.' w.e.f 30 June, 2012 in terms of the scheme of merger approved by the Hon'ble Bombay and Gujarat High Courts vide its order dated 12 November, 2013 and 15 January, 2014, respectively, The said scheme is effective from 4 April, 2014);  
Office :Lighthall, B-Wing, Saki Vihar Road, Andheri (E), Mumbai 400 072.

Dy. Commissioner of Income tax, 8(2),  
Aaykar Bhawan,  
Mumbai – 400 020

Vs.

PAN – AABCH3909H

**(Appellant)**

**(Respondent)**

**ITA No.1540/Mum/2014  
(Assessment Year: 2009-10)**

Huntsman International (India) Private Limited (as successor to 'Huntsman Advanced Materials India Pvt. Ltd.' w.e.f 30 June, 2012 in terms of the scheme of merger approved by the Hon'ble Bombay and Gujarat High Courts vide its order dated 12 November, 2013 and 15 January, 2014, respectively, The said scheme is effective from 4 April, 2014);  
Office :Lighthall, B-Wing, Saki Vihar Road, Andheri (E), Mumbai 400 072.

Dy. Commissioner of Income tax, 8(2),  
Aaykar Bhawan,  
Mumbai – 400 020

Vs.

PAN – AABCH3909H

**(Appellant)**

**(Respondent)**

Appellant by: Shri Farrokh V. Irani, A.R  
Respondent by: Shri Anand Mohan, CIT D.R  
Date of Hearing: 10.07.2019  
Date of Pronouncement: 04.10.2019

## ORDER

### PER RAVISH SOOD, JM

The present appeals filed by the assessee are directed against the respective orders passed by the Assessing Officer under Section 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (for short 'Act') for A.Y 2008-09 and A.Y 2009-10. As common issues are involved in the said appeals, therefore, they are being taken up and disposed off by way of a consolidated order. We shall first advert to the appeal of the assessee for A.Y 2008-09.

2. Briefly stated, the assessee company which is a fully owned subsidiary of Vantico International S.a.r.l., Luxembourg and engaged in the business of purchase of epoxy resin and hardeners from its group companies and other third parties and sale of the same to the customers in India, had e-filed its return of income for A.Y 2008-09 on 29.09.2008, declaring its total income at Rs. 24,92,47,946/-. The return of income filed by the assessee company was processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. During the course of the assessment proceedings the A.O made a reference u/s 92CA(1) of the Act to the Transfer Pricing Officer(for short 'TPO') for determining the Arms Length Price (for short 'ALP') of the international transactions of the assessee.

4. In the course of the proceedings, it was observed by the TPO that the assessee had carried out the following international transactions during the year under consideration:

Sr. No.	Name of the associated enterprise	Nature of Transaction	Amount	Method used
1.	Huntsman Group	Import of finished goods	Rs. 31,39,64,1888/-	Resale

				Price/TNMM
2.	Huntsman Advanced Material (UAE)	Export of goods	Rs. 88.70,751/-	Cost plus/TNMM
3.	Huntsman Advanced Material (Switzerland)	Management charges paid	Rs. 3,88,72,208/-	TNMM
4.	Tioxide (Malaysia)	Indenting commission received	Rs. 1,47.44,396/-	TNMM
5.	Huntsman Singapore Pvt. Ltd.	Services charges received	Rs. 52,99,440/-	TNMM

It was observed by the TPO that the assessee had sliced the profit & loss account into manufacturing and trading and further sliced the same into transactions with related and unrelated parties. It was noticed by him that the assessee had carried out comparable search on three fronts viz. (i). manufacturing; (ii). Trading (the indenting & services activities were also clubbed into trading); and (iii). company as a whole. Further, it was observed by the TPO that the assessee for the purpose of slicing had allocated expenses under the different heads among the manufacturing and trading segment. Except for some specific heads the allocation of the expenses was made on the basis of turnover. In the manufacturing segment, the assessee had benchmarked the transactions using the Transactional Net Margin Method (for short 'TNMM') with the operating margin as the Profit Level Indicator (for short 'PLI'). Operating margin ratio to sales was worked by the assessee at 35.31%, which was stated to be higher than the margin of 8.79% for the comparables. Under the trading segment the assessee had included imports of goods, commission and proportionate management fees and had selected Resale Price Method (for short 'RPM') as the most appropriate method and had worked out its gross margin ratio at 10.87%. However, due to paucity of data and external comparables, the trading activity etc. was also benchmarked using TNMM with operating margin as the PLI. The operating margin ratio of 3.20% in the assessee's case was found to be higher than 0.81% for the comparables. Also, the operating profit of the assessee company as a whole was benchmarked using TNMM, which indicated that the operating margin ratio of 7.07% in the assessee's case was better than 3.55% for the comparables. Accordingly, all the international transactions were considered by the assessee to be at arm's length. However, the TPO was of the view that as the various activities carried out by the assessee were quite distinct

functionally, therefore, the trading segment (trading sales being Rs. 316.99 crores out of total turnover of Rs. 362.39 crores) were required to be benchmarked separately. As the gross margin of the comparables was not available, therefore, the TPO held that RPM could not be used as the most appropriate method and proceeded to apply TNMM. Observing, that the assessee had wrongly worked out the operating margin ratio for its trading segment at 3.39% after allocating the advertising and promotion expenses in entirety to the manufacturing segment, the TPO allocated the said expenses on turnover basis and reworked out the operating margin ratio in the trading segment at 1.45%. Further, the TPO used the same comparables as were used in the earlier years and found that their mean operating margin worked out at 2.81%. Applying the differential on the trading sales of Rs. 316.99 crores, the TPO determined an adjustment of Rs. 4,30,12,000/-.

5. On the basis of the order passed by the TPO u/s 92CA(3) of the Act, dated 31.10.2011, the A.O inter alia proposed to make an upward transfer pricing adjustment of Rs. 4,30,12,000/-, vide his draft assessment order passed u/s 143(3) r.w.s 144C(1), dated 09.11.2011.

6. Aggrieved, the assessee filed objections with the Dispute Resolution Panel-1, Mumbai (for short 'DRP'). The DRP was not persuaded to accept the claim of the assessee, that for the purpose of benchmarking the international transactions, the transactions in trading, indenting and services were required to be aggregated and benchmarked as a whole. It was observed by the DRP, that as the functions performed in each of the three activities were different, therefore, the TPO had rightly concluded that the same were required to be separately benchmarked. Accordingly, the DRP upheld the view of the TPO, that the international transactions of import of finished goods was required to be separately benchmarked. As regards rejection of RPM and applying of TNMM by the TPO for benchmarking the international transactions of import of finished goods by the assessee, the DRP finding itself to be in agreement with the view taken by the TPO, observed, that though theoretically RPM would have been the most appropriate method, however, on account of non-availability of database the resale margins could not reliably worked out by applying the said method. As such, the benchmarking of the trading transactions by applying TNMM by the TPO was approved by the DRP. As regards, the principle objection of the assessee,

that the TPO had erred in allocating the advertisement and promotion expenses to the trading segment, the DRP not finding favour with the claim of the assessee that no part of the aforesaid expenses could be attributed to the trading segment, directed it to verify the factual position. In reply, it was submitted by the assessee, that out of total advertisement and promotion expenses of Rs. 7.79 crores, a sum of Rs. 6.39 crores were towards reimbursements to the authorized dealers in respect of the promotional schemes and events which were undertaken by them on behalf of the assessee on various occasions during the year, and pertained only to the manufacturing segment. As such, it was submitted by the assessee, that if the balance expenses of Rs. 1.40 crores were allocated between the manufacturing and trading segments in the proportion of their respective turnovers, then the operating profit margin in the trading segment would work out at 3% as against the arithmetical mean of the comparables that was worked out at 2.81% by the TPO. On the basis of the facts discernible from the assessee's TP study report, and the fact that the assessee had not maintained separate accounts, the DRP was not inclined to accept the claim of the assessee that the advertisement and sales promotion expenses pertained exclusively to the manufacturing segment. Also, in the absence of any supporting evidence, the claim of the assessee that the reimbursement of expenses to the stockists and distributors was only in relation to the manufactured goods, the DRP declined to accept the same. Accordingly, the DRP upheld the allocation of the advertisement and sales promotion expenses by the TPO in proportion of the turnover of the manufacturing, trading and the other segments. Lastly, it was submitted by the assessee before the DRP, that the TPO had erred in not determining the arm's length price only in relation to the international transactions of the assessee. It was the claim of the assessee, that if the arm's length operating margin is worked out only in respect of the revenues of Rs. 35.22 crores in the AE segment, then the arms' length cost of the imports would work out more than the actual cost of imports, and no adjustment would be called for in its case. On the aforesaid issue, it was observed by the DRP that the assessee was trading in different kinds of goods from its AE's as well as non-AE's, while for the sales were made in the domestic market only. In the backdrop of the aforesaid fact, the DRP was of the view, that as the assessee had not maintained separate accounts for the AE and the non-AE segments, therefore, it was not possible to prepare reliable

segment-wise accounts. Also, it was observed by the DRP that the assessee itself had benchmarked its international transactions using entity level operating margins as the PLI. Apart there from, the DRP was of the view, that as the non-AE transactions were intrinsically at arm's length, therefore, the differential in the operating margin arrived at after appropriate analysis had to be attributed to the tainted international transactions. Accordingly, the DRP confirmed the action of the TPO in applying the mean operating margin on the entire trading sales of the assessee company.

7. On the basis of the aforesaid order of the DRP, the A.O framed the assessment u/s 143(3) r.w.s 144C(13), dated 14.09.2012, wherein after inter alia making an upward TP adjustment (as per the directions of DRP) of Rs. 4,30,12,000/-, the income of the assessee under the normal provisions was determined at Rs. 29,22,59,950/- and the 'book profit' u/s 115JB was worked out at Rs. 24,38,41,243/-.

8. Aggrieved, with the order passed by the A.O u/s 143(3) r.w.s 144C(13), dated 14.09.2012, the assessee has carried the matter in appeal before us. As regards the TP adjustment of Rs. 4,30,12,000/- made by the TPO/DRP, the Id. A.R submitted that the lower authorities had erred in not confining the determination of the arm's length price only as regards the international transactions of the assessee, and had thus wrongly worked out the same on the entire trading sales of the assessee. In support of his aforesaid contention, the Ld. A.R had relied on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Tara Jewels Exports (P) Ltd. (2016) 381 ITR 404 (Bom). It was submitted by the Id. A.R, that the Hon'ble High Court in the said judgment had held that as per the provisions of Chapter X of the Act, the arm's length of only the international transactions of the assessee with its AE's is to be determined. It was submitted by the Id. A.R, that if the determination of the ALP is confined to the international transactions entered into by the assessee with its AEs during the year under consideration and not its entire turnover, then the variance would fall within the safe harbour range of (+/-) 5% and no adjustment would be called for in the hands of the assessee. It was submitted by the Id. A.R, that on the basis of his said claim which was supported by the judgment of the Hon'ble High Court of Bombay on the case of Tara

Jewels (supra), the assessee had on an earlier occasion filed with the Tribunal a 'Chart', which substantiated the fact that if the determination of the ALP was restricted to the international transactions of the assessee with its AEs during the year under consideration, then remaining within the allowable (+/-) 5% parameters, would not call for any adjustment in its hands. It was submitted by the Id. A.R, that the Tribunal taking cognizance of the said claim of the assessee, had thus on 01.02.2016 directed the TPO/A.O to verify the same and submit a report. The Id. A.R submitted, that in compliance of the aforesaid directions of the Tribunal, the DCIT(Transfer Pricing)-2(20)(2), Mumbai, had filed its report dated 15.03.2016. The Id. A.R drawing our attention to the said report, submitted, that the TPO had admitted that as per the settled position of law, the adjustments, if any, were to be limited to the AE transactions of the assessee. Apart there from, the TPO in his remand report had admitted, that as regards the calculations given in the assessee's chart, if the adjustment made in the course of the TP proceedings had to be distributed proportionately over the AE and non-AE transactions (the way it was done in the order passed by the Tribunal in the case of Alstom Projects Ltd., ITA No. 8670 of 2010, as claimed by the assessee), then the assessee's calculation was correct arithmetically and the amount of proportionate adjustment distributed over the AE transactions, would fall within the (+/-) 5% as per the new second proviso of Sec. 92C(2) of the Act. As regards the claim raised by the TPO in his report, that the SLP of the revenue involving a similar issue as was adjudicated by the Hon'ble High Court of Bombay in the case of Tara Jewels (supra) i.e as to whether the adjustments are to be restricted only to the international transactions where the assessee had selected TNMM and applied the same on entity level, had been admitted by the Hon'ble Supreme Court in the case of CIT, Mumbai Vs. Firestone International Pvt. Ltd., it was averred by the Id. A.R, that the said claim of the TPO was absolutely misconceived. The Id. A.R taking us through the order of the Hon'ble High Court of Bombay in the case of CIT Vs. M/s Firestone International Pvt. Ltd (ITA No. 1354 of 2013, dated 15.06.2015), submitted, that three issues were involved in the said appeal viz. (i). that, as to whether the adjustments are to be restricted only to the international transactions where the assessee had selected TNMM and applied the same on entity level; (ii). that, as to whether the Tribunal was justified in deleting the adjustment, for the reason, that the AE transactions the same

were found to be within (+/-) 5%; and (iii). that, as to whether the Tribunal was justified in restoring the issue as regards the disallowance made u/s 14A to the file of the A.O for fresh consideration in view of the judgment in the case of Godrej & Boyce Manufacturing Co. Ltd. (328 ITR 81), against which a SLP had been filed with the Hon'ble Apex Court. In the backdrop of the aforesaid facts, it was submitted by the Id. A.R, that the revenue in its SLP filed before the Hon'ble Apex Court had only assailed the issue pertaining to the disallowance made u/s 14A. In order to drive home his aforesaid contention, the Id. A.R had drawn our attention to the order of the Hon'ble Supreme Court in the case of CIT, Mumbai Vs. Firestone International Pvt. Ltd. (Civil Appeal No. 008177/2016, dated 31.01.2018. In sum and substance, it was submitted by the Id. A.R, that the order of the Hon'ble High Court of Bombay in the case of CIT Vs. M/s Firestone International Pvt. Ltd (ITA No. 1354 of 2013, dated 15.06.2015), on the issue, that as to whether the adjustments are to be restricted only on the international transactions where the assessee had selected TNMM and applied the same on entity level, was not carried in appeal by the revenue before the Hon'ble Apex Court, and had thus attained finality. Accordingly, on the basis of his aforesaid contentions, it was submitted by the Id. A.R, that now when it is admitted by the TPO in his 'remand report', that by following the view of the Tribunal in the case of Alstom Projects Ltd., ITA No. 8670 of 2010 if the TP proceedings were to be distributed proportionately over the AE and non-AE transactions, then the assessee's calculation was correct arithmetically, and the amount of proportionate adjustment distributed over the AE transactions would fall within the allowable (+/-) 5% limits as per the new second proviso of Sec. 92C(2) of the Act, therefore, the adjustment of 4,30,12,000/- made by the TPO/DRP was liable to be vacated on the said count itself. Apart there from, the Id. A.R also assailed the order of the A.O, on the ground, that he had erred in granting short credit of TDS of Rs. 8,68,509/- and consequently had levied higher interest u/s 234B and 234C of the Act.

9. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the Id. A.R, that in all fairness an opportunity may be afforded to the A.O to verify the veracity of the calculations made by the assessee in its 'Chart', that was filed in support of its claim that no TP adjustment was called for in its hands. It was thus submitted by the Id. D.R, that for the said limited purpose the matter may be restored to the file of the A.O.

10. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record and also the judicial pronouncements relied upon by them. As is discernible from the orders of the lower authorities, the TPO had worked out the PLI (OP/sales) of the trading segment at 1.45% (after reallocating the advertisement and sale promotion expenses on a proportionate basis). As against that, the mean PLI (OP/Sales) of 4 comparables which were selected by the TPO in the immediately preceding year i.e A.Y 2007-08, and also approved by the DRP in the year prior to that i.e A.Y 2006-07, was found by the TPO for the year under consideration at 2.81%. Applying the mean PLI of 2.81% of the comparables to the total sales of the assessee, the TPO had worked out a TP adjustment of Rs. 4,30,12,000/- in the hands of the assessee, as under:

(Rs. in '000)

	Actual		Comparables		Adjustment
Sales		3,169,868		3,169,868	
AE Costs	313,964		2,70,952		43,012
Non-AE Costs	2,809,843	3,123,807	2,809,843	3,080,795	
OP		46,061		89,073	
Op to Sales		1.45%		2.81%	

11. We have given a thoughtful consideration and are unable to persuade ourselves to subscribe to the methodology adopted by the TPO for working out the TP adjustment in the hands of the assessee. As observed by us hereinabove, the TPO had worked out a TP adjustment of Rs. 4,30,12,000/- by applying the mean PLI of 2.81% of the comparables to the total trading sales of Rs. 316,98,68,000 of the assessee. In our considered view, the very basis for working out the TP adjustment by the TPO is fallacious. As observed by the **Hon'ble High Court of Bombay** in the

case of **CIT Vs. Tara jewels Exports (P) Ltd. (2016) 381 ITR 404 (Bom)**, adjustment which has to be done to arrive at ALP is only in respect of transactions of the assessee with its AEs. In fact, we need not dwell any further on the said aspect, for the reason, that the TPO in his remand report dated 15.03.2016 that was filed with the Tribunal, had admitted, that there is no dispute that the adjustment, if any, should be limited to the international transactions. Apart there from, the TPO had also accepted in his remand report, that if the adjustments made by the TPO had to be distributed proportionately over the AE and the non-AE transactions, in the way, it had earlier been held by this Tribunal in the case of **Alstom Projects India Ltd. Vs. Addl. CIT (2014) 150 ITD 460 (Mum)**, then the assessee's calculation is correct arithmetically and the amount of proportionate adjustment distributed over the AE transactions will fall within the (+/-) 5% limits, as per the new second proviso of Sec. 92C(2) of the Act. We have perused the order passed by this Tribunal in the case of Alstom Projects India Ltd. (supra), and find, that as in the case before us, in the said case also the TPO while making the TP adjustment had considered the entire turnover of the assessee. On appeal, it was observed by the Tribunal, that the TP adjustment was permissible only as regards the AE transactions of the assessee. Accordingly, it was held, that the TPO was wrong in making TP adjustments on non-AE transactions. Observing, that even if the mean margin adopted by the TPO was applied to the case of the assessee before them, the difference in the ALP would be much less than (+/-) 5%, the Tribunal had concluded that no TP adjustment was called for in its hands. Admittedly, the facts in the case before us are in parity with those as were there before the Tribunal in the case of Alstom Projects India Ltd. (supra). We thus, in the backdrop of our aforesaid observations, are of the considered view that as the difference in the ALP in respect of the trading segment of the assessee, as admitted by the TPO in his remand report is less than (+/-) 5%, therefore, no TP adjustment would be called for in its hands. At the same time, we are persuaded to accept the submission of the Id. D.R, that the A.O may be afforded an opportunity to verify the veracity of the calculations in the 'chart' that was filed by the assessee to buttress its claim that no TP adjustment was called for in its hands. Accordingly, for the limited purpose of verifying the calculations provided by the assessee in its aforesaid 'Chart', the matter is restored to the file of the A.O. Before parting, we may herein clarify that the matter is being

restored for the limited purpose of verifying the calculations that had been put into service by the assessee in support of its claim that no TP adjustment was called for in its hands. Accordingly, if the calculations filed by the assessee are found to be in order, and the difference in ALP is found to be within the safe harbour range of (+/-) 5%, then the TP adjustment of Rs. 4,30,12,000/- made by the A.O/TPO shall stand vacated. The **Grounds of appeal No. 7 & 8**, as regards which contentions had been advanced by the Id. A.R before us, are allowed for statistical purposes in terms of our aforesaid observations.

12. As the Id. A.R had not advanced any contentions as regards the remaining grounds of appeal viz. **Grounds of appeal Nos. 2 to 6**, therefore, we refrain from advert to and adjudicating the same, which thus are left open.

13. We shall now advert to the claim of the assessee, that the A.O had erred in granting short credit of tax deducted at source of Rs. 8,68,059/-, and resultantly had levied higher amount of interest u/ss. 234B and 234C. As the said issue requires verification of facts, therefore, we direct the A.O to verify the veracity of the said claim of the assessee. In case, the claim of the assessee is found to be in order, then credit for the deficit amount of TDS shall be allowed to it. Consequently, the interest u/ss. 234B and 234C shall be accordingly reworked out by the A.O. The **Ground of appeal No. 10** is allowed for statistical purposes.

14. The **Ground of appeal No. 9** wherein the assessee has assailed the initiation of penalty proceedings by the A.O u/s 271(1)(c) of the Act, being premature, is accordingly dismissed.

15. The **Grounds of appeal Nos. 11 & 12** being general are dismissed as not pressed.

16. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

**ITA No. 1540/Mum/2014**  
**A.Y 2009-10**

17. We shall now advert to the appeal of the assessee for A.Y 2009-10. Briefly stated, the assessee company had e-filed its return of income for A.Y 2009-10 on 22.09.2009, declaring its

total income at Rs. 24,17,88,919/- and 'book profit' of Rs. 24,09,62,770/- under Sec. 115JB of the Act. The return of income filed by the assessee company was processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

18. During the course of the assessment proceedings the A.O made a reference u/s 92CA(1) of the Act to the Transfer Pricing Officer(for short 'TPO') for determining the Arms Length Price (for short 'ALP') of the international transactions of the assessee.

19. In the course of the proceedings, it was observed by the TPO that the assessee had carried out the following international transactions during the year under consideration:

Sr. No.	Name of the associated enterprise	Nature of Transaction	Amount	Method used
1.	Huntsman Group	Import of finished goods	Rs. 21,27,23,655/-	RPM/TNMM
2.	Huntsman Group	Export of goods	Rs. 90,32,049/-	Cost plus/TNMM
3.	Huntsman Advanced Material (Switzerland)	Service charges paid	Rs. 3,65,44,465/-	TNMM
4.	Tioxide (Malaysia)	Indenting commission received	Rs. 1,20,72,979/-	TNMM
5.	Huntsman Singapore Pvt. Ltd.	Services charges received	Rs. 66,00,000/-	TNMM
6.	Huntsman International LLC	Corporate Service charges paid	Rs. 2,90,22,756/-	TNMM

It was observed by the TPO that the assessee had sliced the profit & loss account into manufacturing and trading and further sliced the same into transactions with related and unrelated parties. It was noticed by him that the assessee had carried out comparable search on three fronts viz. (i). manufacturing; (ii). Trading (the indenting & services activities were also clubbed into trading); and (iii). company as a whole. Further, it was observed by the TPO that the assessee for the purpose of slicing had allocated expenses under the different heads among the manufacturing and trading segment. Except for some specific heads the allocation of the expenses was made on the basis of turnover. In the manufacturing segment, the assessee had benchmarked the transactions using the Transactional Net Margin Method (for short 'TNMM') with the operating

margin as the Profit Level Indicator (for short 'PLI'). Operating margin ratio to sales was worked by the assessee at 27.70% which was stated to be higher than the margin of 9.09% for the comparables. Under the trading segment, the assessee had included imports of goods, commission and proportionate management fees and had taken its gross margin ratio at 11.86%, which was claimed to be higher as against the ratio of 7.12% of its comparables. The updated operating margin ratio of the comparable companies was worked out at 10.21%. Also, for benchmarking all transactions especially management fees, the assessee had made an analysis on the company level. The operating profit of the assessee company was worked out at 6.21% as against 10.25% for the comparable companies. Accordingly, the assessee exercised its option as per the proviso to Sec. 92C(2) of the Act, and treated the transactions as being at arm's length. However, the TPO proceeded to benchmark ALP of the transactions of trading, indenting, services and management fees at entity level. Also, the TP study report of the assessee was rejected by the TPO as per the provisions of Sec. 92C(3)(C) r.w Sec. 92CA, for the reason, that the information/data used in the computation of the arm's length price was not reliable or correct. Observing, that the assessee had earned an operating margin of 6.21% on sales whereas its comparable companies as per the TP study report had earned updated margin of 9%, the TPO suggested an adjustment of Rs. 9,90,54,430/-. Alternatively, the TPO also worked out the adjustment as done in the previous years only in respect of the trading segment of the assessee. Accordingly, using updated margins of the same comparables which had consistently been selected by the TPO in the preceding years, and after reallocating the advertisement expenses on turnover basis, an adjustment of Rs. 6,18,37,337/- was worked out by the TPO.

20. On the basis of the order passed by the TPO u/s 92CA(3) of the Act, dated 23.01.2013, the A.O inter alia proposed to make a transfer pricing adjustment of Rs. 9,90,54,430/-, vide his draft assessment order passed u/s 143(3) r.w.s 144C(1), dated 11.03.2013.

21. Aggrieved, the assessee filed objections with the Dispute Resolution Panel-1, Mumbai (for short 'DRP'). It was observed by the DRP, that similar objections were raised by the assessee before the panel for A.Y 2008-09. The DRP was not persuaded to accept the claim of the assessee,

that the TPO for the purpose of benchmarking the international transactions had erred in adopting two distinct approaches i.e one by using entity level and second by considering only the trading segment. As regards rejection of RPM and applying of TNMM by the TPO for benchmarking the international transactions of import of finished goods by the assessee, the DRP finding itself to be in agreement with the TPO, observed, that though theoretically RPM would have been the most appropriate method, however, on account of non-availability of database the resale margins could not reliably worked out by applying the said method. As such, the benchmarking of the trading transactions by applying TNMM by the TPO was approved by the DRP. As regards, the principle objection of the assessee, that the TPO had erred in allocating the advertisement and promotion expenses to the trading segment, the DRP not finding favour with the claim of the assessee that no part of the aforesaid expenses could be attributed to the trading segment. On the basis of the facts discernible from the assessee's TP study report and the fact that the assessee had not maintained separate accounts, the DRP was not inclined to accept the claim of the assessee that the advertisement and sales promotion expenses pertained exclusively to the manufacturing segment. Also, in the absence of any supporting evidence, the claim of the assessee that the reimbursement of expenses to the stockists and distributors was only in relation to the manufactured goods, the DRP declined to accept the same. Accordingly, the DRP upheld the allocation of the advertisement and sales promotion expenses by the TPO in proportion of turnover of the manufacturing, trading and the other segments. Lastly, it was submitted by the assessee before the DRP, that the TPO was entitled to have determined the arm's length price only in relation to the international transactions of the assessee. It was the claim of the assessee, that if the arm's length operating margin is worked out only in respect of the revenues of Rs. 35.22 crores in the AE segment, then the arms' length cost of the imports would work out more than the actual cost of imports and hence no adjustment would be called for in the case of the assessee. On the aforesaid issue, it was observed by the DRP that the assessee was trading different kinds of goods from its AE's as well as non-AE's, while for the sales were made in the domestic market only. In the backdrop of the aforesaid fact, the DRP was of the view, that as the assessee had not maintained separate accounts for the AE and the non-AE segments, therefore, it was not possible to prepare reliable

segment-wise accounts. Also, it was observed by the DRP, that the assessee itself had benchmarked its international transactions using entity level operating margin as the PLI. Apart there from, the DRP was of the view, that as the non-AE transactions were intrinsically at arm's length, therefore, the differential in the operating margin arrived at after appropriate analysis had to be attributed to the tainted international transactions. Accordingly, the DRP confirmed the action of the TPO in applying the mean operating margin on the entire trading sales of the assessee company.

22. On the basis of the aforesaid order of the DRP, the A.O framed the assessment u/s 143(3) r.w.s 144C(13), dated 30.01.2014, wherein after inter alia making a TP adjustment (as per the directions of DRP) of Rs. 6,18,37,337/-, the income of the assessee under the normal provisions was determined at Rs. 30,36,26,260/- and the 'book profit' u/s 115JB was worked out at Rs. 24,25,87,767/-.

23. Aggrieved, with the order passed by the A.O u/s 143(3) r.w.s 144C(13), dated 14.09.2012, the assessee has carried the matter in appeal before us. On a perusal of the final assessment order passed by the A.O u/s 143(3) r.w. s 144C(13), dated 30.01.2014, it stands revealed, that pursuant to the order passed by the TPO, dated 28.01.2014, giving effect to the directions of the DRP, dated 24.01.2014, the A.O had made an addition in respect of the alternate TP adjustment of Rs. 6,18,37,337/- that was made by the TPO, vide his original order passed u/s 9CA(3), dated 23.01.2013 in respect of the trading segment of the assessee. As the facts and the issue involved in the present appeal are the same as were there before us in the appeal of the assessee for A.Y 2008-09, viz. ITA No. 6528/Mum/2012, therefore, our order therein passed while disposing off the said appeal shall apply mutatis mutandis in the present appeal of the assessee for A.Y 2009-10, viz. ITA No. 1540/Mum/2014. Accordingly, in the same terms, we are of the considered view that as the difference in the ALP in respect of the trading segment of the assessee, as admitted by the TPO in his remand report is less than (+/-) 5%, therefore, no TP adjustment would be called for in its hands. At the same time, we are persuaded to accept the submission of the Id. D.R, that the A.O may be afforded an opportunity to verify the veracity of the calculations in the 'chart' that was

filed by the assessee to buttress its claim that no TP adjustment was called for in its hands. Accordingly, for the limited purpose of verifying the calculations provided by the assessee in its aforesaid 'chart', the matter is restored to the file of the A.O. Before parting, we may herein clarify that the matter is being restored for the limited purpose of verifying the calculations that had been put into service by the assessee in support of its claim that no TP adjustment was called for in its hands. Accordingly, if the calculations filed by the assessee are found to be in order and the difference in ALP is found to be within the safe harbour range of (+/-) 5%, then the TP adjustment of Rs. 6,18,37,337/- made by the A.O/TPO shall stand vacated. The **Grounds of appeal No. 8 & 9**, as regards which contentions had been advanced by the Id. A.R before us, are allowed for statistical purposes in terms of our aforesaid observations.

24. As the Id. A.R had not advanced any contentions as regards the remaining grounds of appeal viz. **Grounds of appeal Nos. 2 to 7** and **Ground of appeal No. 10**, therefore, we refrain from advertng to and adjudicating the same, which thus are left open.

25. The **Ground of appeal No. 11** wherein the assessee has assailed the initiation of penalty proceedings by the A.O u/s 271(1)(c) of the Act, being premature, is accordingly dismissed.

26. The **Grounds of appeal Nos. 12 & 13** being general are dismissed as not pressed.

27. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

28. Resultantly, both the appeals of the assessee for A.Y 2008-09 and A.Y 2009-10 i.e ITA No. 6528/Mum/2012 and ITA No. 1540/Mum/2014 are partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 04/10/2019.

Sd/-  
(M.Balaganesh)  
ACCOUNTANT MEMBER

Sd/-  
(Ravish Sood)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 04.10.2019  
PS. Rohit

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai