INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'K' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)]
and Pavan Kumar Gadale (Judicial Member)]

ITA No. 6248/Mum/2018
Assessment Year: 2012-13

Diesel Fashion India Reliance Pvt. Ltd., **…….. Appellant**
8th Floor, Maker Tower E, Cuffe Parade,
Colaba, Mumbai 400005 [PAN: AACCD6235H]

Vs.

Assistant Commissioner of Income Tax, 3 (1)(1)
Mumbai. **…….Respondent**

ITA No. 6460/Mum/2018
ITA No. 2931/Mum/2019
Assessment years: 2012-13 & 2013-14

Deputy Commissioner of Income Tax, 3 (1)(1)
Mumbai **…….……Appellant**

Vs.

Diesel Fashion India Reliance Pvt. Ltd., **……Respondent**
8th Floor, Maker Tower E, Cuffe Parade,
Colaba, Mumbai 400005 [PAN: AACCD6235H]

CO No. 228/Mum/2019
Arising out of ITA No. 6460/Mum/2018
Assessment year: 2012-13

CO No. 56/Mum/2021
Arising out of ITA No. 2931/Mum/2019
Assessment year: 2013-14

Diesel Fashion India Reliance Pvt. Ltd., **……..…Cross objector**
8th Floor, Maker Tower E, Cuffe Parade,
Colaba, Mumbai 400005[PAN: AACCD6235H]

Vs.

Deputy Commissioner of Income Tax, 3 (1)(1)
Mumbai **……..…Respondent**

Appearances:
Nimesh Vora *for the appellant*
Satya Pinisetty *for the respondent*

Date of concluding the hearing : January 28, 2022
Date of pronouncement the order : March 04, 2022

O R D E R

Per Pramod Kumar, VP:

1. These cross appeals filed by the parties, and the cross objections filed by the assessee, are directed against the order dated 3rd August 2018 passed by the learned CIT(A) in the matter of assessment under section 143(3) r.w.s. 144C(3) of the Income Tax Act 1961, for the assessment year 2012-13.

2. We will first take up appeal filed by the assessee.

3. Ground no. 1 is general in nature and it does not call for any adjudication.

4. In ground nos 2 to 5, the assessee has raised the following grievances which we will take up together:-

> ***2. Erred in partly confirming the adjustment made by the Learned TPO in relation to the international transaction involving payment of royalty undertaken by Diesel India with its Associated Enterprise ('AE').***
>
> ***3. Erred in adopting an inconsistent approach by considering 'Rampage' and 'Bill Blass' with a Guaranteed Minimum Royalty ('GMR') clause for the purpose of benchmarking the payment of royalty transaction, while rejecting 'Antik Denim' as it also has GMR clause.***
>
> ***4. Erred in rejecting 'Provogue' and 'Gingiss formal wear' as comparable agreements without appreciating the comparability criterion adopted by the Appellant.***
>
> ***5. Without prejudice to the above, shall be deemed to consider 'Antik Denim' as a comparable if 'Rampage' and 'Bill Blass' are considered as comparables.***

5. The relevant material facts are as follows. The assessee before us is a joint venture between Diesel SPA (Italy) and Reliance Brands Ltd (RBL). The present year is the first year of it's full operations. The assessee is engaged in the business of distribution of Diesel products in India through wholesale channel and through retail network of Diesel products. Under the franchise agreement dated 6th May 2009, the assessee's AE (i.e. Diesel SPA) had granted the following:-

- ***Exclusive right to use "Diesel" as part of company name of Diesel India;***
- ***Exclusive right and license to use the technical know-how (proprietary methods, processes, trade secrets, techniques, distribution procedures, models, standards and specification and information as to distribution of the products in India) licensed by Diesel S.P.A. and that are necessary for the operation of the business by Diesel India in Inda;***
- ***Diesel S.P.A. shall make available to Diesel India the latest improvements, developments, modifications in the technical know-how.***

6. The TPO, however, picked up our comparables to justify arm's length price of the royalty at 3.31% as against payment of 5% royalty made by the assessee for the above. The comparables picked up by the TPO were as follows:-

Sr. No	***Name of the Comparable***	***Royalty rate***
1	***Donakaran, Donakaran New York, DKNY***	***1.75%***
2	***Victorinox***	***7%***
3	***Rampage***	***1%***
4	***Bill Blass***	***3.5%***
	Arithmetic mean	***3.31%***

7. Based on the above, an ALP adjustment of Rs. 59,78,932/-. When the matter travelled in appeal, learned CIT(A) further directed inclusion of 'Guess' at a royalty of 7% by stating that " that contention of the appellant is examined and the comparable in accepted as the same was inadvertently excluded by the TPO in the final set though it was clearly accepted in tabulation at page 43 of TPO order". On that aspect the matter has reached finality but the assessee is in further appeal as even after this inclusion the royalty paid by the assessee in mere than arm's length price so determined.

8. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

9. We have noted that admittedly in the cases of Rampage as also Bill Blass, there is clause for guaranteed minimum royalty and even though this fact is clearly noted by the CIT(A), these cases are accepted as valid comparables. That is, in our considered view, an unacceptable approach. Once it is clear that the guaranteed minimum royalty clauses are present in comparables adopted and these clauses are missing in the assessee's case and admittedly guaranteed minimum return clause makes the situation maternally different there could not be any valid justification in including these comparables. We, therefore, direct exclusion of these cases. On doing so, we find that the arithmetic mean of comparables comes to 5.25 which is more than the royalty paid by the assessee. The royalty paid by the assessee thus within arm's length range. We, therefore, uphold the plea of the assessee, and direct deletion of impugned ALP adjustment. The assessee gets the relief accordingly.

10. Ground no. 2 to 5 are thus allowed.

11. In ground nos. 6 to 10, the assessee has raised the following grievances which will be taken up together:-

> ***6. Erred in confirming the adjustment of INR 14,00,761 made by the Learned TPO in relation to the international transaction of payment of design fees undertaken by the Appellant with its AE.***
>
> ***7. Erred in rejecting the Comparable Uncontrolled Price ('CUP') Method as the most appropriate method considered by the Appellant to benchmark the international transaction of payment of design fees to its AE.***
>
> ***8. Erred in determining the ALP of design fees as 'Nil' by alleging that the design services are a part of royalty paid by the Appellant under the franchise agreement.***
>
> ***9. Erred in not applying any of the methods prescribed under section 92C of the Act to benchmark the international transaction of payment of design fees to its AE.***
>
> ***10. Without prejudice to the above, if design services are considered to be part of franchise agreement, erred in not aggregating payment of design fees and royalty for benchmarking purpose.***

12. So far as this ALP adjustment of Rs. 14,00,761 is concerned only a few material facts need to be taken note of the assessee had paid Rs. 14,00,761 as design fees to Diesel SPA but TPO held that the design fees was part of royalty agreement, and as such the payment so made was in excess of the arm's length price of royalty because *inter alia*, royalty paid itself has been held to be more than it's arms length price. Learned CIT(A) has also confirmed the resultant ALP adjustment made by the Assessing Officer. The assessee is not satisfied and is in further appeal before us.

13. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

14. We find that even if the payment of Rs. 14,00,761 is to be treated as part of payment for royalty, the total payment for royalty will be less than 5.25% which is held to be arm's length price in our findings in paragraph 9 above. The impugned ALP adjustment is, therefore, devoid of legally sustainable basis. We delete the same.

15. Ground nos. 6 to 10 are thus allowed.

16. In the result, the appeal filed by the assessee is allowed in the terms indicated above.

17. We will now take up the appeal filed by the Assessing Officer.

18. Grievances raised in the revenue's appeal, all of which will be taken up together, are as follows:-

> ***1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.12,53,86,000/- in respect of international transactions involving purchase of merchandise and samples?***
>
> ***2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in rejecting the Transactional Net Margin Method (TNMM) adopted by the AO/TPO as the Most Appropriate Method and in directing adoption of Resale Price Method (RPM) as done by the Assessee?***
>
> ***3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in relying on the ratio laid down in the decision of the Hon'ble High Court in the case of M/s. L'Oreal India Pot. Ltd. (ITA No.1046 of 2012) dated 07.11.2014 and upholding Resale Price Method (RPM) as the Most Appropriate Method (MAM), thus ignoring that the assessee is a full-fledged high risk distributor performing marketing and warranty functions as well and also spending high amount under the head other expenses?***

