IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K" MUMBAI

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 4750/MUM/2017
Assessment Year: 2010-11

ACIT-15(1)(2), Room No. 483A, 4th floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	M/s Brother International (India) Pvt. Ltd., 703/704, Powai Plaza, Hiranandani Business Park, Powai, Mumbai-400076. **PAN No. AADCB0263E**
Appellant		**Respondent**

ITA No. 5075/MUM/2017
Assessment Year: 2010-11

M/s Brother International (India) Pvt. Ltd., Unit No. 408, 4th floor, B-Wing, 215 Atrium, Andheri Kurla Road, Andheri (East), Mumbai-400059. **PAN No. AADCB0263E**	Vs.	The Assistant Commissioner of Income Tax, 15(1)(2), [Earlier The Income Tax Officer-10(3)(1)], Room No. 483A, 4th floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant		**Respondent**

Assessee by : Mr. Ketan Ved, Mr. Pawan Sharma, Mr. Vinay Deshmane, ARs

Revenue by : Mr. Ashish Heliwal, DR

Date of Hearing : 07/01/2020
Date of pronouncement: 13/01/2020

ORDER

PER N.K. PRADHAN, AM

The captioned cross appeals filed by the Revenue and assessee are directed against the order passed by the Commissioner of Income Tax (Appeals)-55, Mumbai [in short 'CIT(A)'] and arise out of the assessment order passed u/s 143(3) r.w.s144C of the Income Tax Act 1961, (the 'Act').

2. For the sake of convenience, we begin with the appeal filed by the assessee (ITA No. 5075/Mum/2017). The 1st, 2nd, 3rd and 4th grounds of appeal which relate to transfer pricing adjustment of Rs.11,917,839/- read as under :

1. The Ld. CIT(A) has erred in restoring the matter back to the Transfer Pricing Officer[TPO].
2. The learned CIT(A) / TPO erred on facts and in the circumstances of the case in determining the arm's length adjustment to the appellant's international transactions from Associated Enterprises ('AEs') and thereby resulting in the enhancement of returned income of the appellant by Rs.11,917,839/-.
3. The learned CIT(A) / TPO erred on the facts and in the circumstances of the case and in law, in not appreciating that in respect of the concerned international transactions, none of the conditions set out in section 92C(3) of the Act are satisfied and therefore, it is incorrect to disregard the transfer pricing analysis carried out by the appellant and to re-determine the arm's-length price for the said transactions.
4. The learned CIT(A) / TPO erred both on facts and in law in making an adjustment of Rs.11,917,839/- to the income of the appellant by holding that its international transaction of purchase of IT peripherals does not satisfy the arm's length principle envisaged under the Act. In doing so, the learned CIT(A) / TPO has grossly erred in:
    - rejecting the economic analysis in the transfer pricing('TP') documentation of the appellant used to determine the ALP;

- rejecting the Resale Price Method ('RPM') applied by the appellant and applying the Transaction Net Margin Method ('TNMM');
- disregarding the fact that RPM has been consistently accepted by the TPO as the most appropriate method for the said international transaction in the previous assessment years i.e. A.Y.2009-10 and A.Y. 2008-09 after making due analysis.

3. Briefly stated, the facts of the case are that the assessee is a part of the Brother Group of Companies. It is a wholly owned subsidiary of Brother Japan. It was incorporated on 14.12.2006 and began its operations from March 2007. Brother Japan is one of the premier providers of products for the home, home office and office. It markets many industrial products, home appliances, business products manufactured at various manufacturing locations. The assessee has selected Resale Price Method (RPM) as the most appropriate method to benchmark trading transaction. During the year under consideration, the assessee is engaged in the business of distribution of information and communication equipments such as printers and facsimile machines by importing from AE and selling in the local market. As per functional analysis submitted before the TPO, it acts as a distributor buying goods and selling it in the domestic market without adding significant amount of value to the products. In response to a query raised by the TPO to explain why transactional net margin method (TNMM) should not be used as the most appropriate method instead of Resale Price Method (RPM) for benchmarking the international transaction of import of finished goods from AE, the assessee filed a reply dated 22.01.2014 stating that (i) since it has consistently selected RPM as the most appropriate method for its international transaction of import from AEs, on the principles of consistency, the RPM method followed

by it and accepted by the tax department in earlier years should be accepted in the current year also; (ii) RPM is normally used in cases involving the purchase and resale of tangible property or services in which there is no substantial value addition by the reseller either by physically altering such goods or by using marketing intangibles; (iii) the assessee is engaged in the business of selling and distribution of information and communication equipments which are imported from AEs ; the assessee imports information and communication equipments from its AEs and sells the same without any value addition, after adding an appropriate profit margin to third parties; (iv) the assessee has only considered the cost of goods/materials in cost while calculating the gross profit margin of the assessee as well as comparables ; certain miscellaneous costs such as freight expenses, import duty etc. are not considered as part of cost while calculating the gross profit margin in the case of the assessee as well as comparables and thus, there is no question of distortion in the GP margin of comparables; (v) the assessee is engaged in trading of IT peripherals and bears of the risks associated with distribution of such goods ; similarly, all the comparables selected by the assessee are also full fledged traders performing all the functions generally performed by traders and bears full risk involved in distribution and hence RPM should be selected as the most appropriate method to benchmark the international transaction of import of information and communication equipments from its AEs.

However, the TPO was not convinced with the above explanation of the assessee for the reason that for achieving proper comparability, complete information about business profile and functional data should be available in

respect of all the parties which are examined as comparables, whereas in the instant case, these details are not found in the public domain. Therefore, he rejected RPM and adopted TNMM as the most appropriate method. Accordingly, the TPO worked out the ALP of purchase of finished goods from AEs at Rs.181,116,926/- against Rs.193,034,766/- shown by the assessee leading to an adjustment of Rs.11,917,839/- u/s 92CA of the Act. The AO followed the order of the TPO and thereby made an addition of Rs.11,917,839/- as adjustment u/s 92CA (3) of the Act.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that vide order dated 28.02.2017 the Ld. CIT(A) held :

> "A simple search on internet about "PRINTER" and "FAX MACHINE" reveals that there are six suppliers of foreign brand printers and three suppliers of foreign brand fax machines in India as follows:
>
> PRINTER ::: KORES, RICOH, KONICA, EPSON, KODAK. UNITECH…
> FAX MACHINE ::: PANASONIC, CANON, SHARP.....
>
> All the above companies are reputed brands which sell their Brand of products, that is, printers and fax machines in India through their distributors and sellers. And most of the details about these companies are available in public domain and even if these are not so, the TPO/AO are sufficiently empowered to conduct further inquiries and collect details and documents. It is therefore fair and reasonable if the TPO makes inquiries and collects details and documents about these companies, gives an opportunity to the assessee to file their written submissions, analyze the same vis-a-vis the details of the assessee and rule 10D of the IT Rules 1962 and section 92 to 92CA of the IT Act 1961 and then determine the arm's length price accordingly. It is therefore directed that the TPO will collect details and documents about these companies in different segments, compare assessee's details and documents with these companies, give sufficient opportunities to the assessee and then determine the arms length price of transaction of purchase of IT Peripherals of

transaction value Rs.19,30,34,766/- as per facts, law and judicial pronouncements on the subject. It is also directed that the TPO will not pass orders in a hurry at the end of the time period of six months from the date of receipt of this appellate order and forward copier of the TP order u/s. 92CA of the IT Act 1961 to the AO and assessee for necessary action."

5. Before us, the Ld. counsels for the assessee reiterate their submission before the TPO and CIT(A). On the other hand, the Ld. Departmental Representative (DR) supports the order passed by the TPO/AO.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

As mentioned earlier, the assessee is a wholly owned subsidiary of Brother Japan. It is engaged in the business of distribution of information and communication equipments such as printers and facsimile machines by importing from AE and selling in the local market. RPM is a transfer pricing method where the resale price to the independent party is reduced by comparable resale price margin to arrive at ALP of the product transferred between the related parties. Resale price margin is a margin representing the amount out of which a reseller would seek to cover its selling and other operating expenses and, in the light of the functions performed (taking into account assets used and risks assumed) make an appropriate profit. It is well settled that RPM is to be used for determining ALP only when goods purchased from the associated enterprise are resold to unrelated parties and there is very little value addition involved.

In *CIT v. L' Oreal India (P.) Ltd*. (2015) 53 taxmann.com 432 (Bombay), it is held that in case of distribution or marketing activities when goods are

purchased from associated entities and sales are effected to unrelated parties without any further processing, then, RPM (resale price method) is most appropriate method to determine ALP of said transaction.

In *Nokia India (P.) Ltd. v. DCIT* (2014) 153 ITD 508 (Delhi-Trib.), it is held that RPM is best suited for determining ALP of an international transaction in nature of purchase of goods from an AE which are resold as such to unrelated parties and it pre-supposes no or insignificant value addition to the goods purchased from foreign AE.

In *Mattel Toys (I) (P.) Ltd. v. DCIT* (2014) 30 ITR (T) 283 (Mumbai-Trib.), it is held that RPM is most appropriate for benchmarking arm's length price for resale takes place without any value addition to product by the assessee.

In *ACIT v. L' Oreal India (P.) Ltd.* (2013) 34 taxmann.com 78 (Mumbai-Trib.), it is held that where assessee buys products from its AEs and sells to unrelated parties without any further processing, RPM is most appropriate method to determine ALP.

Having examined the facts of the present case, we are of the considered view that the principles laid down in the above decisions are applicable here. Therefore, we set aside the order of the Ld. CIT(A) on the above grounds of appeal and delete the adjustment of Rs.11,917,839/- made by the AO u/s 92CA(3) of the Act. Thus the 1st, 2nd, 3rd and 4th grounds of appeal are allowed.

7. The 5th and 6th ground of appeal read as under :

5. The learned CIT(A) / TPO has erred both on facts and circumstances of the case and in law in proposing an adjustment of Rs.42,70,636/- as the compensation for its

Advertisement Marketing and Promotion ('AMP') services by holding that the appellant incurs 'excessive' AMP expenses in relation to its distribution activities thereby qualifying as 'services' as per the arm's length principle envisaged under the Act, and in doing so have grossly erred in:

- disregarding that the AMP expenses incurred by the appellant represent purely domestic transaction(s) undertaken towards third parties, not covered under the purview of Section 92 of the Act and that the analysis of ''domestic" transactions undertaken with third parties in respect of which no TP reference has been made by the AO to the TPO, is beyond the powers vested with the TPO under Section 92CA of the Act;
- incorrectly applying the "bright line" concept to the appellant's distribution segment/ operations; while disregarding the fact that the AMP expenses of the appellant after reducing selling expenses was just 0.91% of the total sales, which is nearly equivalent to the average AMP expenses of comparables i.e. 0.90% ;
- ignoring the fact that the AMP expenses incurred by the appellant were in respect of its own business requirements/ considerations/ purposes and that all and any benefit resulting from such expenditure are to its own account (in the form of increased sales and market share) and benefit, if any, to the overseas AEs, was purely incidental.
- erroneously holding that the appellant has rendered services to the AEs by incurring 'excessive' AMP expenses and by holding that a mark-up has to be earned by the appellant in respect of the "alleged excessive" AMP expenses;
- in applying a mark-up of 17.51% on the ''alleged excessive" AMP expenses, for determining the compensation/ service fee towards "alleged AMP service" by the appellant to its AEs;

6. The learned CIT(A) / TPO has erred in disregarding judicial pronouncements in India in making the TP adjustment.

8. During the course of transfer pricing proceedings, the TPO observed that the assessee being a distributor and not doing any value addition to the products sold in India is not required to incur huge expenses on advertisement and marketing. Accordingly, the TPO was of the view that the assessee-company should recover advertising/promotion and marketing expenses and mark up on the above expenditure should be charged taking the average margin of the comparable companies at arm's length rate. Accordingly, the TPO determined the arm's length price as under :

Particulars	**Amount**
AMP expenses on brand promotion (a)	36,34,275
Arm's Length rate 17.51% mark up advertisement (b) = a*17.51%	6,36,361
Arm's Length price of brand expenses (a+b)	42,70,636
Less already recovered by assessee	NIL
Adjustment	42,70,636

It may be mentioned here that the TPO has stated in his order that the adjustment on account of trading is made of Rs.11,917,839/- and on account of brand promotion of Rs.42,70,636/- and requested the AO to add only Rs.11,917,839/- in the total income of the assessee and take amount of Rs.42,70,636/- as telescoped into the above. The TPO noted that in the event in appellate proceedings, the adjustment on account of trading goods is deleted, then the AMP adjustment will remain.

9. In appeal, the Ld. CIT(A) held as under :

> "Ground number 7.5 deals with determination of arm's length price in respect of and out of the advertisement expenses incurred by the assessee company during the previous year. The TPO issued a show cause notice to the assessee and asked it as to

why it had incurred AMP expenses @ 3.03% of the sales value as compared to 0.9% incurred by the comparable selected by the assessee during the year. Again the issue boils down to the same issue but from a different perspective, that is, vis-a-vis the "AMP Expenses" incurred by the assessee company. Again the facts are the same, that is, selection of four comparable by the assessee was wrong and hence the adoption of figures of AMP expenses to sales was equally erroneous because assessee operated its business in a domain different from the domain in which four software development companies operated and basically parameters of their operations required incurrence of a different set of parameters. As discussed in foregoing paragraphs, the issue is the selection of wrong comparables and it will be fair and reasonable if the TPO collects details of advertising and marketing from a total of nine (six plus three) companies also, compares it with the advertising and marketing expenses especially advertising expenses with that of the assessee and re-determines the arm's length price in respect of the brand value created out of the actual expenses incurred on advertising and marketing which contained the brand name Brother and which is deemed to have created brands value and its enhancement in India. Therefore, it is directed that the TPO will carry out a similar exercise in respect of advertisement expenses also as directed in earlier paragraphs for determination of IT Peripherals, give sufficient opportunities to the assessee to file its submissions and then determine the arms length price in respect of Brand Value created out of advertisement expenses. In nutshell, assessee's appeal is deemed to have been partly allowed."

10. Before us, the Ld. counsels for the assessee submit that in the present case the assessee incurred total expenses on advertisement of Rs.1.22 crore which is 3.03% of its sales of Rs.39.84 crore while in case of comparables it is 0.9%. Further, it is stated that out of the total expenses, only Rs.36.34 lacs are expenses towards brand promotion, while the remaining expenses of Rs.86 lacs pertained to the selling expenses such as incentives and other benefits paid to dealers/distributors for promoting sale and not the brand name of the

AE. Thus it is stated that the AMP expenses (excluding incentives etc. paid to dealers) of the assessee amounts to just 0.91% of its sales. It is stated that the above working was filed before the TPO *vide* letter dated 26.08.2013. Finally it is stated by them that since, the AMP expenses of the appellant after reducing selling expenses are just 0.91%, which is nearly equivalent to the average AMP expenses of comparables at 0.9%, the same meets the ALP standard under the Indian Transfer Price Regulation and hence, no adjustment is warranted.

On the other hand, the Ld. DR relies on the order of the TPO/AO.

11. We have heard the rival submissions and perused the relevant materials on record. We find that out of total expenses on advertisement of Rs.1.22 crore, only Rs.36.34 lacs are expenses towards brand promotion, while the remaining expenses of Rs.86 lacs pertain to the selling expenses such as incentives and other benefits paid to dealers/distributors for promoting sale and not the brand name of the AE.

In *Maruti Suzuki India Limited v. CIT* [2016] 381 ITR 117 (Delhi), the Hon'ble Delhi High Court held that "there being no international transaction on AMP spend with an ascertainable price, neither substantive nor machinery provision of Chapter X were applicable to the transfer pricing adjustment exercise".

In *Bausch & Lomb Eyecare (India) Pvt. Ltd. & Ors. v. Additional Commissioner of Income Tax & Ors*. (2015) [2016] 381 ITR 227 (Delhi), the Hon'ble Delhi High Court again held that "where existence of an international transaction involving AMP expense with an ascertainable price is unable to be

shown to exist, even if such price is Nil, Chapter X provisions cannot be invoked to undertake a TP adjustment exercise.

In *Commissioner of Income Tax v. Whirpool of India Limited* (2015) [2016] 381 ITR 154 (Delhi), the Hon'ble Delhi High Court again held that "where revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between Indian subsidiary and foreign parent, revenue cannot proceed to determine ALP of AMP expenses by inferring existence of an international transaction based on bright line test.

In *Honda Siel Power Products Limited v. Deputy Commissioner of Income Tax* (2015) (94 CCH 0170), the Hon'ble Delhi High Court again held that "when assessee is carrying on business as independent enterprise and is incurring AMP expenses for its own benefit and not at the behest of AE, hence benefit of creation of marketing intangibles for foreign AE on account of AMP expenses can at best said to be incidental".

All the more, since the AMP expenses of the assessee, after reducing selling expenses are just 0.91%, which is nearly equivalent to the average AMP expenses of comparables at 0.9%, the same meets the ALP standard under the Act and hence, no adjustment is required.

In view of the above reasons, we set aside the order of the Ld. CIT(A) and hold against the AMP adjustment of Rs.42,70,636/- made by the TPO. Thus the 5th and 6th grounds of appeal are allowed.

12. The 7th and 8th ground of appeal are as under :

7. The Id. CIT(A) has erred in law and on facts in confirming disallowance of advertisement& sales promotion expenses of Rs.2,84,514/- based on erroneous observation that the expenses has been debited thrice on 23 March 2010.
8. The ld. CIT(A) has erred in law and on facts in confirming disallowance of provision of warranty of Rs. 11,61, 620/- by making erroneous observation that the actual warranty expense of Rs.11,61,620/- has also been debited to profit & loss account and allowance of the said expenses will lead to double claim of expense.

13. The contentions of the Ld. counsel that the above disallowances are based on erroneous observations of the Ld. CIT(A) needs re-verification. Therefore, we set aside the order of the Ld. CIT(A) on the above grounds of appeal and restore the matter to the file of the AO to make an order after proper verification. We direct the assessee to file the relevant documents/evidence before the AO. Thus the 7th and 8th grounds of appeal are allowed for statistical purposes.

14. In the result, the appeal filed by the assessee is partly allowed.

15. Then we turn to the appeal filed by the Revenue which is produced below :

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the TPO to make enquiries and collect documents about certain comparables and after giving an opportunity to the assessee, analyze the same before determining the ALP instead of calling for a remand report from the TPO or analyzing the comparables at his end.
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in effectively setting aside the matter back to the AO/TPO, when section 251 of the IT Act, 1961 does not permit the same.

16. Since we have deleted the adjustment of Rs.11,917,839/- made by the TPO/AO as discussed at para 6, and the adjustment of Rs.42,70,636/- by the TPO as discussed at para 11 hereinbefore, the appeal filed by the Revenue does not survive.

17. In the result, the appeal filed by the assessee is partly allowed, whereas the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 13/01/2020.

Sd/-	Sd/-
(VIKAS AWASTHY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;

Dated: 13/01/2020
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai