IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'I-1' NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER
[Through Video Conferencing]

ITA No.4315/Del./2014
Assessment Year: 2009-10

ACIT, Circle-12(1), New Delhi	**Vs.**	M/s. Hermes India Retails & Distributors Pvt. Ltd., G/H 5-9, Shopping Arcad, The Oberoi, Dr. Zakir Hussain Marg, New Delhi
		PAN :AADCK2054N
(Appellant)		**(Respondent)**

Appellant by	Shri Surenderpal, CIT(DR)
Respondent by	Sh. Salil Agarwal, Adv. Sh. Madhur Agarwal, Adv. Sh. Shailesh Gupta, CA & Sh. Sanjeev Jain, CA

Date of hearing	21.01.2021
Date of pronouncement	23.02.2021

ORDER

PER O.P. KANT, AM:

This appeal by the Deputy Commissioner of Income-tax, Circle-12(1), New Delhi [in short 'the Assessing Officer(AO)'] is directed against order dated 05/05/2014 passed by the CIT (Appeals)-XX, New Delhi [in short 'the Ld. CIT(A)'] the case of M/s

Hermes India Retail and Distributors Private Limited (in short 'the assessee') for assessment year 2009-10 raising following grounds:

1. *On the facts and circumstances of the case an in law, the Ld. CIT(A) has erred in accepting evidence produced at appellate stage, as the assessee had failed to demonstrate that its case was covered under any of the conditions mentioned in clause(a) to (d) of Rule 46A of the Income Tax Rules.*
2. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in treating the comparable Alta Moda as non-comparable although it is a robust comparable in the case of assessee and thereby deleting TP addition of Rs.7,24,81,076/-.*
3. *On facts and circumstances of the case and in law, the Ld. CIT(A) has erred in accepting bills and vouchers which the assessee had failed to submit during transfer pricing proceedings and also erred in deleting TP adjustment of Rs.5,32,25,677/- in this respect.*
4. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.*

2. Briefly stated facts of the case are that the assessee is engaged in importing and selling of products of brand namely "Hermes", in the Indian market. In relevant year under consideration, the assessee sold products through its own store located at 'Oberoi Hotel', New Delhi. The assessee filed return of income for the year under consideration on 30/09/2009, declaring loss of Rs.99,85,343/-. The return of income filed by the assessee was selected for scrutiny assessment and accordingly statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In view of the international transactions carried out by the assessee, the Ld. Assessing Officer referred the matter of determination of the arm's-length price of those international transactions to the learned Transfer Pricing

Officer (TPO). The learned TPO after taking into consideration transfer pricing study of the assessee and other evidences, proposed transfer pricing adjustment of ₹ 12,57,06,753/- in her order dated 29/01/2013. The Learned Assessing Officer passed the impugned assessment order on 03/05/2013 after making additions including the transfer pricing adjustment proposed by the Learned TPO and disallowance out of miscellaneous expenses of ₹ 20,428/-. Aggrieved with the order of the Assessing Officer, the assessee preferred appeal before the Learned CIT(A), who partly allowed the appeal of the assessee. Aggrieved with the order of the Ld. CIT(A), the Revenue (through the Assessing Officer) is in appeal before the Income-tax Appellate Tribunal (in short 'the Tribunal'), raising the grounds as reproduced above.

3. Both the parties appeared before the Tribunal through Video Conferencing facility and filed papers electronically.

4. The first ground of the appeal is against admission of additional evidences by the Learned CIT(A). Before us, the Learned Departmental Representative (DR) submitted that Ld. CIT(A) has admitted additional evidences in violation of Rule 46A of Income Tax Rules, 1962 (in short 'the Rules'). According to him, the assessee appeared 11 times before the learned TPO during transfer pricing proceedings, which lasted for around one year, but failed to produce the evidences before the learned TPO. He submitted that the assessee has not demonstrated before the Learned CIT(A) as how it fulfilled requirement of Rule 46A of the Rules. The learned DR relied on the decision of the Hon'ble Delhi High Court in the case of Manish Buildwell Pvt. Ltd. reported in 245 CTR 397 and Jansampark Advertising and Marketing Private

Limited reported in 375 ITR 373 and submitted that after admission of the additional evidences, those evidences should have been referred to the Assessing Officer/TPO for his comments on merit.

4.1 On the contrary, the Learned Counsel of the assessee relied on the finding of the Learned CIT(A) and submitted that before admitting, the Ld. CIT(A) had sent the additional evidences to Learned Assessing Officer for his comments, and the learned AO/TPO not only objected to admissibility of those evidences only, but also given comments on merit of the addition and thus there is due compliance of the decision of Hon'ble High Court in the case of Manish Buildwell P. Ltd. (supra). As far as eligibility under Rule 46A of the Rules is concerned, the learned Counsel referred to page 76 to 120 of the paper-book and submitted that query regarding the comparable company M/s Alta Moda was made on 28/01/2013 by the learned TPO i.e. one day before passing of transfer pricing order and thus no sufficient opportunity was provided by the TPO. He Submitted that the Assessing Officer/learned TPO made the order without providing sufficient opportunity to the assessee for producing evidences and therefore in terms of Rule 46A(1)(d) of Rules, the assessee is eligible for producing additional evidences before the Ld. CIT(A). He submitted that in remand proceedings, the Ld. TPO has commented on the issue of selection of comparable, namely, Alta Moda. He further submitted that the Ld. CIT(A) has already analyzed the additional evidences and complied with the decision of Hon'ble High Court in the case of Jansampark Advertising &

Marketing Pvt. Ltd. (supra), therefore, no requirement of sending the same again to either the Learned AO or the TPO.

4.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material, including the finding of the Learned CIT(A) on admissibility of additional evidences. The Ld. CIT(A) in para 4.1 has referred that additional evidences produced by the assessee in paper-books 1 to 5 were forwarded to the learned TPO for his comments. The learned TPO objected to the admissibility of the additional evidences, on the ground that the assessee failed to produce evidences during the transfer pricing proceedings and, therefore, conditions for invoking Rule 46A of the Rules are not fulfilled by the assessee. The Learned CIT(A), however, relied on the decision of the Tribunal in the case of M/s Quark Systems Private Limited (supra) and decision of the Hon'ble Madhya Pradesh High Court in the case of Babulal Jain (supra). The Ld. CIT(A) perused the Chart of chronological dates during transfer pricing proceedings , which was produced by the assessee and concluded that no sufficient opportunity was provided to the assessee and, therefore, he admitted additional evidence. The relevant finding of the Learned CIT(A) is reproduced as under:

> *"4.1.4 The Show Cause Notice dated 17/01/2013 proposing (i)Kewal Kiran Clothing Ltd as comparable with proposed GP rate of 60.98% (ii)rejecting 8 comparables used in TP study & (iii)asking for details of reimbursement of Expenses was received by the appellant only on 19/01/2013 through mail. Written submission rejecting Kewal Kiran as a comparable and sample copies of re-imbursement of expenses were filed by the appellant on 28/01/2013. New Comparable namely Alta moda garments Ltd was proposed by TPO on 28/01/2013 vide entry in order sheet. Written submission was filed by appellant vide letter dated 29/01/2013. The Order u/s*

92CA(3) determining the TP adjustment of Rs. 12.57 crores was passed by TPO on 29/01/2013. The sequence of events shows that the appellant was not given ^proper opportunity to furnish evidence during TP proceedings. During the appellate proceedings, the appellant has submitted five paper books. The submission of the appellant dated 18.11.2013 along with the copies of all the paper books were forwarded to the TPO vide the letter F.No. CIT(A)-XX/2013-14/455 dated 19.11.2013. In response to it, the TPO has submitted the remand report F.No. DDIT/TPO I(5)/2013-14/175 dated 14/02/2014 as discussed above. Considering the facts of the case, I am of the opinion that the TPO has passed the order u/s 92CA(3) without giving sufficient opportunity to the appellant to adduce evidence and the present case falls within the ambit of the exceptional circumstances as specified in Rule 46A(l)(d). In view of the above, I hold that the additional evidence is required to be admitted as per the provision of Rule 46A and also in the interest of justice. Therefore, the additional evidences are admitted in this case."

4.3 On perusal of the order sheet of transfer pricing proceedings, it is undisputed that query regarding the comparable M/s Alta Moda was made only one day prior to the passing of the order by the Ld. TPO and thus it is evident that no sufficient opportunity was provided to the assessee to adduce evidence in support to challenge of the comparable, namely, M/s Alta Moda. Thus, we do not find any error in the finding of the Ld. CIT(A) that the assessee is eligible for filing additional evidences under Rule 46A(1)(d) of the Rules.

4.4 However, in view of the decision of the Hon'ble Delhi High Court in the case of Manish Buldwell Private Limited (supra), the Ld. CIT(A) was required to forward the additional evidences for the comment of the Learned AO/TPO on merit. The Hon'ble Delhi High Court in the case of Manish Buildable Private Limited has held as under:

"22. *As we have with the consent of the learned counsel, heard them on merits, we proceed to decide the aforesaid substantial questions of law. Since the CIT(A) himself refers to r. 46A and has also admitted that the confirmation letters adduced by the assessee before him were technically fresh evidence, it is not possible to accept the plea of the learned counsel for the assessee that the CIT(A), in examining the confirmation letters, was exercising his independent powers of enquiry under sub-s. (4) of s. 250 of the IT Act. It is true that the CIT(A) as first appellate authority has coterminous powers over the sources of income constituting the subject-matter of the assessment, except the power to tackle new sources of income not considered by the AO, and can do what the AO can do and can direct the AO to do what he has failed to do, as held by the Supreme Court in the case of CIT vs. Kanpur Coal Syndicate (1964) 53 ITR 225 (SC) but in this case, the CIT(A) did not exercise this right. This power, which is recognized in sub-s. (4) of s. 250, has to be exercised by the CIT(A) and there should be material on record to show that he, while disposing of the appeal, had directed further enquiry and called for the confirmation letters from the assessee even in respect of receipt of monies from customers by way of cheques. Rule 46A is a provision in the IT Rules, 1962 which is invoked, on the other hand, by the assessee who is in an appeal before the CIT(A). Once the assessee invokes r. 46A and prays for admission of additional evidence before the CIT(A), then the procedure prescribed in the said rule has to be scrupulously followed. The fact that sub-s. (4) of s. 250 confers powers on the CIT(A) to conduct an enquiry as he thinks fit, while disposing of the appeal, cannot be relied upon to contend that the procedural requirements of r. 46A need not be complied with. If such a plea of the assessee is accepted, it would reduce r. 46A to a dead letter because it would then be open to every assessee to furnish additional evidence before the CIT(A) and thereafter contend that the evidence should be accepted and taken on record by the CIT(A) by virtue of his powers of enquiry under sub-s. (4) of s. 250. This would mean in turn that the requirement of recording reasons for admitting the additional evidence, the requirement of examining whether the conditions for admitting the additional evidence are satisfied, the requirement that the AO should be allowed a reasonable opportunity of examining the evidence etc. can be thrown to the winds, a position which is wholly unacceptable and may result in unacceptable and unjust consequences. The fundamental rule which is valid in all branches of law, including IT Law, is that the assessee should adduce the entire evidence in his possession at the earliest point of time. This ensures full, fair and detailed enquiry and verification. A seven-Judge Bench of the Supreme Court in Keshav Mills Co. Ltd. vs. CIT (1965) 56 ITR 365 (SC) had observed as under:*

"Proceedings taken for the recovery of tax under the provisions of the Act are naturally intended to be over without unnecessary delay, and so, it is the duty of the parties, both the Department and the assessee, to lead all their evidence at the stage when the matter is in charge of the ITO."

23. *It is for the aforesaid reason that r. 46A starts in a negative manner by saying that an appellant before the CIT(A) shall not be entitled to produce before him any evidence, whether oral or documentary, other than the evidence adduced by him before the AO. After making such a general statement, which is in consonance with the principle stated in the above judgment, exceptions have been carved out that in certain circumstances it would be open to the CIT(A) to admit additional evidence. Therefore, additional evidence can be produced at the first appellate stage when conditions stipulated in the r. 46A are satisfied and a finding is recorded. Rule 46A reads :*

"46A. Production of additional evidence before the Deputy Commissioner (Appeals) and Commissioner (Appeals).—(1) The appellant shall not be entitled to produce before the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, except in the following circumstances, namely :

(a) where the Assessing Officerhas refused to admit evidence which ought to have been admitted; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or

(c) where the appellant was prevented by sufficient cause from producing before the Assessing Officerany evidence which is relevant to any ground of appeal; or

(d) where the Assessing Officerhas made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under sub-r. (1) unless the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) records in writing the reasons for its admission.

(3) The Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall not take into account any evidence

produced under sub-r. (1) unless the Assessing Officerhas been allowed a reasonable opportunity

(a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or

(b) to produce any evidence or document or any witness in rebuttal of the additinal evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty [whether on his own motion or on the request of the Assessing Officerunder cl. (a) of sub-s. (1) of s. 251 or the imposition of penalty under s. 271."

We are highlighting these aspects only to press home the point that the conditions prescribed in r. 46A must be shown to exist before additional evidence is admitted and every procedural requirement mentioned in the rule has to be strictly complied with so that the rule is meaningfully exercised and not exercised in a routine or cursory manner. A distinction should be recognized and maintained between a case where the assessee invokes r. 46A to adduce additional evidence before the CIT(A) and a case where the CIT(A), without being prompted by the assessee, while dealing with the appeal, considers it fit to cause or make a further enquiry by virtue of the powers vested in him under sub-s. (4) of s. 250. It is only when he exercises his statutory suo motu power under the above sub-section that the requirements of r. 46A need not be followed. On the other hand, whenever the assessee who is in appeal before him invokes r. 46A, it is incumbent upon the CIT(A) to comply with the requirements of the rule strictly.

24. *In the present case, the CIT(A) has observed that the additional evidence should be admitted because the assessee was prevented by adducing them before the AO. This observation takes care of cl. (c) of sub-r. (1) of r. 46A. The observation of the CIT(A) also takes care of sub-r. (2) under which he is required to record his reasons for admitting the additional evidence. Thus, the requirement of sub-rs. (1) and (2) of r. 46A have been complied with. However, sub-r. (3) which interdicts the CIT(A) from taking into account any evidence produced for the first time before him unless the AO has had a reasonable opportunity of examining the evidence and rebut the same, has not been complied with. There is nothing in the order of the CIT(A) to show that the AO was confronted with the confirmation letters received by the assessee from the customers who paid the*

amounts by cheques and asked for comments. ***Thus, the end result has been that additional evidence was admitted and accepted as genuine without the AO furnishing his comments and without verification. Since this is an indispensable requirement, we are of the view that the Tribunal ought to have restored the matter to the CIT(A) with the direction to him to comply with sub-r. (3) of r. 46A.*** *In our opinion and with respect, the error committed by the Tribunal is that it proceeded to mix up the powers of the CIT(A) under sub- s. (4) of s. 250 with the powers vested in him under r. 46A. The Tribunal seems to have overlooked sub-r. (4) of r. 46A [sic-s. 250] which itself takes note of the distinction between the powers conferred by the CIT(A) under the statute while disposing of the assessee's appeal and the powers conferred upon him under r. 46A. The Tribunal erred in its interpretation of the provisions of r. 46A vis-à-vis s. 250(4). Its view that since in any case the CIT(A), by virtue of his coterminous powers over the assessment order, was empowered to call for any document or make any further enquiry as he thinks fit, there was no violation of r. 46A is erroneous. The Tribunal appears to have not appreciated the distinction between the two provisions. If the view of the Tribunal is accepted, it would make r. 46A otiose and it would open up the possibility of the assessees' contending that any additional evidence sought to be introduced by them before the CIT(A) cannot be subjected to the conditions prescribed in r. 46A because in any case the CIT(A) is vested with coterminous powers over the assessment orders or powers of independent enquiry under sub-s. (4) of s. 250. That is a consequence which cannot at all be countenanced.*

(emphasis supplied externally)"

4.5 The assessee has produced additional evidence before the Ld. CIT(A), which were forwarded to the Learned TPO. The Ld. CIT(A) in the impugned order has reproduced the comment of the TPO on the issue of selection of comparable M/s Alta Moda and reimbursement of expenses. The objection of the TPO on the issue of selection of M/s Alta Moda is extracted as under:

"Comments of the TPO:
In the Annual Report of the Alta Moda Garments, although it is mentioned at one place that assessee is in business of construction, but in the same breath in Director's Report its says "the company principally engaged to carry on the business of trading in high

fashion garments of various Italian brands and different kinds of ornaments, leather items, accessories etc."

4.6 Thus, it is evident that as far as issue of selection of M/s Alta Moda is concerned, the learned TPO has given his comment on the merit and, therefore, no violation of the finding of the Hon'ble Delhi High Court in the case of Manish Buildwell P Ltd. As far as second issue of reimbursement of expenses is concerned, the learned TPO has not given his comment on merit, which is evident from his comments reproduced by the Ld. CIT(A), which are extracted as under:

"Since the assessee could not provide these evidences at the time of TP proceeding, as assessee claims no sufficient time was given, the adjustment were made on these expenses. However, the invoices which the assessee has produced on this stage, could have been provided at the time of TP proceedings, as all these invoices are to be meant to be maintained at time of the Transfer Pricing study under Rule 10D."

4.7 On perusal of the above comments of the Learned TPO, we find that that there is no violation on the part of Ld CIT(A). He had duly forwarded all evidences for the comment of the Ld. TPO, but the Ld. TPO consciously did not give any comment on the evidences related to reimbursement of expenses. The Ld. CIT(A) can't be faulted in such circumstances for the inaction of the Ld TPO. In view of above facts and circumstances, we don't find any violation on the part of Ld. CIT(A) in admitting additional evidences under Rule 46A of the Rules. The ground no. 1 of the appeal is accordingly dismissed.

5. In ground no. 2, the Revenue has challenged exclusion of comparable M/s Alta Moda.

5.1 The facts in brief qua the issue in dispute are that the assessee reported following international transactions:

Nature of International Transaction	***Most Appropriated Method***	***Profit Level Indicator (PLI)***	***Tested Party's Margin***	***Comparables Margin***	***Value of International Transaction***
Purchase of Traded Goods	*Resale Price Method (RPM)*	*Gross Profit/Sales (GP/Sales)*	*45.11%*	*25.67%*	*91,580,453*
Purchase of fixed assets	*Comparable Uncontrolled Price Method ('CUP')*				*3,647,163*
Reimbursement of expenses paid	*CUP*				*87,887,042*

5.2 In support of claim that transaction of purchase of traded goods is at arms' length, the assessee chose Resale Price method (RPM) as the most appropriate method and taking the assessee as tested party, compared gross profit margin (45.11%) of the assessee with the average margin comparables including, foreign comparables companies. The learned TPO rejected the comparable selected by the assessee and selected comparable, namely, M/s. Alta Moda having gross profit ratio of 72.30%. The learned TPO accordingly proposed an adjustment of ₹ 7,24,81,076/- to the international transaction of purchase of traded goods. The Learned CIT(A) rejected the comparable M/s. Alta Moda observing as under:

> *"4.3.3 The appellant has submitted the following chart showing the cost of sales to sales ratio of M/s Alta Moda Garments Limited for F. Y. 2009-2010 and F. Y. 2008-2009.*
>
> *"Cost of sales to sales ratio of M/s Alta Moda Garments Limited is 1:6 in 2009 whereas it is 1:3 in next year 2010 i.e., drastic fall in Cost of Goods Sold (COGS) ratio as compared to the ratio with first*

year. Comparable calculation of the same for the F.Y.2008-2009 & F.Y.2009-2010 is detailed below for your reference.

Particulars	***F. Y. 2009-2010***		***F. Y. 2008-2009***	
Revenue				
Sales	*40,251,236.00*		*20,813,987.00*	
Other Incomes			*13,983.00*	
Closing Stock	*4,519,801.00*		*3,342,000.00*	
Total	*44,771,037.00*		*24,169,970.00*	
Expenditure				
Opening Stock	*3,342,000.00*		*4,306,125.00*	
Purchases				
	14,087,500.00		*2,250,869.00*	
Direct costs	-		*136,806.00*	
Franchise commission	*4,812,500.00*		-	
Total	*22,242,000.00*		*6,693,800.00*	
	Amount	*Ratio*	*Amount*	*Ratio*
Cost of goods sold to sales ratio (Before franchise commission)	*12,909,699*	*(32%) 1:3*	*3,351,800*	*(16%) 1:6*
Cost of goods sold to sales ratio (After franchise commission)	*17,722,199*	*(44%) 4:9*	*3,351,800*	*(16%) 1:6*

4.3.4 I have carefully gone through the order passed u/s 92CA(3), submission of the appellant and the remand report. The appellant has stated that the TPO had proposed the name of Alta Moda Garments Ltd as a comparable to the appellant on 28/1/2013 and the reply was to be given on 29/ 1/2013 the very next day. The TPO passed the order u/s 92CA on 29/1/2013 itself. The TPO did not give adequate time and was in a hurry to pass the said order in the case of the appellant company. The appellant has submitted that the search strategy was not provided by the TPO to the appellant, with respect to the selection of Alta Moda Garments Ltd as a comparable vide order sheet entry dated 28th January, 2013. It is also pertinent to note that with the search strategy and filters adopted by the TPO in show cause notice, only one comparable namely Kewal Kiran Clothing Limited was proposed. The audited accounts also reveals that Alta Moda Garments is into "multiple activities" of construction and textile industry whereas the appellant is in the business of exclusively selling "Hermes" branded products which consists of silk and textile products, leather products, ready to wear accessories, perfumes, watches, tableware and other products. The appellant

has submitted that since Alta Model Garments Ltd. is in the multiple businesses, the segment- wise result is not available. The appellant has also argued that the TPO has disregarded FAR profile of the appellant Company which was completely different from Alta Moda. Alta Moda Garment is working on the franchise model while the appellant is in retail business. The appellant has stated that the financial statements of Alta Moda Garments Limited for the F.Y. 2008-09 were not available in public domain till 30th November 2009 as the financials were audited & signed by the statutory auditors on 02.12.2009 and the Annual General Meeting (AGM) of the company was held on 29th December, 2009. In the present case, the appellant has completed its transfer pricing study on 19th September 2009 and based on that had filed the report in form 3CEB on 29th September 2009, The P & L A/c of Alta Moda Garments reveals that an amount of Rs.7,06,745/- has been debited as custom duty separately, which has not been included in purchases for the purpose of computing G.P. The appellant has further submitted that in the case of the appellant company, the custom duty of Rs.2,51,75,641 is included in purchases for the purposes of determining the GP. The appellant has argued that for the purpose of making the GP of the appellant company comparable with M/s Alta Moda Garments, percentage of custom duty i.e. 36.51% should be added to the GP margin of 45.11% declared by the appellant company. Thus the adjusted G.P. margin comes to 81.62%, which is higher than the GP margin of comparable company, Alta Moda Garments i.e. 72.3%."

5.3 Further, the Ld. CIT(A) accepted the five foreign comparable companies and their airthmatic mean gross profit margin (29.86%) being less than the gross profit margin of the assessee (45.11%), the Ld. CIT(A) deleted the transfer pricing adjustment of ₹ 7,24,81,076/-.

5.4 Before us, the Learned DR submitted that the Ld. CIT(A) has rejected the comparable by making frivolous claims that M/s. Alta Moda is a brand and trademark holder and is not into retailing business and following franchise model. According to him, M/s Alta Moda has paid Frenchise commission in subsequent assessment year and, therefore, in the year under consideration it cannot be rejected on the ground of different business model.

5.5 The Learned Counsel of the assessee, on the other hand, relied on the order of the Ld. CIT(A). He also referred to the annual report of the company filed in paper-book to support that the company was engaged in construction and therefore it is functionally dissimilar to the assessee. He emphasized that the company also needs to be excluded on the ground of different business model i.e. franchise model as compared to retail business by the assessee though its own shop. He also submitted that while computing the margin of M/s Alta Moda the custom duty paid for import of product has not been considered. According to him, if the custom duty paid by the assessee is excluded, assessee's gross profit margin works out to 81.62% which is higher than the gross profit margin of M/s Alta Moda, consequently no transfer pricing adjustment would be required in the case of the assessee with reference to international transaction of purchase of traded goods.

5.6 We have heard rival submission of the parties and perused the relevant material on record. As far as contention of the learned Counsel that the company, M/s Alta Moda is engaged in construction, we find that under the clause of general information (schedule -13) to the significant accounting policies and notes of account (page -199 of paperbook-1), it is reported as under:

> *"The company is principally engaged to carry on the business of constructions. The financial statements are approved and authorised for issue in accordance with resolution of the Board of Directors on 02/12/2009.*

5.7 However, we note that under Director's Report (page 183 of APB-1), the principal activity of the company is mentioned as under:

> *"Principal activity*
>
> *the company is primarily engaged to carry on the business of trading in high fashion garments of various Italian Branson different kinds of ornaments, leather items, assessee is etc."*

5.8 In view of the above, in our opinion, the remark of business of construction may be with reference to construction of the store, however, for verifying this fact beyond doubt, we feel it appropriate to set aside the finding of the Learned CIT(A) on the issue in dispute and restore the matter back to the AO/TPO for ascertaining the functions of the company during relevant year from the company itself using authority under section 133(6) of the Act.

5.9 Regarding the issue as to whether the company is in retailing through its own shop or though 'Franchise' model is concerned, on perusal of chart of financial statement of the company for financial year 2008-09 (i.e. assessment year under consideration) available in impugned order, we find that in financial year 2008-09, no franchise commission has been shown as received. Further, on page 183 of the paperbook-1, in Director's Report, under the head 'review of the operations' it is mentioned as under:

> *"Alta Moda commenced its operations at its flagship store in Hyderabad on 16th Feb., 2008. The store was received very well and*

has clocked reasonably strong sales in the last one year. The second outlet was opened in Chennai on 24th April, 2008 on a franchisee basis. The Company had also started the concept of Shop N Shop, having established two more outlets in Hyderabad. All the retail outlets are located in up market areas. The company has achieved a top line of Rs.208 lakhs for the financial year ending 31st March, 2009."

5.10 Thus, the company has its own store and during the relevant year opened a franchisees store also, but no income from franchise commission has been shown in the year under consideration therefore there is no impact of franchise store on the gross profit margin reported in financial statement of the company in the year under consideration. Thus, it cannot be held as functionally different on the ground of different business model as compared to the assessee.

5.11 The comment of the Ld. CIT(A) that the company M/s Alta Moda Garments Ltd. has not filed its annual return for financial year 2009-10 with Register of Companies, is not related to the year under consideration and pertains to subsequent to the financial year under consideration and, therefore, it cannot be presumed that fraudulent activities might have been adopted by the company for inflating its profit in the year under consideration. Further, the comment of the Ld. CIT(A) that profit of the company in subsequent year has dropped to 50.32% from 72.39% in the year under consideration and, therefore, profit of the company is extremely volatile, is also not relevant because in the transfer pricing comparability has to be considered in relevant year and not with subsequent years. The Ld. CIT(A) has concluded his finding merely on the presumption that assessee might have inflated its profit in the initial year to come out for

public offering of shares. Reliance placed by the Ld. CIT(A) on unfounded information without any cogent evidence is not justified.

5.12 However, as far as the ground that while computing margin of the Company, the custom duty paid on import of products has been excluded, is concerned, we are of the opinion that for comparability gross profit margin of both the company and the assessee has to be computed in similar manner. Both in the case of assessee as well as in the comparable company treatment of the custom duty has to be given in the similar manner. If the custom duty is part of the trading account then same is to be treated in identical manner while computing the gross profit margin of the company as well as the assessee. Since we have already rendered the issue of verifying the function of the company to the Ld AO/TPO, so if the company is found to functionally similar to the assessee, the Ld AO/TPO, shall compute the margin of the company in view of our direction above.

5.13 The ground No. 2 of the appeal of the Revenue is accordingly allowed for the statistical purposes.

6. In ground No. 3, the Revenue has challenged adjustment of ₹ 5,32,25,677/- made to the international transaction of reimbursement of expenses to Associated Enterprises (AEs).

6.1 The facts in brief qua the issue in dispute are that the assessee has shown reimbursement of expenses paid at Rs.8,78,87,042/-, towards cost reimbursement to its AEs. According to the assessee, these expenses were incurred by the Associated Enterprises towards third parties, which have been

reimbursed by the assessee on the cost to cost basis. In view of the assessee, these intra-group transaction of reimbursement are on cost to cost basis, and thus at arm's-length. The assessee submitted that reimbursement of the expenses broadly include two types of expenses. Firstly, the expenses in the nature of hotel rent, salary, fees, travel expenses, courier charges, office stationary etc. which are categorized as revenue expenses and debited to the profit and loss account under various heads. Secondly, expenses in the nature of the capital expenditure, such as laptop purchased, furniture and air-conditioner purchase etc. which have been capitalized by adding to the fixed asset accounts. The assessee filed invoices/debit notes of the above expenses on sample basis. The learned TPO, however, observed that the assessee did not provide breakup of the reimbursement expenses and sample invoices provided were either not relevant for the period under consideration, without any reconciliation with its audited financials and were in the language other than English, making it difficult to understand the particulars and necessity of the transactions/invoices. He also noted that the assessee had not provided details or invoices of the expenses under head 'hotel rent', 'salary', 'fees', 'courier charges' etc. In view of the observation the learned TPO accepted expenses to the extent of ₹ 3,46,61,365/-and for the balance, the learned TPO observed that the assessee failed to demonstrate the genuineness, existence and/or the tangible benefit derived from such expenses. The learned TPO also observed that no cost benefit analysis of the expenses was provided. She concluded that the assessee failed to provide any credible basis regarding necessity and genuineness of

the payment and consequently the CUP of those intra group services was held to be at ₹ 3,46,61,365/- and adjustment of ₹ 5,32,25,677/- was proposed.

6.2 Before the Ld. CIT(A) the assessee claimed to have produced evidence in support of remaining expenses also. The Ld. CIT(A) forwarded those evidences to the learned TPO, however the learned TPO simply objected to the admission of the additional evidence and no comment was given on the merit. The Ld. CIT(A) after considering the submission and rejoinder of the assessee on the remand report, deleted the transfer pricing adjustment observing as under:

> *"4.5.5 In the present case the details of expenses with bill/vouchers were requisitioned by the TPO vide show cause notice dated 17/01/2013, which was received by the appellant through email on 19/01/2013. Due to paucity of time, the appellant had submitted sample invoices of the transactions before the TPO on 25/01/2013. The TPO vide her order dated 29/1/2013 u/s 92CA(3) had disallowed the amount of Rs.5,32,25,677 out of the total reimbursement expenses of Rs.8,78,87,042 to its AE. The remaining amount of Rs.3,46,61,365/- had been allowed by the TPO. The said amount of Rs.5,32,25,677/- had been disallowed by the TPO on the ground that documents submitted by the appellant company were inadequate and the need for such of expenditure shown to be incurred by AEs had not been established. The reimbursement expenditure consists of (i) The Leasehold Improvement of Rs 53,810,549/-, (ii) Purchase of Rs 22,355,686/-, (iii) Administrative, Selling & Other Expenses of Rs 4,749,927/-, (iv) Fixed Rent & Rates of Rs 3,810,585/-, (v) Communication Expenses of Rs 1,785,665/-, (vi) Furniture & Fixtures of Rs 762,920/-, (vii) Wages & Allowances of Rs 566,830/-, (viii) Miscellaneous Expenses of Rs 4,539/- and (x) Computers of s 40,500/-. The appellant has also stated that all the relevant details of Rs.8,78,87,042/- had already been filed by the appellant company vide its reply dated 12/4/2012 and 26/4/2012 (Page No. 167 to 190 of the Paper Book No.l) as per the earlier requisition of the TPO. The said details were not considered by the TPO while passing order u/s 92CA(3). The appellant has stated that the disallowance of Rs.38,10,585/- on account of fixed rent 8s rates relates the payment to the landlord of the premises of the Oberoi Hotel. The appellant has stated that the disallowance of Rs.3,62,39,803/- out of reimbursement relates to capital expenditure*

such as Leasehold Improvement expenditure. The appellant has also stated that the Purchases of Rs.58,82,335/- included in reimbursement of expenses were initial purchases due to start-up operations and were on cost-to-cost basis without any markup. During the course of the appellate proceedings the appellant has submitted Paper Book-4 and Paper Book-1 containing the copies of invoices with respect to reimbursement of expenses. All the paper books were forwarded to the TPO for his comments. In the remand report the TPO has not made any adverse comment except making the observation that nofresh evidence should be admitted under Rule 46A. At Para4.1.4 of this order above, I have already held the additional evidence is required to be admitted as per the provision of Rule 46A and alsoin the interest of justice. Accordingly, the additional evidence has been admitted under Rule 46A in the instant case.

4.5.6The appellant has explained that the appellant company was formed in May 2007 and started its commercial operation in the financial year 2008-09 onwards (1/9/2008). During the entire period of 2007-2008, the appellant company did not begin its operations or undertake any business since the appellant company was engaged in the constructions of its showroom from where the goods were proposed to be sold. The appellant company had set up its business operations in India through a retail showroom at the Oberoi Hotel, New Delhi which was under construction from May 2007 to May 2008. The appellant has further explained that during the said period, the paid up capital of the company was only Rs. 1,00,000/- and it had to build and set up its show room at the Oberoi Hotel, New Delhi. The appellant company during the said period had to renovate the Oberoi Hotel premises completely since bare shell premises had been provided to it by the Hotel. For this purpose and due to paucity of funds, the AE(s) had paid to various third parties on behalf of the appellant company, which was duly reimbursed to the AEs on cost to cost basis without any mark-up or any element of profit. The TPO has disallowed the amount of Rs 5,32,25,677/- out of the total reimbursement of Rs 8,78,87,042/- on the ground that the appellant did not submit the full details. During the course of the appellate proceedings the appellant has submitted Paper Book-4 and Paper Book-1 containing the copies of all the invoices with respect to reimbursement of expenses. I have perused the details submitted by the appellant company. In the present case, the AEs which had made payments to third parties on behalf of the appellant company due to paucity of funds in the initial year of operation were duly reimbursed by the appellant company on cost to cost basis without any mark-up. Considering the facts of the case I am of the view that the TPO has wrongly determined the TP adjustment of Rs.5,32,25,677/- out of reimbursement expenses of Rs.8,78,87,042/- paid to its AE. Accordingly, the AO/TPO is directed

to delete the addition of Rs 5,32,25,677/- on account of the TP adjustment out of reimbursements expenses. This issue is decided in favour of the appellant."

6.3 Before us, the learned DR submitted that despite show cause notice dated 17/01/2013 to provide details of head-wise reimbursement of expenses and its purpose issued by the learned TPO, only sample bills were furnished by the assessee and therefore learned TPO is justified in proposing the adjustment.

6.4 The learned Counsel of the assessee, on the other hand, relied on the order of the Learned CIT(A) and submitted that details of entire expenditure ₹ 8,78,87,042/- was furnished before the Learned CIT(A), who forwarded those details including bills/invoices of the expenses for his/her comments. The Learned Counsel also referred to the copy of invoices of those expenses filed in the form of paper-book 2. According to him, the sample copies of bills were filed before the learned TPO during transfer pricing proceeding and he did not insist for filing bills/ invoice of all the expenses, otherwise the assessee would have filed all the details before him.

6.5 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. There is no dispute on the fact that only sample bills of expenses reimbursed to the AEs were produced before the learned TPO during original transfer pricing proceedings and therefore the learned TPO proposed adjustment in respect of the expenses for which bills/invoices were not produced before her. During appellate proceedings before the Learned CIT(A), the assessee has produced entire details of expenses reimbursed along with

bills/invoices as additional evidence, which were forwarded by the Learned CIT(A), to the learned TPO for his comments. The Learned TPO objected to the admission of the additional evidences and abstained from giving his comments on the evidences of expenses, which shows that he was unable to point out any defect in the evidences of the assessee. Before us, the Ld DR has also not pointed out any defect or irregularity in analysis of the CIT(A) on the issue of expenses reimbursed. In such circumstances, no useful purpose will be served by sending the matter back to Ld. TPO. We, accordingly reject the arguments of the Ld. DR and dismiss the ground No. 3 of the appeal.

6.6 In result, the appeal of the Revenue is allowed partly for statistical purpose.

Order pronounced in the open court on 23rd February, 2021

Sd/-	***Sd/-***
(AMIT SHUKLA)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 23rd February, 2021.
RK/-(DTDS)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi