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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 24.10.2024

+ **ITA 471/2019**

**PR. COMMISSIONER OF INCOME
TAX- 2, DELHI**

..... Appellant

Through: Mr Aseem Chawla, SSC with Ms
Pratishtha Chaudhary, Advocates.

Versus

M/S. BURBERRY INDIA PVT. LTD.

..... Respondent

Through: Mr Vishal Kalra and Mr S.S.
Tomar, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (Oral)

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter *the Act*) impugning an order dated 22.06.2018 (hereafter *the impugned order*) passed by the Income Tax Appellate Tribunal (hereafter *the Tribunal*) in ITA Nos. 758/Del/2017 and 7684/Del/2017 captioned *Burberry India Pvt. Ltd. V. ACIT Circle 5(1) New Delhi*, in respect of the assessment years (AY) 2012-13 and 2013-14 respectively.

2. The respondent (assessee) had preferred the appeal (ITA No.758/Del/2017) impugning an order dated 30.11.2016 passed by the Assessing Officer (AO) pursuant to the order dated 18.10.2016 passed



by the learned Dispute Resolution Panel (DRP) in respect of the AY 2012-13. In addition, the assessee had also filed an appeal (being ITA No.7684/Del/2017) before the learned Tribunal impugning an order dated 19.12.2016 passed by the AO in respect of the AY 2013-14. The AO had passed the aforesaid order pursuant to the directions issued by the DRP on 15.09.2017. Since both the appeals (ITA Nos. 758/Del/2017 and 7684/Del/2017) involved a common question, the same were taken up by the learned Tribunal together. These appeals were disposed of by a common order dated 22.06.2018 – that is, the impugned order. However, the present appeal is confined to the learned Tribunal’s decision in ITA No.758/Del/2017 in respect of the AY 2012-13.

3. The controversy involved in the present appeal relates to the most appropriate method required to be used for benchmarking the international transaction entered by the assessee for determining the Arms Length Price (ALP). The learned Tribunal held that the Resale Price Method (RPM) would be the most appropriate method and had accordingly, directed the Transfer Pricing Officer (TPO) to adopt the same for benchmarking the international transaction – import of the finished goods for a declared value of ₹28,88,97,371/-.

QUESTIONS OF LAW

4. The Revenue has projected the following questions for consideration of this Court:

“A. Whether, the Hon’ble ITAT erred in directing the TPO to apply RPM in respect of transaction relating to import of



furnished goods without giving cogent reasons as to how this method is the Most Appropriate Method for benchmarking this transaction, in spite of the fact that the TPO/DRP in the original order had given elaborate reasons for rejecting RPM as MAM for this transaction?

- B. Whether the Hon'ble ITAT erred in directing the TPO to apply RPM as MAM without considering the fact that complete information about business profile and financial data in respect of comparable under RPM method should be available which were not found in public domain?"

THE CONTEXT

5. The assessee was incorporated in January, 2010 and is engaged in trading of imported luxury goods bearing the trademark 'Burberry'. The assessee is a joint venture of Burberry International Holdings Ltd. UK and Genesis Colours Private Limited, India. The said entities owned equity capital of the assessee in the ratio of 51:49.

6. The assessee retails the said luxury products from outlets, which are directly managed by it. The assessee operates seven luxury retail stores – two in Delhi and one each in Gurgaon, Hyderabad, Chennai, Mumbai and Bangalore.

7. The assessee filed its return of income for the AY 2012-13 on 30.11.2012, declaring a loss of ₹1,80,33,018/- during the said AY. The assessee had undertaken the following international transactions and reflected the same in Form-3 CEB:

"Nature of transactions	Value (in Rs.)
Import of finished goods	28,88,97,371
Cost reimbursement received/receivable	90,32,791
Receipt of marketing contribution	1,96,54,640



Accounts payable	10,54,36,618”
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8. The AO made a reference to the TPO for determining the ALP under Section 92CA(3) of the Act.

9. The assessee furnished its Transfer Pricing Documentation to the TPO to establish that its international transactions were based on ALP's basis.

10. Insofar as the international transactions relating to reimbursement of the costs received / receivable; receipt of marketing contribution; and accounts payable are concerned, there is no controversy and the TPO has accepted the same. However, the TPO did not accept the assessee's transfer pricing study in respect of the international transactions relating to the import of finished goods for a value of ₹28,88,97,371/-

11. The assessee had used a Comparable Uncontrolled Price (CUP) method as the most appropriate method and had corroborated the same by RPM method to establish the ALP. The TPO did not accept that the CUP or the RPM are the most appropriate method. The TPO adopted the Transactional Net Margin Method (TNMM) as the most appropriate method and selected operating profit/operating cost (OP/OC) as the profit level indicator (PLI) for determining the ALP. The TPO also proceeded to finalise the set of comparable entities. The TPO rejected two out of the three entities selected by the assessee as comparable on the ground that the functional profile of the said



entities was different. However, the TPO accepted the remaining third entity (Shoppers stop Limited) as a comparable entity.

12. In addition, the TPO also selected four other entities as comparable to the assessee for determining the ALP.

13. The assessee raised the objections to the inclusion of some of the entities. Whilst the TPO accepted the assessee's objection in regard to one of the entities, however, it rejected the objections in regard to the others.

14. Accordingly, the TPO selected the following four comparable entities for determining the ALP:-

S.No.	Comparable companies	OP/OI%
1	Shoppers Stop Limited	5.07%
2	Rama Vision Ltd.	2.04%
3	Arvind Retail Ltd (Marged)	-0.69%
4	Avenue Supermarts Ltd	4.78%
	Average	2.80%

15. Based on the mean PLI, the TPO has determined the ALP's Adjustment as under:-

Operating Cost	66,62,78,780
Arms Length Margin (%)	2.80%
Arms Length Price (ALP)	68,49,34,586
Price received	61,54,75,995
Shortfall being adjustment u/s 92CA	6,94,58,591

16. Accordingly, the TPO passed an order under Section 92CA (3) of the Act directing the AO to enhance the assessee's declared income by sum of ₹6,94,58,591/- under Section 92CA of the Act.



Additionally, the TPO also observed that the AO may examine the issue regarding the initiation of the penalty under Section 271(1)(c) of the Act.

17. In view of the above directions, the AO issued the draft assessment order dated 04.03.2016 under Section 143(3) of the Act assessing the assessee's income at ₹5,14,25,573/-. This was computed by adding the sum of ₹6,94,58,591/- to the returned loss of ₹1,80,33,018/-.

18. The assessee filed the objections to the draft assessment order dated 04.03.2016 before the Dispute Resolution Panel (DRP). Apart from contending that the AO had committed a jurisdictional error in referring the matter to the TPO without recording any reasons, the assessee also objected to the rejection of the CUP and RPM as the most appropriate method. The assessee also objected to the use of one of the entity Avenue Supermarts Limited as a comparable entity to the assessee on the ground that it was not functionally similar to the assessee.

19. In addition, the assessee also objected to the TPO in rejecting the working capital adjustment and lease rent adjustment for determining the PLI of the selected comparable entities.

20. The DRP accepted the assessee's objection regarding the requirement to make an adjustment on account of working capital and to confine the application of mean PLI only to the value of the international transactions in question. The DRP directed the TPO to



compute the working capital adjustment in accordance with the specific directions issued by the DRP and to further restrict the transfer pricing adjustment to the international transactions in question.

21. Thereafter, the AO passed the final assessment order dated 30.11.2016, based on the directions issued by the DRP.

22. The assessee appealed the said assessment order dated 30.11.2016 before the learned Tribunal, which was allowed in terms of the impugned order.

23. A plain reading of the impugned order indicates that the assessee had confined its challenge to the final assessment order dated 30.11.2016 and the order passed by the TPO in respect of the findings pertaining to the rejection of the CUP method as corroborated by the RPM and substituting the same with TNMM as the most appropriate method.

24. The TPO and the DRP had rejected RPM as a most appropriate method for computing the ALP on the ground that the assessee had incurred significant advertisement, marketing and promotion (AMP) expenses. The learned Tribunal faulted the TPO and the DRP for rejecting RPM on the aforesaid ground and held, in the given facts, that RPM is the most appropriate method. The learned Tribunal also held that there was no dispute regarding the functional profile of the assessee. Therefore, the findings that the assessee was not a simple



distributor on account of incurring substantial AMP expenses, was not justified.

25. The learned Tribunal relied upon its earlier decision in ***Nokia India (P) Ltd v. Dy CIT : (2014) 52 taxman.com 492/153 ITD 508 (Delhi)*** as well as the decision of this Court in ***Principal Commissioner of Incometax-6 v. Matrix Cellular International Services (P) Ltd : (2018) 90 taxman.com 54 (Delhi)*** in arriving at the aforesaid conclusion that RPM is the most appropriate method for benchmarking the international transaction in question.

REASONS AND CONCLUSION

26. In view of the above, the only issue required to be considered by this Court is whether in the given facts, the learned Tribunal's conclusion that RPM is the most appropriate method, is erroneous.

27. At the outset, it is material to note that there is no cavil as to the functional profile of the assessee. Admittedly, the assessee is engaged in importing of goods bearing brand name 'Burberry' from its Associate Enterprise (AE) and retailing the same through its stores. The assessee does not add any value to the said goods; the same are sold in the same condition as imported. It is in these given facts that the learned Tribunal had concluded that RPM method would be the most appropriate method.

28. The United Nations Practical Manual on Transfer Pricing for Developing Countries (2021) briefly describes the RPM as under:-



“4.3 Traditional Transaction Methods: Resale Price Method (RPM)

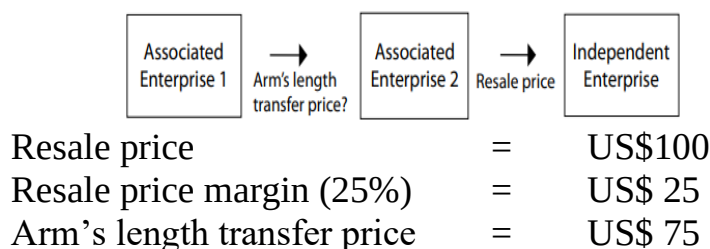
4.3.1 Introduction to RPM

4.3.1.1 The Resale Price Method (RPM) is one of the traditional transaction methods that can be used to determine whether a transaction reflects the arm’s length principle. The Resale Price Method focuses on the related sales company which performs marketing and selling functions as the tested party in the transfer pricing analysis. This is depicted in Figure 4.D.2 below.

4.3.1.2 The Resale Price Method analyzes the price of a product that a related sales company (i.e. Associated Enterprise 2 in Figure 4.D.2) charges to an unrelated customer (i.e. the resale price) to determine an arm’s length gross margin, which the sales company retains to cover its sales, general and administrative (SG&A) expenses, and still make an appropriate profit. The appropriate profit level is based on the functions it performs, the assets it uses and the risks it assumes. The remainder of the product’s price is regarded as the arm’s length price for the intragroup transactions between the sales company (i.e. Associated Enterprise 2) and a related company (i.e. Associated Enterprise 1). As the method is based on arm’s length gross profits rather than directly determining arm’s length prices (as with the CUP Method) the Resale Price Method requires less direct transactional (product) comparability than the CUP Method.

Figure 4.D.2

Resale Price Method





4.3.1.3 Consequently, under the RPM the starting point of the analysis for using the method is the sales company. Under this method the transfer price for the sale of products between the sales company (i.e. Associated Enterprise 2) and a related company (i.e. Associated Enterprise 1) can be described in the following formula:

$TP = RSP \times (1 - GPM)$, where:

- TP = the Transfer Price of a product sold between a sales company and a related company;
- RSP = the Resale Price at which a product is sold by a sales company to unrelated customers; and
- GPM = the Gross Profit Margin that a specific sales company should earn, defined as the ratio of gross profit to net sales. Gross profit is defined as Net Sales minus Cost of Goods Sold.”

29. It is also relevant to refer to the following passage from the said text relating to the issue of the required comparability in RPM:-

“4.3.4 Comparability in Applying the Resale Price Method

4.3.4.1 An uncontrolled transaction is considered comparable to a controlled transaction if:

- There are no differences between the transactions being compared that materially affect the gross margin (for example, contractual terms, freight terms etc.); or
- Reasonably accurate adjustments can be performed to eliminate the effect of such differences.

4.3.4.2 As noted above, the Resale Price Method is more typically applied on a functional than on a transactional basis so that functional comparability



is typically more important than product comparability. Product differences will probably be less critical for the Resale Price Method applied on a functional basis than for the CUP Method, because it is less probable that product differences will have a material effect on profit margins than on price. One would expect a similar level of compensation for performing similar functions across different activities.

4.3.4.3 While product differences may be more acceptable in applying the Resale Price Method as compared to the CUP Method, the property transferred should still be broadly similar in the controlled and uncontrolled transactions. Significant differences between the nature of the products sold in the controlled and uncontrolled transactions may reflect differences in functions performed, assets used or risks assumed. Such differences might suggest differences in arm's length gross margins.

4.3.4.4 The compensation for a distribution company should generally be the same whether it sells washing machines or dryers, because the functions performed (including risks assumed and assets used) are similar for the two activities. It should also be noted, however, that distributors engaged in the sale of markedly different products cannot be compared. The price of a washing machine will, of course, differ from the price of a dryer, as the two products are not substitutes for each other. Although product comparability is less important under the Resale Price Method, greater product similarity is likely to provide more reliable transfer pricing results. It is not always necessary to conduct a resale price analysis for each individual product line distributed by the sales company. Instead, the Resale Price Method can be applied more broadly, for example based on the



gross margin a sales company should earn over its full range of broadly similar products.

4.3.4.5 As the gross profit margin remunerates a sales company for performing marketing and selling functions; the Resale Price Method especially depends on comparability regarding functions performed, risks assumed and assets used. The Resale Price Method thus focuses on functional comparability. A similar level of compensation is expected for performing similar functions (using similar assets and assuming similar risks) across different activities. If there are material differences that affect the gross margins earned in the controlled and the uncontrolled transactions, adjustments should be made to account for such differences. In general, comparability adjustments should be performed on the gross profit margins of the uncontrolled transactions. The operating expenses in connection with the functions performed, assets used and risks assumed should be taken into account in this respect, as these differences are frequently reflected in different operating expenses.”

30. In the present case, the assessee had used the RPM as a corroborative method for benchmarking the international transactions relating to the import of the finished goods. The assessee had compared gross profit margin from the sale of such imported luxury products with the gross profit margin of comparable entities in respect of the similar transaction (namely sale of the imported products in domestic markets). The assessee also relied upon the OECD Guidelines as well as the Guidance Note issued by the ICAI in support of its contention regarding use of RPM as the most appropriate method for benchmarking the international transactions in question.



The same being in respect of the activities for purchase of the goods from related parties and resale to the unrelated parties. The assessee had highlighted that RPM would be the most appropriate in cases where the reseller does not add any value to the products purchased and sold.

31. In the present case, the DRP had accepted the TPO's conclusion that RPM was not the most appropriate method, essentially, for the reason that the assessee had incurred about ₹5.44 Crores towards AMP expenses, which the DRP considered as substantial. Accordingly, the DRP had also concluded that the assessee is not a simple distributor.

32. The relevant extract of the DRP's order dated 18.10.2016 is as under:-

“6. In his order, the TPO has discussed this issue in considerable detail. This discussion is not being repeated here for the sake of brevity. The TPO has pointed out that RPM can only be used as the MAM if the products/services are similar. The TPO has also pointed out that similarity of market conditions, functions performed, accounting treatment and products/services rendered, between the assessee and the comparables, is essential for use of RPM, and the assessee has failed to demonstrate such similarity.

7. As per its Form no. 3CD, the assessee has a gross profit rate of 54.96% and a net profit rate of (-) 14.73%. In its P&L account, the assessee has debited about Rs.28.97 Cr. Towards 'other expenses' and shown substantial loss. The assessee has incurred about Rs.5.44 Cr. towards 'advertisement and marketing expenses' on a



turnover of about Rs.61.55 Cr. It is claimed that about Rs.2.42 Cr. has been reimbursed towards advertisement and marketing expenses however, it is clear 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 requirements of using RPM. The assessee has failed to demonstrate that the comparables have also incurred similar expenditure and have a similar functional profile required for RPM analysis.”

33. Before the learned Tribunal, the assessee contended that it had not incurred heavy expenditure on AMP expenses and other comparable entities had also incurred similar expenses.

34. The learned Tribunal accepted the said contention and faulted the DRP for finding that the assessee is not a simple distributor. The learned Tribunal noted that there was no dispute as to the assessee merely purchased and sold the products without adding any value to the core products. And, the assessee’s functional profile as a routine distributor was not disputed by the TPO.

35. The question whether RPM is the most appropriate method in cases of the distributor that purchases the products from its AE and resells the same to unrelated parties without any further processes is covered by the several decisions.

36. In *Commissioner of Income tax v. L’Oreal India (P) Limited : (2015) 53 taxman.com 432(Bombay)* the Division Bench of Bombay High Court had considered the Revenue’s challenge to an order passed



by the learned Tribunal in a similar case holding that the RPM was the most appropriate method in a case where the assessee had imported the finished goods and resold the same in the same condition. In the aforesaid context, the Bombay High Court had observed as under:-

“7. 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 Appeal is devoid of merits and is, therefore, dismissed. There would be no orders as to costs.”



37. In ***Principal Commissioner of Incometax-6 v. Matrix Cellular International Services (P) Ltd : (2018) 90 taxman.com 54 (Delhi)***

this Court considered the question whether the Tribunal had erred in adopting RPM for determining the ALP in relation to the assessee's business of reselling and distributing the sim cards imported from AEs. The relevant extract of the said decision is set out below:-

“7. The dispute before the Court is whether the ITAT erred in adopting the RPM in order to determine the arms' length price in relation to the assessee's business. In the relevant assessment year, the assessee had four AEs. Three of them were wholly owned subsidiaries, whereas in the fourth, the assessee held 49% shareholding. The ITAT found that the AEs were engaged in the business of identifying, negotiating and buying SIM cards from the networks of different countries and selling them to the assessee. This arrangement, according to the assessee, foreign networks were reluctant to deal with foreign companies. The ITAT, relying on the TPO's order, found that the business of the assessee only involved re-selling or distributing the SIM cards imported from the AEs, without making any value addition. The ITAT also found that there was no distinction between airtime and SIM cards, as no value could be added to the airtime resold by the assessee. Since the SIM cards are resold without making any value addition, the ITAT concluded that the assessee carried out purely trading business, and hence the RPM was the Most Appropriate Method for calculating arms' length price.

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 re-selling 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. Dy. CIT*, (2014) 52 taxmann.com 492/153 ITD 508 (Delhi), 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 (P.) Ltd. v. Asstt. CIT* (2017) 78 taxmann.com 325 (Delhi – Trib.), 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 India (P.) Ltd. v. Dy. CIT* (2013) 34 taxmann.com 203/144 ITD 76:

"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 *CIT v. L'Oreal India (P.) Ltd.* (2015) 53 taxmann.com 432/228 Taxman 360, 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. Addl. CIT* (2016) 381 ITR 227/237 Taxman 24/65 taxmann.com 141 (Delhi), while considering the decision of this Court in *Sony Ericsson Mobile Communications India Pvt. Ltd. v. CIT* (2015) 374 ITR 118/231 Taxman 113/55 taxmann.com 240 (Delhi), 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.”

38. The aforesaid decision was also followed by this Court in ***The Pr. Commissioner of Income Tax-3 v. Fujitsu India Private Limited: Neutral Citation: 2023: DHC:7952-DB.***

39. In the present case, as noted above, the learned Tribunal had accepted the assessee’s contention that its AMP expenses were not excessive and were similar to those incurred by other comparable entities.

40. There is no cavil that the AMP activities are a part of the functional profile of the assessee. In the given facts, the DRP’s decision that the assessee was not a ‘routine distributor’ is clearly sustainable.

41. In view of the above, we find no merits in the Revenue’s challenge to the decision of the learned Tribunal. No substantial question of law arises in the present appeal.



42. The appeal is, accordingly, dismissed.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

OCTOBER 24, 2024

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