19. Once again a reference to some undisputed facts will be in order. The assessee company is a joint venture between Diesel SPA and Reliance Brands Ltd. The assessee company is engaged in the business of distribution of Diesel products through wholesale channel and through the retail network during the relevant period, the assessee purchase merchandise and samples amounting to Rs. 18,40,27,155 from Diesel SPA for resale in India, and benchmarked the same on the basis of Retail Price Method (RPM) as the most appropriate method. On the basis of this benchmarking the 'gross profit on sale' of the assessee worked out to 52.54% as against arithmetic mean of 32.16% of the 12 comparables selected by the assessee. However, the TPO rejected this benchmarking. He was, *inter alia*, of the view that that computation based on annual reports, rather than audited financials, are ten reliable, certain inputs are non verifiable, that apart from selling the goods the assessee is marking substantial value addition by advertising and marketing etc., that the RPM method does not take into account the marketing junction, that the facts of L'oreal case relied upon by the assessee were materially different via-a-vis assessee's case, that the assessee is an exclusive distributors of Diesel products in India whereas such products in respect of the comparables adopted is not clear, that the possible difference in the level of marketing efforts involved makes RPM comparison undependable and that the level of risk assumed in distribution activity varies from case to case rending it inappropriate in comparison. He thus rejected RPM and proceeded to adopt TNMM for benchmarking analysis. On this aspect of the matter when matter travelled in appeal, learned CIT(A) revised the stand of the TPO and observed as follows:-

> ***6.3.1 I have considered the facts of the case and submissions of the Appellant. The undersigned has gone through the order of the TPO/AO and has examined the contentions of the Appellant on this issue.***

6.3.2 The Appellant has filed detailed analysis of the functions performed, risks assumed and assets utilized by its AE. On perusal of the functional analysis submitted by the Appellant, it is seen that the Appellant is engaged in business of distribution of products purchased from AE. The Appellant is neither processing the goods nor adding any value to the core product. The Appellant adopted RPM as the MAM which has been rejected by the TPO. TPO adopted TNMM as the MAM.

6.3.3 As per Rule 10B(1)(b), the price at which the product is sold to an unrelated party is reduced by normal gross profit margin, i.e. the gross profit margin accruing in comparable on resale. Thus, RPM is to be applied in a situation in which the reseller purchases tangible property and resale is made without any value addition having been made. This is also laid down in para 2.29 of the OECD guidelines.

6.3.4 The TPO has relied upon para 2.28 of the OECD Guidelines (2010 version) to contend that RPM may be less reliable when there are differences between the controlled and uncontrolled transactions and reasonably accurate adjustments are not made to account for these differences having material effect on the comparability analysis. However, the PO has not brought out any factual differences between the controlled transactions and comparables. Similarly the TPO has relied upon para 2.32, 2.34, 2.36, 2.37 and 2.38 of the OECD guidelines and a number of illustrations thereunder, to depict various situations where appropriate adjustments need to be carried out to the resale price margin in order to effect proper comparability and to arrive at an arm's length resale price margin. However the TPO has not brought out any factual aspect to demonstrate that the circumstances enumerated in these paragraphs do exist in the comparability analysis performed by the assessee. The approach of the TPO of merely going on conjectures and surmises and rejecting RPM as the MAM cannot be upheld.

6.3.5 The Jurisdictional Bombay High Court in its judgment dated 07.11.2014 in Commissioner of Income Tax v. L'Oreal India Pvt. Ltd. (ITA No. 1046 of 2012) held that there was no error in law committed by the ITAT when it held that RPM was the Most Appropriate Method especially when goods are purchased from associated entities and there are sales effected to unrelated parties without any further processing.

