आयकर अपीलीय अधिकरण "के" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI

माननीय श्री विकास अवस्थी**,** न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI VIKAS AWASTHY, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. No.5157/Mum/2016
(**निर्धारण वर्ष /** Assessment Year: 2010-11)

Bristol-Myers Squibb India Pvt. Ltd. Indiabulls Finance Centre 6th Floor, Tower-1, Senapati Bapat Marg Elphinstone West, Mumbai-400 013	**बनाम**/ Vs.	**DCIT-6(1)** Mumbai.
स्थायीलेखासं./जीआइआरसं./ PAN/GIR No. **AACCB-4313-Q**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकरअपील सं./ I.T.A. No.5035Mum/2016
(**निर्धारण वर्ष /** Assessment Year: 2010-11)

DCIT-6(1) Mumbai.	**बनाम**/ Vs.	**Bristol-Myers Squibb India Pvt. Ltd.** Indiabulls Finance Centre 6th Floor, Tower-1, Senapati Bapat Marg Elphinstone West, Mumbai-400 013
स्थायीलेखासं./जीआइआरसं./ PAN/GIR No. **AACCB-4313-Q**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Jehangir Mistri-Ld. Sr. Counsel
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri Sunil Deshpande & Shri Sushil Kumar Mishra-Ld.DRs

सुनवाईकीतारीख**/ Date of Hearing**	:	09/06/2021
घोषणाकीतारीख / **Date of Pronouncement**	:	01/09/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member): -

1.1 Aforesaid cross-appeals for Assessment Year (AY) 2010-11 arises out of the order of Ld. Commissioner of Income Tax (Appeals)-55, Mumbai [CIT(A)] dated 28/04/2016 in the matter of assessment framed by Ld. Assessing Officer u/s 143(3) r.w.s. 144C(3) on 16/04/2014 pursuant to the directions of Ld. Transfer Pricing Officer-I(8) (TPO) vide order dated 29/01/2014.

1.2 The grounds raised by the assessee read as under: -

Based on the facts and circumstances of the case, the Appellant respectfully prefers an appeal under section 253 of the Income-tax Act, 1961 ('the Act') against the order dated April 28, 2016 (received on June 13, 2016) passed by the Commissioner of Income tax (Appeals)-55 ['CIT(A)'].

1. Under the facts and circumstances of the case and in law, the learned AO/CIT(A) erred in making an upward adjustment of Rs.164,115,028 in determining the Arm's Length Price ("ALP") of the international transactions entered into by the Appellant pertaining to purchase of formulations and incurring of significant Advertisement, Marketing and Sales Promotion Expenses ("AMP").

2. Under the facts and circumstances of the case and in law, the learned AO/CIT(A) erred in not giving a notice to the Appellant conveying grounds on which adjustment is proposed to be made to the income of the Appellant which is against the principle of natural justice.

3. Transfer pricing adjustment in respect of purchase of formulations: Rs. 139,929,027

3.1 Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in not considering the functions performed by the Appellant in a correct perspective while rejecting Resale Price Method ("RPM") selected by the Appellant and applying Transactional Net Margin Method ("TNMM") as the Most Appropriate Method ("MAM").

3.2 Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in not considering the submissions of the Appellant in relation to use of adjusted Gross Profit Margin ("GPM") for applying RPM as the MAM.

3.3 Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in considering the selling and distribution expenses incurred as a value addition by the Appellant to the product and thus applying TNMM as MAM.

3.4 Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in relating the losses incurred by the Appellant to the pricing policy of the Appellant not being at arm's length.

3.5 Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in stating that the Appellant performed the function of guaranteeing the goods, and borne warranty risk in respect of distribution of pharmaceuticals.

4. Transfer Pricing adjustment in respect of incurring of significant AMP expenses: Rs. 24,186,002

4.1. Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in not appreciating that the advertisement and sales promotion expenses incurred by the Appellant in India cannot be characterized as an international transaction as per section 92B of the Act, so as to invoke the provisions of section 92 of the Act.

4.2. Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in not considering that the advertisement and sales promotion expenses incurred by the Appellant are in the nature of selling expenses.

4.3. Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in not appreciating that the selling expenses, unilaterally incurred by the Appellant, could not be regarded as a 'transaction' under section 92F of the Act in the absence of any understanding / arrangement between the Appellant and the Associated Enterprises ("AEs").

4.4. Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred not appreciating that in the absence of any understanding / arrangement between the Appellant and the AE, the AE was under no obligation to remunerate the Appellant for the advertisement and sales promotion expenses incurred for sale of its products to third parties.

4.5. Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in not providing any direct or indirect evidence of incurring AMP expenses by the Appellant or rendering any services under the head AMP for the benefit of the AE or on behalf of the AE.

4.6. Without prejudice to the above grounds, that on the facts and circumstances of the case and in law the learned AO/ CIT(A) erred in concluding that any perceived/notional indirect benefit to the AE due to incurrence to AMP expenses as an international transaction.

4.7 Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in linking incurrence of alleged AMP expenses to the development of brands owned by the AE.

4.8. Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in concluding that there was an arrangement between the Appellant and its AE to carry out activities which resulted in creating brand awareness.

5. Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in questioning the commercial expediency of the Appellant in doing business of distribution of pharmaceuticals in India.

6. Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in stating that the Appellant is incurring legal expenses in relation to patent violations cases which are being fought in India.

7. Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in segregating purchase of formulations and the alleged AMP expenses and in undertaking a separate transfer pricing adjustment for both the transactions.

8. Under the facts and circumstances of the case and in law, the learned AO/ CIT(A) erred in considering only judicial precedents which were in favour of the Revenue and failed to distinguish the judicial precedents (for RPM and AMP expenses) placed on record by the Appellant which were in favour of the Appellant.

9. Disallowance of expenses incurred on conference & seminar and sales promotion under section 37(1) of the Act

9.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the disallowance made by the learned AO ignoring the fact that CBDT Circular No. 5 of 2012 (the CBDT Circular) was issued on August 1, 2012 and hence, shall be applicable from AY 2013-14 only and not for the year under appeal i.e. AY 2010-11.

9.2 Without prejudice to above, on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the disallowance made by the learned AO in respect of conference and seminar expenses amounting to INR 70,19,788 and sales promotion expenses amounting to INR 24,93,086, claimed by the Appellant under section 37(1) of the Act

without appreciating the fact that same are not in the nature of medical freebies as defined under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the MCI Regulations).

9.3 Without prejudice to above, on the facts and in the circumstances of the case and in **law, the** learned CIT(A) erred in upholding the disallowance made by the learned AO ignoring the fact that aforesaid expenses are genuine business expenses incurred with only purpose of creating more awareness about its products and not to provide any personal benefits to the doctors / medical practitioners.

9.4 **Without prejudice to above,** on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the disallowance made by the learned AO disregarding that the MCI Regulations provides for Code of Conduct for the doctors and the professional associations of doctors in their relationship with the industry and hence, the said Regulations apply only to medical practitioners and not to pharmaceutical and allied healthcare industry.

9.5 **Without prejudice to above,** on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the disallowance made by the learned AO not considering the fact that the Medical Council of India has not questioned the current practice followed or expenses incurred by the Appellant and hence, the current practice cannot be treated as constituting violation of the MCI Regulations.

9.6 The Appellant prays that the said disallowance under section 37(1) of the Act for expenses incurred on conferences & seminar amounting to INR 70,19,788 and sales promotion expenses amounting to INR 24,93,086 may please be deleted.

As evident, the assessee is aggrieved by confirmation of certain Transfer Pricing Adjustment as well as by confirmation of addition on account of sales promotion expenses incurred on conferences and seminars.

1.3 The grounds raised by the revenue read as under: -

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) is right in deleting M/s Priya International Ltd. comparable when the same was accepted as comparable in AY 2009-10.
2. On the facts and circumstances of the case and in law, the Ld. CIT(A) is justified inr ejecting M/s Priya International Ltd. as a comparable on the ground that it was dealing in petroleum product as against pharmaceuticals by the assessee, although the assessee had not raised this as a ground.
3. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not allowing mark up on AMP expenditure for benchmarking this international transaction after having accepted that there is an arrangement of AMP between AE and the assessee in respect of this transaction.
4. Alternatively, on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not following the aggregate approach for benchmarking the transaction by finding the suitable comparables with similar level of marketing functions, in view of decision of Delhi High Court in the case of Sony India.

1.4 The assessee being resident corporate assessee is stated to be engaged in pharmaceutical products, healthcare products, life saving drugs and nutritional products. The assessee engages as distributor of oncology products in India. Bristol-Mayors Squibb Company (Bristol US) is stated to be the ultimate holding company of the assessee.

2. The Ld. Sr. Counsel, Shri J.D. Mistri, at the outset, placed on record ground-wise chart to submit that substantial issues are covered by earlier order of the Tribunal in assessee's own case for AY 2009-10, ITA No.1969/Mum/2014 order dated 28/08/2019. The copy of the order has been placed on record. The Ld. Sr. Counsel also submitted that few issues are covered by various decisions of the Tribunal as well as Hon'ble High Courts as tabulated in the chart. It was submitted that facts are pari-materia the same in this year. The Ld. DR, on the other hand, supported the assessment framed by Ld. AO.

3. We have carefully heard the rival submissions and perused relevant material on record including ground-wise chart as placed before us. Our adjudication on the subject matter of the appeals would be as given in succeeding paragraphs.

Assessment Proceedings

4.1 Since the assessee carried out certain international transactions with its Associated Enterprises (AE), the same were referred to Ld. TPO u/s 92CA (1) for determination of Arm's Length Price (ALP). The subject matter of dispute before us is with respect to purchase of formulations by the assessee from its AE namely Bristol US. The quantum of purchases

aggregated to Rs.3466.79 Lacs. The products were purchased for distribution in India. The assessee benchmarked the transactions using Resale Price Method (RPM). As per functional analysis, it was submitted that the assessee act as a distributor buying goods for resale in the domestic market without adding significant value to the products. The assessee reflected Gross Profit (GP) margin of 65% as against mean margin of 36.40% reflected by the comparable entities. The adjusted GP margins after excluding advertisement, marketing and distribution costs were also stated to be higher than adjusted mean margin of comparable entities. Thus, no adjustment was proposed by the assessee in its TP study report.

4.2 However, Ld. TPO proposed to apply Transactional Net margin Method (TNMM) which was objected to by the assessee on the ground that transaction of import of finished goods would not affect the operating margins earned by the assessee. It only impacts the gross margins since the import would only affect the cost of goods sold. However, the same could not convince Ld. TPO who held that TNMM would be the most appropriate method (MAM) to benchmark the transactions. The Profit Level Indicator (PLI) was taken as operating profit to operating revenue which in assessee's case worked out to -11.33% as pitied against PLI of 6.29% reflected by 6 comparable entities which have been tabulated in para-20 of Ld. TPO's order. Applying the same, Ld. TPO worked out TP adjustment of Rs.1703. 99 Lacs as tabulated in para-21.5 of the order.

4.3 Another adjustment was on account of Advertisement, Marketing and Promotion expenses (AMP). It was noted by Ld. TPO that the Bristol Myers

Squibb group was one of the largest integrated health and personal care companies in the world and a pharmaceutical leader in anti-cancer treatments and cardiovascular therapies with a strong position in anti-infective area. The group, through its divisions and subsidiaries, is engaged in discovery, development, licensing, manufacturing, marketing, distribution and sale of pharmaceutical products. The assessee received strategic input from BMS group and central marketing unit guides the assessee in adopting global marketing strategies to meet local requirement. Thus, the assessee receives tangible and intangible support from the group for conducting advertisement, marketing and promotion activities. It was clear that the assessee did not own any intangibles and trademarks and the same were owned by Bristol US. The assessee has a distribution network in order to ensure timely delivery to customers in the market. It was observed that the assessee incurred AMP expenses of Rs.1317.81 Lacs on sale of Rs.9606.77 Lacs which worked out to 13.72% of total sales whereas the mean AMP expenses incurred by four comparable entities were 8.54%. Thus, the expenses could not be accepted to be at Arm's Length Price (ALP). In other words, Ld. TPO proposed to apply 'Bright Line Test' Method to benchmark these transactions.

4.4 The assessee refuted the allegation by submitting that the expenses were in the nature of selling expenses to create awareness of recently introduced four drugs namely Onglyza, Perfalgan, Orencia and Ixempra, The expenses so incurred were not in the nature of international transactions since no payment was made to AE. The expenditure include advertisement, sponsorship of conferences in relation to products sold by

the assessee, honorarium paid to doctors for medical educational events, travel, banquet and accommodation expenses for attending conferences, purchase of stationery bearing the trademark of products being sold by the assessee etc. Pertinently, the expenses were paid to third parties. The assessee was not the owner of brand but it was only responsible to sell the products in individual capacity. No royalty was being paid to AE for use of brand. The expenses incurred were for the benefit of assessee and assessee only and no benefit was derived by AE. It was in the business interest of the assessee to incur these expenses. The contention that expenses would lead to marketing intangibles had no basis.

However, Ld. TPO formed an opinion that the assessee incurred excessive AMP expenses. It was providing advertising services to AE and therefore, the transactions were to be suitably benchmarked. The assessee should also earn a mark-up at the rate which would be earned / charged by independent advertising service providing companies. The transaction was international transactions as supported by the decision of Special bench of Delhi Tribunal in **M/s LG Electronics India Pvt. Ltd. V/s ACIT (29 Taxmann.com 300)** which has approved the application of 'Bright Line Test' to benchmark such transactions. Finally, adopting benchmarking rate of 8.54%, the excess expenditure was identified as Rs.497.40 Lacs which were to be further marked-up by 12.25%. Finally, AMP adjustment was computed at Rs.558.33 Lacs. Since this adjustment was separately made, Transfer Pricing (TP) adjustment under trading segment was to be suitably reduced after excluding AMP expenditure. Accordingly, TP adjustment in trading segment was revised to Rs.1206.59 Lacs. Both these adjustments

were proposed in order u/s 92CA(3). These adjustments were ultimately incorporated by Ld. AO in assessment order dated 16/04/2014.

4.5 Another addition made in assessment order was disallowance of Medical freebies u/s 37(1). The same stem from the fact that the assessee incurred expenditure on conferences and seminars which were alleged to be in violation of regulations issued by Medical Council of India (MCI). The assessee controvert the same by submitting that the assessee do not undertake any direct advertising of the products rather it create awareness of the products, as per normal industry practices, by conducting seminars and conferences for doctors, patients and hospitals. There was no violation of Indian Medical Council (Professional conduct, etiquette and ethics) Regulations, 2002. More so, these regulations were applicable only to medical practitioners since the jurisdiction of Medical Council of India extended only to medical practitioners and do not apply to pharmaceutical and allied healthcare companies. Alternatively, the regulations were applicable only from 14/12/2009 and therefore, no such disallowance could be made for expenses incurred prior to that date. However, Ld. AO disallowed expenditure of Rs.306.88 Lacs u/s 37(1) and added the same to the income of the assessee. The nature of these expenses could be tabulated as under: -

No.	**Nature of Expenses**	**Amount (Rs.)**
1.	Conference Expenses	Rs.202.00 Lacs
2.	Promotional Expenses	Rs.60.34 Lacs
3.	Honorarium Expenses	Rs.33.85 Lacs
4.	Conference and Seminar Expenses incurred for Doctors	Rs.10.69 Lacs
	Total	**Rs.306.88 Lacs**

Appellate Proceedings

5.1 Aggrieved by above adjustments / disallowances, the assessee preferred further appeal before Ld. CIT(A) which culminated into impugned order dated 28/04/2016.

5.2 The Ld. CIT(A) concluded that though the assessee earned high GP margins but it was incurring losses year after year. The same would be explained by the fact that the assessee was incurring AMP expenditure and also rendering after sales services. The imports were made at prices which resulted into commercial losses for the assessee. Therefore, RPM method was not a suitable method for benchmarking the transaction. This method would not reflect true state of commercial affairs vis-à-vis the business of distribution of pharmaceuticals in India especially in view of the fact that the assessee introduced new drugs in India which require intensive marketing which has absorbed high GP margins of the assessee, Therefore, TNMM as adopted by Ld. TPO was appropriate method for benchmarking. Having said so, Ld.TPO was directed to exclude one comparable entity namely M/s Priya International Limited which computing the adjustment since that entity was held to be non-comparable.

5.3 Regarding AMP adjustment, Ld. CIT(A) observed that these expenses were incurred directly or indirectly for promoting the sale of four new drugs and other old drugs manufactured by assessee's AE abroad and the expenditure was done to create awareness about the pharmaceutical formulations among the doctors and medical fraternity like hospitals and doctors to first make them familiar about the names of new drugs, their

usefulness in curing the diseases and their availability in India. The assessee conducted seminars and functions and sponsored various programs where the utility of pharmaceutical formulations were explained by the assessee and in the process, expenses on travel, accommodation and other charges, freebies etc. were incurred by the assessee. The sponsorship seminars and programs served the purpose of popularizing the name of company as well its products amongst doctors.

5.4 The Ld. CIT(A), on page 40 of the order, observed that it appears that there was prima facie arrangement between the AE controlling the affairs of the assessee that assessee's entire advertising program and marketing will be conducted as per the directions of the AE and it was done accordingly. Right from the time of import of drug formulation in bulk, packaging these drugs in small packs as vials as per specified details and names, giving free samples, conducting seminars for doctors and hospitals and bearing all the travel, lodging and boarding expenses, putting up stalls at exhibitions and printing relevant drug formulations, literature etc., assessee's AE had total control over the mechanism to be followed since it owned the brand name as well as drug formulation patents for all the drugs which was evident from legal battles for brand name between the AE and various other parties. Therefore, there was an arrangement of brand creation and awareness and the transactions were international transactions which were rightly benchmarked by Ld. TPO. However, a comparable entity namely M/s Priya International Ltd could not be held to be comparable entity since it was engaged in the business of petro products. Further, separate mark-up would not be required. At the same time, the TP adjustment on trading

segment would require upward revision in the light of this adjudication. For the same, appropriate directions were issued to lower authorities. In other words, the ground was partly allowed.

5.5 Regarding disallowance u/s 37(1) relating to Medical Freebies, it was observed that the expenditure fall within the purview of Medical Council Regulations applicable to Medical Practitioners prohibiting them from accepting gifts / benefits from pharma companies. What was illegal for recipient would also be illegal for the giver of such benefits. Honorarium paid to doctors for giving lectures etc. would not be covered by such rules and would thus be excluded while making disallowance. However, other expenses would fall under the Medical Council Rules and therefore, any such expenses incurred after 14/12/2009 was required to be disallowed u/s 37(1). In other words, the ground was partly allowed.

5.6 Aggrieved, the assessee as well as revenue is in further appeal before us.

Our findings and Adjudication

6. First we take up the issue of Transfer Pricing (TP) adjustment in trading segment. It could be seen that the assessee has adopted RPM method as most appropriate method while benchmarking the transactions. Using this method, the assessee's margins have been shown to be higher than mean margins of comparable entities. However, Ld. TPO has rejected the method and adopted TNMM as the most suitable method and proposed TP adjustment in the order. The Ld.CIT(A) while upholding the action of Ld. TPO has directed for exclusion of one comparable entity i.e. M/s Priya

International Ltd. since that entity has been held to be non-comparable entity.

7. We find that, as rightly pointed out by Ld. Sr. Counsel, the issue of adoption of Most Appropriate Method came up before this Tribunal in assessee's own case for AY 2009-10 vide ITA No. 1969/Mum/2014 order dated 28/08/2019 wherein the bench, in para-11, upheld the adoption of RPM as MAM by observing as under: -

> 11. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. Admittedly, the assessee is engaged in the business of importing formulations from its AEs and distributing them to unrelated parties in India. Apart therefrom, it was also engaged in providing coordination and back office support services to its AEs viz. Bristol Myers Squibb Company, USA. As observed by us hereinabove, the TPO had proposed TP adjustment of Rs.10,31,20,379/- only as regards the purchase of formulations (trading) by the assessee from its AEs. The aforesaid TP adjustment was upheld by the DRP vide its order passed under Sec.144C(5), dated 20.12.2013. As observed by us hereinabove, the assessee had in its TP study report benchmarked the aforesaid transactions of purchase of formulations from its AE by adopting resale price method (RPM) as the most appropriate method. The core controversy involved in the present appeal hinges around the view taken by the lower authorities that RPM adopted by the assessee for benchmarking its international transactions, in the absence of complete information about business profile and financial data of the comparables selected by the assessee could not be accepted as the most appropriate method. As is discernible from the order of the TPO, he had after rejecting RPM adopted TNMM at entity level as the most appropriate method for benchmarking the international transactions of the assessee. In fact, the TPO while rejecting the RPM had observed that as the amount of the resale price margin would be influenced by the level of activities performed by the reseller, therefore, the functions performed, which affects the resale price margin should either be similar or it should be possible to make adjustments for such differences. Also, the TPO after rejecting the RPM method had declined to accept 4 comparables (out of 6 comparables) selected by the assessee, for the reason, that they had a different year ending. It was observed by the TPO that as per Rule 10B(4) the companies whose accounts are prepared for the same period are most suitable for comparison than the companies whose accounts cover a different period. On the basis of his aforesaid deliberations, the TPO computed the ALP as per the TNMM after adopting operating profit/operating revenue as the PLI by

confining himself to two comparables (out of 6 comparables) selected by the assessee, namely (i) M/s Om Chemical Industries ltd.; and (ii) M/s Priya International ltd. We find that the DRP while disposing off the objections of the assessee as regards the rejection of the comparables did not find any infirmity in the view taken by the TPO, and concurred with his view that as per Rule 10B(4) companies having a different year ending could not have been selected as comparables. Also, the specific claim of the assessee that one of the comparable viz. M/s Daga Global Chemicals ltd. was erroneously rejected by the TPO on the ground that it had a different year ending, despite the fact that the latters financials clearly revealed that it had a similar year ending on 31.03.2009, had not found favour with the DRP. It was observed by the DRP, that the said company viz. M/s Daga Global Chemical Ltd could not be selected as a comparable for three reasons viz. (i) that, the company had about 50% purchases from imports in respect of trading goods whereas the assessee has 100%, imports from its AE; (ii) that, the company was into trading in bulk chemicals and solvents whereas the assessee was into ready to sell/use pharma products; and (iii) that, the company had subsidiaries in Dubai & China. Further, as had been observed by us hereinabove, the DRP also upheld the rejection of segmentation of the distribution segment by the assessee into two parts viz. (i) Pharma division; and (ii) Mead Johnson division.

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

"Determination of arm's length price under section 92C.

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

(a) xxxxxxxx

(b) resale price method, by which-

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

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

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

(iv) the price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between

the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;
(v) the adjusted price arrived at under sub-clause (iv) is taken to be an arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise."

As is discernible from a perusal of Rule 10B(1)(b) of the Income Tax Rules, 1962, it can safely be gathered that RPM is the best suited method for determining the ALP of an international transaction, in a case where the goods purchased by an assessee from its AE are thereafter resold without any value addition to unrelated parties. Our aforesaid view is supported by the order of the coordinate benches of the Tribunal viz. **(i) M/s Videojet Technologies India Pvt. Ltd. Vs. ACIT, Circle-10(3), Mumbai (ITA No. 6956/Mum/2012, dated 28.05.2019; (ii) Burberry India Pvt. ltd. Vs. ACIT, Circle-5(1), new Delhi ITA No.758/Del/2017, dated 22.06.2018;** and **(iii) Nokia India Pvt. Ltd. Vs. DCIT, Circle-13(1), new Delhi (2014) taxmann.com 492 (Delhi-Trib**).In the aforementioned cases, it was observed by the Tribunals that a close scrutiny of sub-clause (i) and (v) along with the remaining sub-clauses of Rule 10B(1)(b) of the Income Tax Rules, 1962, makes it clear beyond any doubt that RPM is best suited for determining the ALP of an international transaction in the nature of purchases made from the AE which are resold as such to unrelated parties. Apart therefrom, we also find that the said aspect has also been looked into by the **Hon'ble High Court of Delhi** in the case of **PCIT Vs. Matrix Cellular International Services (P) Ltd. (2018) 90 taxman.com 54 (Del)**. In the aforementioned case, it was observed by the Hon‟ble High Court that in case of a pure trader where there was no value addition before selling the products RPM was the most appropriate method for benchmarking the said transactions. Also, the **Hon'ble High Court of Bombay** in the case of **CIT Vs. L'Oreal India Pvt. ltd., (ITA No.1046/Mum/2012)** had upheld the order of the Tribunal, wherein it was observed that RPM was the most appropriate method in the case of distribution or marketing activities, specifically when goods which were purchased from AEs were thereafter sold by the assessee to unrelated parties without any further processing. Also, a similar view had been taken by the coordinate benches of the Tribunal viz. **(i) Horiba India (P) Ltd. Vs. DCIT, 81 taxmann.com 209 (Delhi); (ii) Fresenius Kabi India Pvt. Ltd. Vs. DCIT (ITA No. 235/PUN/2013);** and **(iii) ACIT Vs. KobelcoConstruction Equipment India Pvt. ltd., ITA No. 6401/Del/2012 (Delhi)**. On the basis of our aforesaid observations, we are of a strong conviction that in the case of a pure distributor RPM is the most appropriate method for benchmarking its international transactions. On the other hand, under the TNMM, the ALP is determined bycomparing the operating profit related to an appropriate base i.e. cost or sale or assets of the "tested party" with the operating profit of an uncontrolled party engaged in comparable transactions. As such, under the TNMM, the net margin or operating profit achieved in related party transactions is compared with those entered into between the independent entities. Accordingly, under the TNMM the major thrust is to derive the operating profit at the transactional level and

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

13. We shall now advert to the observations of the TPO/DRP on the basis of which the application of RPM by the assessee for benchmarking its transactions with the AE had been rejected by them. As is discernible from the orders of the lower authorities, the core issue that had weighed in the mind of the lower authorities while rejecting the RPM as the most appropriate method was that neither the complete information about the business profile and financial data of the comparables selected by the assessee was available in the public domain, nor the same was furnished by the assessee. We have given a thoughtful consideration to the aforesaid observations of the TPO/DRP and are unable to persuade ourselves to subscribe to the view taken by them. We are of the considered view that in case the A.O was of the view that the complete information about the business profile and financial data in respect of the aforesaid comparables was not available, then the remedy available with him was to search for fresh comparables. However, merely for the reason that the comparable selected by the assessee were not found to be appropriate could not have by any means justified rejection of the aforesaid method adopted by the assessee for benchmarking the ALP of its international transactions. Our aforesaid view is fortified by the order of the **ITAT, Bangalore bench** in the case of **CIT Vs. Sanyo India Pvt. Ltd. (2015) 45 CCH 98 (Bang)** and also the order of the **ITAT, Delhi Bench** in the case of **Burberry India Pvt. Ltd. Vs. ACIT Circle-5(1), New Delhi (ITA No. 758/Del/2017, dated 22.06.2018)**. Also, a similar view had been taken by the **ITAT "J" bench, Mumbai**, in the case of **M/s Videojet Technology (I) Pvt. Ltd. Vs. ACIT, Circle-10(3), Mumbai (ITA No.6956/Mum/2012, dated 28.05.2019)**. We are of the considered view that for the purpose of application of RPM what is relevant is that as to whether there is any value addition or not to the goods purchased by the assessee for resale or not. In case, there is no significant value addition and the finished goods which are purchased from the AE are resold in the domestic market in the same form, then the gross profit margin earned on such transactions becomes the determinative factor for benchmarking the international transactions of the assessee with its AE by taking RPM as the most appropriate method. Our aforesaid view is supported by the order of the **ITAT Pune, Bench** in the case of **Fresenious Kabi India (P) Ltd. Vs. DCIT (ITA No. 235/Mum/2013)**, wherein it was held that in caseof distribution activity the selling and marketing expenses which are borne by the assessee would not lead to any value addition to the product in question. In the backdrop of our aforesaid deliberations, we find substantial force in the

> contention advanced by the ld. A.R that as per Rule 10B(1)(b) in the Income Tax Rules, 1962, the RPM can safely be taken as the best suited method for determining the ALP of the international transactions in the case of the assessee before us, which as observed by us hereinabove had imported formulations from its AE and resold the same without making any value addition to unrelated parties in the domestic market. Our aforesaid view is further fortified by the orders of the various coordinate benches of the Tribunal viz.(i) Burberry India Pvt. Ltd. Vs. ACIT, Circle-5(1), New Delhi, ITA No.758/Del/2017, dated 22.06.2018;(ii) Horiba India (P.) Ltd. vs. DCIT (81 taxmann.com 209 (Delhi - Trib); (iii)Fresenius Kabi India Pvt. Ltd. vs. DCIT(ITA No. 235/Pun/2013); (iv). ACIT vis. Kobelco Construction Equipment India Ltd (ITA No.6401/Del/2012);(v)Systems Pvt. Ltd. vs. DCIT & vice versa (ITA No. 683/Hyd/2014); and (vi).Frigoglass India (P.) Ltd. vs. DCIT(2014) 149 ITD 429 (Delhi). In terms of our aforesaid observations, we are of the considered view that the TPO/DRP while dislodging the RPM adopted by the assessee for benchmarking its international transactions, had lost sight of the fact that only the transaction of import of goods by the assessee from its AEs was to be benchmarked and all other functions carried out by the assessee having no nexus with the said import transactions were thus not relevant for the said benchmarking analysis. Be that as it may, we are unable to subscribe to the view taken by the TPO/DRP that merely for the reason that complete information about the business profile and financial data in respect of companies selected by the assessee as comparables in its TP study report was not available in the public domain or furnished by the assessee, therefore, for the said reason the application of the said method for benchmarking the international transactions of the assessee was to be rejected.

The Ld. CIT-DR could not point out any factual distinction in this year. Therefore, facts being pari-materia the same and there being no change in assessee's business, we would hold that RPM was the most appropriate method to benchmark the stated transactions in the trading segment. We order so. We direct Ld. AO / TPO to consider the benchmarking using RPM method and re-determine the issue of ALP of these transactions. This ground of assessee's appeal stand allowed for statistical purposes. Ground No.1 of revenue's appeal is related to exclusion of one comparable entity under TNMM. This ground has become infructuous and accordingly, dismissed.

8. So far as the TP adjustment on account of AMP expenditure is concerned, we find that there is no express agreement between the assessee and its AE wherein the assessee is required to incur the AMP expenditure for brand building on behalf of its AE. All these payments are third party payments. There is no concrete material in support of conclusion of Ld.CIT that there was a prima facie arrangement between the AE and the assessee to incur such expenditure. The said observation is not supported by any express agreement on record. Unless it was shown that there was such an arrangement which resulted into any direct or indirect benefit to the brand of assessee's AE, these transactions could not be regarded as international transaction u/s 92B as held by Hon'ble Delhi High Court in the case of **Maruti Suzuki India Ltd. V/s CIT (2015; 64 Taxmann.com 150).** In this case, it was further held that no adjustment for determination of arm's length price with regard to AMP expenditure can be made by resorting to bright line test or any other similar method which is not provided in the statute. It could be noted that this decision was delivered by the Hon'ble Delhi High Court at a later point of time and after taking note of its own decision in **Sony Ericson Mobile Communications (374 ITR 118).** Therefore, the ratio laid down in Maruti Suzuki India Ltd. (supra) would prevail and the ratio of the same would be applicable to the present appeal since facts are more or less similar. Similar is the view in various other decisions of Mumbai Tribunal which could be tabulated as under: -

(i) Kellogg India Pvt. Ltd. v/s. ACIT (2020; 121 taxmann.com 303)
(ii) Nivea India Pvt. Ltd. v/s. ACIT (2018; 92 taxmann.com 165)
(iii) Johnson & Johnson Pvt. Ltd. v/s. ACIT (2019; 105 taxmann.com 230)
(iv) India Medtronic Pvt. Ltd. v/s. DCIT (ITA No. 1600/Mum/2015)
(v) Synthes Medical Pvt. Ltd. v/s. ACIT (2019; 109 taxmann.com 183)

(vi) Godrej Consumer Products Ltd. v/s. ACIT (ITA Nos. 1102 & 1211/Mum/2015)

By relying upon all these decisions, we would hold that the given transactions could not be regarded as international transaction as defined under section 92B of the Act and therefore, no transfer pricing adjustment could have been made by the Transfer Pricing Officer in this regard. The grounds raised by the assessee stands allowed which makes revenue's grounds infructuous.

9. The last issue to be adjudicated is disallowance u/s 37(1) on account of Medical Freebies. It is evident that the expenditure has been disallowed in terms of Indian Medical Council (Professional Conduct, Etiquette and Ethics) regulations, 2002 as applicable from 14/12/2009. However, in catena of judicial decision, it has been held that the aforesaid regulations apply to Medical Practitioners only and not to pharmaceutical companies incurring such expenditure. The amount so expanded would be an allowable deduction u/s 37(1). Few of such decisions could be enumerated as follows:-

(i) Hon'ble Delhi High Court in Max Hospital Pitampura (WPC No.1334 of 2014 10/01/2014
(ii) Mumbai Tribunal in PHL Pharma Pvt. Ltd. (78 Taxmann.com 36)
(iii) Mumbai Tribunal in Syncom Formulations (I) Ltd. (ITA Nos. 6428-29/Mum/2012 23/12/2015)
(iv) Mumbai Tribunal in Aristo Pharmaceuticals Pvt. Ltd. (ITA No.1104/Mum/2018 15/01/2020)
(v) Mumbai Tribunal in Aristo Pharmaceuticals Pvt. Ltd. (ITA Nos.6680/Mum/2012 & ors. 26/07/2018)
(vi) Mumbai Tribunal in JB Chemicals & Pharmaceuticals Ltd. (ITA No.7389/Mum/2016 dated 23/03/2021)
(vii) Mumbai Tribunal in JB Chemicals & Pharmaceuticals Ltd. (ITA No.6317/Mum/2014 dated 16/04/2019)
(viii) Pune Tribunal in Emcure Pharmaceuticals Ltd. (ITA No.1532/Pun/2015 29/01/2018)

On the basis of ratio of above decisions, we would conclude that the regulations as referred to by lower authorities to make the disallowance are not applicable to the assessee and thus, the disallowance is not sustainable in law. By deleting this addition, we allow assessee's ground of appeal.

Conclusion

10. The revenue's appeal stand dismissed whereas the assessee's appeal stand partly allowed in terms of our above order.

Order pronounced on 1st September 2021.

Sd/-	**Sd/-**
(Vikas Awasthy)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य **/ Judicial Member**	लेखा सदस्य **/ Accountant Member**

मुंबई Mumbai; दिनांक Dated :01/09/2021
Sr.PS, Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

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

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उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई **/ ITAT, Mumbai.**