The Hon'ble HC in Para 7 stated as under"

After having perused the relevant part of the order passed by the Commissioner and the Tribunal on this question, we are in agreement with Mr. Pardiwalla that the Tribunal did not commit any error of law apparent on the face of the record nor can the findings can be said to be perverse. The Tribunal has found that the TPO has passed an order earlier accepting this method. The Tribunal has noted in para 19 of the order under challenge that this method is one of the standard method and the OECD (Organization of Economic Commercial Development) guidelines also state in case of distribution or marketing activities when the goods are purchased from associated entities and there are sales effected to unrelated parties without any further processing, then, this method can be adopted. The findings of fact are based on the materials which have been produced before the Commissioner as also the Tribunal. Further, it was highlighted before the Commissioner as also the Tribunal that the RPM has been accepted by the TPO in the preceding as well as succeeding assessment years.

That is in respect of distribution segment activity of the Assessee. In such circumstances, and when no distinguishing features were noted by the Tribunal, it did not commit any error in allowing the Assessee's Appeal. Such findings do not raise any substantial question of law."

The same view has been held by Delhi High Court in the case of Matrix Cellular International Services (P.) Ltd. [2018] 90 taxmann.com 54 and several Tribunal decisions relied upon by the Appellant for all categories of the products.

The cited decisions and particularly the Jurisdictional High Court in the case L'Oreal clearly lay down that in case of a distributor, wherein the goods are purchased from the AE and resold to any other independent entities without any value addition, RPM should be reckoned as the MAM.

6.3.6 The Appellant has submitted a comparison of the facts in case of L'Oreal and the case of the Appellant which is summarized below:

- ***The Appellant is a joint venture between Diesel S.P.A. Italy (51%) and Reliance Brands Ltd (49%) and not a wholly owned subsidiary as in the case of L'Oreal***

- ***The comparable selected by the Appellant also deal in the same category i.e. apparel and accessories, which was not the case in the aforesaid decision of L'Oreal***

- ***The Appellant is in first full year of operations and has incurred a loss at net level as has been pointed out by the TPO in the case of the Appellant as well in the case of L'Oreal***

- ***The Appellant is also a distributor of imported apparels through its stores in India and there is no value addition made to the imported products purchased from the AE. Same is the case with L'Oreal***

- ***In the current case, it is the stand of the TPO that, functionally dissimilar comparables from Indian domain have been selected by the Appellant. Similar assertions were made by the TPO in the case of L'Oreal as well***

- ***In Loreal's case, the TO was of the opinion that selling and distribution expenses resulted in value addition to the product of the assessee and hence rejected RPM as the MAM and adopted TNMM. Similar assertions have been made by the TPO in the case of Appellant. Here, the PO has stated that the assessee is engaged in a single business of distribution of Diesel's apparels and accessories and has incurred substantial expenditure on AMP and also paid royalty. Therefore, TNMM is the MAM.***

6.3.7 Considering the above facts and circumstances of the case, I am of the view that the Jurisdictional High Court decision in case of L'Oreal squarely apply to the Appellant's case.

6.3.8 The TPO has rejected the Jurisdictional High Court decision on the ground that TO in case of L'Oreal had not disputed the gross margin computation whereas in the case of

Diesel India, TO contends that Rule 10C(2) has been ignored while computing the computation. The TPO further states that Diesel India has paid royalty which was absent in case of L'oreal. I do not agree with the findings of the TPO. Royalty is a separate and distinct international transaction and the same has been separately benchmarked by the Appellant. In my view, this cannot be accepted to be the reason for rejecting the principle of law laid down by the Hon'ble jurisdictional High Court. Therefore, IPO's contentions are rejected and RPM is upheld as the MAM in the facts and circumstances of the case.

6.3.9 In respect of the observations of the TPO that Appellant has incurred substantial AMP expenditure, Delhi Tribunal in case of Burberry India Pvt Ltd (supra) has observed that incurrence of high AMP expenditure does not in any way affect the ALP determination under RPM. The Delhi Tribunal has held that RPM is the MAM in the facts of the case.

The relevant extract of the decision is given below:-

> ***"15. We have gone through the record in the light of the submissions on either side. It is an admitted fact that in this case the assessee is merely purchasing and selling the products without adding any value to the core product. Further, Ld. TO did not dispute the characterisation of the assessee as in the TP document and also accepted the functional profile of the assessee as a routine distributor. Ld. DRP, however, recorded that the assessee has incurred substantial AMP, and other expenses, in relation to its turnover, and is therefore, not a simple distributor in terms of the requirement of using RPM. Now we shall proceed to examine the law applicable these facts.***
>
> ***16. In Nokia India (P) Ltd. v. Dy. CIT[2014] 52 taxmann.com 492/153 ITD 508 (Delhi), the Delhi bench of the ITAT held that; ".....A close scrutiny of the above two sub-clauses along with the remaining sub-clauses of rule 10B(1 b) makes it clear beyond doubt that RPM is best suited for determining ALP of an international transaction in the nature of purchase of from an AE which are resold as such to unrelated parties. Ordinarily, this method pre-supposes no or insignificant value addition to the goods purchased from foreign AE."***
>
> ***17. While noting the above decision also, Hon'ble jurisdictional High Court, in Principal Commissioner of Income-tax-6 v. Matrix Cellular International Services (P.) Ltd. [2018) 90 taxmann.com 54 (Delhi) found that, - "8. This Court finds that once the ITAT, on considering the relevant facts as well as the order of the PO, had concluded that the business of the assessee was merely that of a pure trader, and there was no value addition made before reselling the particular products (i.e. the SIM cards), its consequent finding that RPM is the Most Appropriate Method, is irreproachable.....11. This view has also been affirmed by the Bombay High Court in its judgment dated 07.11.2014 in Commissioner of Income Tax v. L'Oreal India Pvt. Ltd. (ITA No. 1046 of 2012)... ..... 12. Therefore, a contrario, when the reseller does not add any value to the product of the goods, the RP method would be appropriate for determining the arms' length price."***
>
> ***18. In respect of the observations of the Ld. DR that the assessee has incurred substantial AMP, and other expenses, in relation to its turnover, and is therefore, not a simple distributor in terms of the requirement of using RPM, Ld. AR has rightly placed***

reliance on the decision reported in Nokia India Private Limited vs. DCIT (2015) 153 ITD 508 (Delhitrib.) wherein it was held that the incurring of high advertisement and marketing expenses by the assessee vis-avis the other comparable companies does not in any manner affect the determination of ALP under the RPM.

19. The above decisions clinch the issue involved in this matter and squarely applicable to the facts of the case. We, therefore, while respectfully following the same hold that the RPM is the most appropriate method in the facts and circumstances of this case and accordingly direct the Ld. TO to adopt the RPM as the most appropriate method for benchmarking the international transaction."

The decision in the case of Burberry India Pt Ltd directly applies to the case of Appellant which is also dealing in apparel and is based on identical facts.

6.3.10 The appellant has responded to the contention of the TPO that difference in the level of marketing function performed by the Appellant vis-à-vis the comparable will have material impact on the gross margin requiring appropriate adjustments. In this regard, the Appellant has filed the adjusted gross margin (after considering marketing expenses) of the appellant which is 43.83% vis-à-vis the arithmetic mean of the adjusted gross margins (after considering marketing expenses) of the comparable companies considered as comparable by the TPO which is 25.59%. Therefore, even if TPO's contention is accepted that there is difference in level of marketing function, the adjusted gross profits earned by Appellant is still higher than those earned by the comparables of the TPO.

In the result, the appeal of the Appellant in Ground 5 and 9 stands allowed. Ground No.6 to 8 and 10 become academic and do not require any adjudication.

20. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

21. We have heard the rival contentions, perused the material on record, and duly heard facts of the case in the light of the applicable legal position.

22. We find that dealing with a materially similar situation dealing with an Indian entity, which is 51:49 ownership of Burberry International Holding Ltd. UK and Genesis Colours Pvt. Ltd. India and which was dealing with a luxary range of products, a coordinate bench of this Tribunal, in the case of *Burberry India Pvt. Ltd. vs ACIT (ITA Nos. 758 & 7684/Del/2017*; order dated 22.06.2018), has observed as follows:-

15. We have gone through the record in the light of the submissions on either side. It is an admitted fact that in this case the assessee is merely purchasing and selling the products without adding any value to the core product. Further, Ld. TPO did not dispute the characterisation of the assessee as in the TP document and also accepted the functional profile of the assessee as a routine distributor. Ld. DRP, however, recorded that the assessee has incurred substantial AMP, and other expenses, in relation to its turnover, and is therefore, not

a simple distributor in terms of the requirement of using RPM. Now we shall proceed to examine the law applicable these facts.

16. In Nokia India (P) Ltd. v. Dy. CIT[2014] 52 taxmann.com 492/153 ITD 508 (Delhi), the Delhi bench of the ITAT held that,-

> ***9. Sub-clause (i) of clause (b) of Rule 10B(1) deals with identifying the price at which the goods purchased from an AE is resold. Sub-clause (ii) of clause (b) of Rule 10B(1) talks of reducing the amount of normal gross profit margin of comparable uncontrolled transactions from such resale price of the assessee. Sub-clause (iii) states that the result of subclause (ii) is further reduced by the expenses incurred in connection with the purchase of goods and sub-clause (iv) provides that the amount so deduced under sub-clause (iii) is adjusted on account of differences in the international transaction and comparable uncontrolled transactions which materially affect the amount of gross profit margin in the open market. Finally, sub-clause (v) provides that the adjusted price found under sub-clause (iv) is taken as arm's length price in respect of purchase of goods from the AE. When we consider the methodology given under RPM, more specifically sub-clauses (i) and (v), it becomes patent that sub-clause (i) refers to 'property purchased by the enterprise ... is resold ' and sub-clause (v) refers to 'arm's length price in respect of the purchase of the property ... by the enterprise '. A close scrutiny of the above two sub-clauses along with the remaining sub-clauses of rule 10B(1)(b) makes it clear beyond doubt that RPM is best suited for determining ALP of an international transaction in the nature of purchase of from an AE which are resold as such to unrelated parties. Ordinarily, this method pre-supposes no or insignificant value addition to the goods purchased from foreign AE.***

17. While noting the above decision also, Hon'ble jurisdictional High Court, in Principal Commissioner of Income-tax-6 v. Matrix Cellular International Services (P.) Ltd. [2018] 90 taxmann.com 54 (Delhi) found that, -

> ***8. This Court finds that once the ITAT, on considering the relevant facts as well as the order of the TPO, had concluded that the business of the assessee was merely that of a pure trader, and there was no value addition made before reselling the particular products (i.e. the SIM cards), its consequent finding that RPM is the Most Appropriate Method, is irreproachable. In Nokia India (P) Ltd. v. Deputy Commissioner of Income Tax, (2015) 167 TTJ (Del) 243, the Delhi bench of the ITAT held:***
>
> > ***"A close scrutiny of the above two sub-clauses along with the remaining sub-clauses of r. 10B(1)(b) makes it clear beyond doubt that RPM is best suited for determining ALP of an international transaction in the nature of purchase of goods from an AE which are resold as such to unrelated parties. Ordinarily, this method presupposes no or insignificant value addition to the goods purchased from foreign AE. In a case the goods so purchased are used either as raw material for manufacturing finished products or are further subjected to processing before resale, then RPM cannot be characterized as a proper method for benchmarking the international transaction of purchase of goods by the Indian enterprise from the foreign AE."***

9. Similarly, in Swarovski India Pvt. Ltd. v. ACIT, ITA No. 5621/Del/2014, the ITAT held:

> ***"Adverting to the facts of the instant case, we find that the assessee purchased Crystal goods and Crystal components from its AE. No value addition was made to such imports. The goods were sold as such. In the given circumstances, the RPM is the most appropriate method for determining the ALP of the international transaction of' Import of Crystal goods and Crystal components."***

10. A similar view has been adopted by the Mumbai bench of the ITAT in Mattel Toys v. Deputy Commissioner of Income Tax, (2013) 158 TTJ (Mum) 461:

> ***"Thus, the RPM method identifies the price at which the product purchased from the A.E. is resold to a unrelated party. Such price is reduced by normal gross profit margin i.e., the gross profit margin accruing in a comparable controlled transaction on resale of same or similar property or services. The RPM is mostly applied in a situation in which the reseller purchases tangible property or obtain services from an A.E. and reseller does not physically alter the tangible goods and services or use any intangible assets to add substantial value to the property or services i.e., resale is made without any value addition having been made."***

11. This view has also been affirmed by the Bombay High Court in its judgment dated 07.11.2014 in Commissioner of Income Tax v. L'Oreal India Pvt. Ltd. (ITA No. 1046 of 2012), where the Court found that there was no error in law committed by the ITAT when it held that RPM was the Most Appropriate Method in case of distribution or marketing activities especially when goods are purchased from associated entities and there are sales effected to unrelated parties without any further processing. In fact, a Division Bench of this Court in its decision in Bausch & Lomb Eyecare (India) Pvt. Ltd. v. Additional Commissioner of Income Tax, (2016) 381 ITR 227 (Del), while considering the decision of this Court in Sony Ericsson Mobile Communications India Pvt. Ltd. v. Commissioner of Income Tax, (2015) 374 ITR 118 (Del), noted that:

> ***"The RP Method loses its accuracy and reliability where the reseller adds substantially to the value of the product or the goods are further processed or incorporated into a more sophisticated product or when the product/service is transformed."***

12. Therefore, a contrario, when the reseller does not add any value to the product of the goods, the RP method would be appropriate for determining the arms' length price.

18. In respect of the observations of the Ld. DRP that the assessee has incurred substantial AMP, and other expenses, in relation to its turnover, and is therefore, not a simple distributor in terms of the requirement of using RPM, Ld. AR has rightly placed reliance on the decision reported in Nokia India Private Limited vs. DCIT (2015) 153 ITD 508 (Delhitrib.) wherein it was held that the incurring of high advertisement and marketing expenses by the assessee vis-avis the other comparable companies does not

in any manner affect the determination of ALP under the RPM. In the above decision it was held that, -

The ld. DR vehemently argued against the application of RPM in the given circumstances as the most appropriate method by contending that the assessee incurred huge advertisement and marketing expenses. In view of such incurring of expenses, the ld. DR stated that the better course would be to apply TNMM which would consider operating profit. We are unable to accept the contention advanced on behalf of the Revenue. The obvious reason for this is that the incurring of high advertisement and marketing expenses by the assessee vis-a-vis the other comparable companies does not in any manner affect the determination of ALP under the RPM. When we consider gross profit in numerator and net sales in denominator, all the expenses debited to the Profit & loss account automatically stand excluded. It is but natural that only those expenses can have bearing on the gross profit that are debited to the Trading account. As the amount of advertisement and marketing expenses falls 'below the line' and finds its place in the Profit and loss account, the higher or lower spend on it cannot affect the amount of gross profit and the resultant ALP under the RPM. If the assessee has incurred more expenses on advertisement and promotion, which, in the opinion of the ld. DR went on to brand building for an AE, then, the transfer pricing adjustment on account of such AMP expenses was separately called for. Since the TPO has not made any separate adjustment on account of AMP expenses and has given effect to the same under TNMM, we hold that the incurring of such higher advertisement and marketing spend would not affect the calculation of ALP under the RPM. Ex consequent, we hold that RPM prima facie appears to be the most appropriate method in the facts and circumstances of the instant case.

19. The above decisions clinch the issue involved in this matter and squarely applicable to the facts of the case. We, therefore, while respectfully following the same hold that the RPM is the most appropriate method in the facts and circumstances of this case and accordingly direct the Ld. TPO to adopt the RPM as the most appropriate method for benchmarking the international transaction.

20. In view of the fact that we have approved the RPM as the most appropriate method for benchmarking the international transaction relating to the import of finished goods, all other grounds become academic and do not require any adjudication.

23. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench on materially similar facts. In any event, as far as AMP issue is concerned, we have noticed that the Assessing Officer raised the issue, and, satisfied with the explanations given by the assessee, dropped the same. The high spending on marketing are not relevant, as even after excluding the same, the adjusted gross margins (after considering marketing expenses) work out to 43.83% vis-à-vis the arithmetic mean of adjusted from margins of comparables at 25.59%. We have also noted that while the learned TPO has mentioned about ‘substantial value addition’, but then there is no material value addition at all. On the contrary, the sale of imported merchandise does not envisage, in our humble understanding, any value addition. On a careful

consideration of all these factors, as also entirety of the case, we are of the considered view that the rejection of RPM method adopted by the assessee was incorrect, and learned CIT(A) has rightly reversed the said action. We have also noted that the conclusion arrived at by the learned CIT(A) were not solely on the basis of Hon'ble Bombay High Court in the case of L'oreal India Pvt. Ltd., as alleged in the ground of appeal before us. On this count, grievances of the Assessing Office ill conceived.

24. As we part with this issue, we may add that in the case of DCIT vs India Medtronic Pvt. Ltd. [(2019) 112 taxmann.com 318 (Mum)] the TPO discarded TNMM method adopted by the assessee, and imposed RPM method with Malaysian Company's gross profit margins on sale. In this case, a co-ordinate bench did approve adoption of TNMM but then the reason of doing so was the basis of transaction being controlled transactions which were intra AE transaction. That decision cannot be the basis to suggest that TNMM is to be preferred over RPM. TNMM is in away provision. As long as RPM can be reasonably applied, we see no issues with the same. Nothing, therefore, turns on the decision either.

25. In view of the above discussions and bearing in mind entirety of the case, we approve the conclusion arrived at by the learned CIT(A) and decline to interfere in the matter at the instance of the Assessing Officer.

26. The appeal of the Assessing Officer is thus dismissed.

27. To sum up, while the appeal of the assessee is partly allowed in the terms indicated above, the appeal of the Assessing Officer is dismissed, the cross objection filed by the assessee is dismissed as infructuous.

28. We will now take up the assessment year 2013-14.

29 By way of this appeal, the Assessing Officer has challenged correctness of the order dated 18th February 2019, passed by the learned CIT(A) in the matter of under section 143(3) r.w.s. 144C(3) of the Income Tax Act 1961, for the assessment year 2013-14.

30. Grievances raised by the Assessing Officer are as follows:-

> ***1. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs.6,03,33,422/-in respect of international transactions involving purchase of merchandise and samples?***
>
> ***2. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in rejecting the Transactional Net Margin Method (TNMM) adopted by the AO/IPO as the Most Appropriate Method and in directing adoption of Resale Price Method (RPM) as done by the Assessee?***

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CITA) has erred in relying on the ratio laid down in the decision of the Hon'ble High Court in the case of M/s. L'Oreal India Put. Ltd. (ITA No.1046 of 2012) dated 07.11.2014 and upholding Resale Price Method (RPM) as the Most Appropriate Method (MAM), thus ignoring that the assessee is a full-fledged high risk distributor performing marketing and warranty functions as well and also spending high amount under the head other expenses?

31. Learned representatives fairly agree that whatever we decide for the assessment year 2012-13 will apply *mutatis mutandis* to the assessment year 2013-14 as well. Vide our order, set out earlier while dealing with assessment year 2012-13, we have dismissed the said appeal and set out detailed reasons for the same. We see no reasons to take any other view of the matter than the view so taken for the immediately preceding assessment year. Respectfully following the same, we uphold the order of the CIT(A) and decline to interfere in the matter.

32. The appeal of the Assessing Officer for the AY 2013-14 is also thus dismissed.

33. As regards the cross objections filed by the assessee, given the fact that we have dismissed the appeal of the Assessing Officer it has become infructuous. Accordingly it is to be dismissed as such.

34. The cross objection filled by the assessee for the AY 2013-14 is thus also dismissed.

35. To sum up, while the appeals of the Assessing Officer are dismissed in the terms indicated above, the cross objections filed by the assessee are dismissed as infructuous. Pronounced in the open court today on the 04th day of March, 2022

Sd/-	**Sd/-**
Pavan Kumar Gadale	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 04th day of March 2022.

Copies to: *(1) The Appellant* *(2) The respondent*
(3) CIT *(4) CIT(A)*
(5) DR *(6) Guard File*

By order

Assistant Registrar/Sr.PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai