IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)

(THROUGH VIDEO CONFERENCE)

BEFORE
SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 5774/Del./2014
A. Y. : 2009-10

M/s. Michelin India Pvt. Ltd. (Formerly known as Michelin India Tyres P. Ltd.) 3rd Floor, Orchid Business Park, Gurgaon	Vs.	DCIT Circle-6(1) New Delhi

Stay No. 288/Del/2020
(ITA No. 5774/Del./2014)
A. Y. : 2009-10

M/s. Michelin India Pvt. Ltd. (Formerly known as Michelin India Tyres P. Ltd.) 3rd Floor, Orchid Business Park, Gurgaon	Vs.	DCIT Circle-6(1) New Delhi

ITA No.6128/Del./2014
A.Y. : 2009-10

DCIT Circle-6(1) New Delhi	Vs.	M/s. Michelin India Tyres P. Ltd. DLF Towers, Jasola District Center, New Delhi-110025

ITA No.3167/Del./2017
A.Y. : 2010-11

M/s. Michelin India P. Ltd. Orchid Business Park, Sector-48, Sohana Road	Vs.	ACIT Range-6

Gurgaon New Delhi

ITA No.3125/Del./2017
A.Y. : 2010-11

DCIT Circle-16(2) New Delhi	Vs.	Michelin India P. Ltd. 7th Floor, The Pinnacle Business Tower, Faridabad
PAN : AADCM8454G (APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Nageshwar Rao, Adv.

REVENUE BY : Shri Ajit Kr. Singh, CIT-DR

Date of Hearing : 08.12.2020

Date of Order : 24 .12.2020

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER

Since common question of facts and law is involved in all the aforesaid cross appeals, the same are taken up together for disposal by way of composite order to avoid repetition of discussion.

2. Appellant, M/s. Michelin India Pvt. Ltd. (hereinafter referred to as 'taxpayer') and Appellant, Dy. Commissioner of Income Tax, Circle 6(1) (herein after referred to as 'revenue') by filing the present cross appeals sought to set aside the impugned order dated 04.08.2014 and 07.11.2016 for A.Y. 2009-10 and 2010-11 respectively passed by Ld. CIT(A) challenging the order

passed by AO in consonance with the orders passed by the ld. TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') on the grounds inter alia that :-

ITA No. 5774/Del/2014, A.Y.2009-10– Assessee's appeal

The following grounds of appeal are mutually exclusive and without prejudice to each another.

1. ***That on the facts and in law, the Learned Commissioner of Income Tax (Appeals)-XX, New Delhi (hereinafter referred to as "the Hon'ble CIT(A)"/ Learned Assessing Officer (hereinafter referred to as "Ld. AO") erred in assessing the income of the Appellant for the relevant assessment year at Rs. 15,33,85,193 as against the returned income of Rs. 1,47,91,724.***

2. ***Grounds pertaining to Corporate Tax***

2.1 That the Hon'ble CIT(A) / Ld. AO have erred on facts and in law in disallowing the management fee amounting to Rs. 54,698,578 paid by the Appellant and questioning the need for availing such services from its associated enterprise, thereby challenging the commercial expediency of the services availed. The Hon'ble CIT(A) / Ld. AO have failed to give due cognizance to the detailed submissions filed by the Appellant which clearly demonstrate the nature services availed, need of the Appellant and the benefit reaped therefrom, and have instead subjectively disallowed the expenditure purely based on presumed disposition.

2.2 ***That the Hon'ble CIT(A) / Ld. AO erred in mindlessly disallowing management fee paid by the Appellant without appreciating the prime facts applicable to the Appellant's business operations and thereby causing double taxation in the hands of Appellant.***

2.3 ***Without prejudice, the Hon'ble CIT(A) / Ld. AO has erred in disallowing management fees paid by the Appellant to its AE without appreciating that the expenditure is an international transaction and has already been subjected to detailed scrutiny by the Ld. Transfer Pricing Officer pursuant to a reference made by the Ld. AO under section 92CA(1) of the Act.***

2.4 That the Hon'ble CIT(A) / Ld. AO erred in facts and law in disallowing the Appellant's claim of brought forward losses amounting to Rs. 6,50,98,677 collectively for the AY 2005-06 and AY 2006-07, thereby ignoring the fact that the

matter is pending before the Hon'ble Tribunal for disposal.

2.5 That the Ld. AO erred in levying interest under section 234C of the Act.

2.6 That the Ld. AO has erred in facts and circumstances of the case by initiating penalty proceedings under section 271(1)(c) of the Act, which is bad in law.

3. <u>Grounds pertaining to Transfer Pricing Matters</u>

3.1 That the Hon'ble CIT(A) / Ld. TPO erred in law and on facts in inappropriately applying Transfer Pricing provisions to benchmark specific domestic expenses incurred to fulfill Appellant's own business interests, and without appreciating that such unilateral action of the Appellant (to incur such expense) cannot be regarded as an "international transaction" as per the provision of Section 92B of the Act.

3.2 That the Hon'ble CIT(A) / Ld. TPO erred in law and on facts while benchmarking the impugned transaction of the Appellant without conclusively determining a "method" prescribed under the Act and used the 'Brightline' approach, which is not a method under the Act.

3.3 That the Hon'ble CIT(A) / Ld. TPO erred in adopting a myopic view of the expense trends of the Appellant, and has instead deliberately not given any credence to the fact that the Appellant (being the sole distributor of Michelin products in India) is the primary and only direct beneficiary of the Advertisement, Marketing and Promotion ('AMP') expenses incurred locally, and any benefit what-so-ever which may have been derived by the AEs is purely incidental.

3.4 ***Without prejudice, the Hon'ble CIT(A) / Ld. TPO failed to apply the international guidance as espoused in the case of M/s DHL Incorporated and in the decision of the Hon'ble Special Bench of Delhi Tribunal in the case of M/s L.G. Electronics India Private Limited providing specific guidelines on the manner in which 'Brightline' approach may be applied.***

3.5 That the Hon'ble CIT(A) / Ld. TPO erred on facts and in circumstances of the instant case by conveniently ignoring that the Appellant (which operates as a limited risk distributor) is reimbursed / remunerated for all its costs (including personnel cost, AMP expenses, finance cost etc.) along with an appropriate / arm's length mark-up.

3.6 Without prejudice, the Hon'ble CIT(A) / Ld. TPO erred on facts in holding that dealer's incentive, commission and discounts/rebates leads to creation of "marketing intangibles". Ld. TPO/ Hon'ble CIT(A) erred in including such expenses for the purpose of determining

the AMP expense of the Appellant, thereby erroneously assuming such expense leads to creation of market network through dealers and customers.

3.7 Without prejudice, the Hon'ble CIT(A) erred confirming the Ld. TPO's approach of drawing a subjective comparison of the Appellant's AMP/ sales ratio with the AMP/sales ratio which are inexact and highly inappropriate comparable companies . Ld. TPO/ Hon'ble CIT(A) has chosen to completely ignore the guidance on the issue of choice of appropriate comparable companies for a 'Brightline' analysis, as has been laid out in the decision of Hon'ble Special Bench of the Delhi Tribunal in the case of M/s L.G. Electronics India Private Limited.

3.8 Without prejudice to the above grounds, Ld. TPO/ Hon'ble CIT(A) erred in facts and circumstances in concluding that the Appellant has effectively provided a brand building services/creation of marketing intangible to its AEs, without giving any specific finding / reason to support such erroneous claim and have committed another absurdity by applying a mark-up 15% using highly inappropriate data points.

ITA No.6128/Del./2014, A.Y. 2009-10- Revenue's appeal

1. ***Whether on the facts and circumstances of the facts & in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 5,31,75,329- on account of advertising and publicity expenses stating that these expenses are revenue in nature by completely ignoring the detailed reasons given by AO and without appreciating that the facts that above expenditure was not uncured wholly and exclusively for the purpose for the purpose of business and was also capital in nature?***
2. ***Whether on the facts and circumstances of the facts & in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 12,83,663/- on account of impairment of stock ignoring the facts that AO has established that assessee has tried to claim a provision, which is neither ascertained not is in fact, liability of assessee?***
3. ***That the order of the Ld. CIT(A) is erroneous and is not tenable on facts and in law.***
4. ***That the grounds of appeal are without prejudice to each other.***
5. ***That the appellant craves leave to add, alter, amend or forego any ground(s) of the appeal raised above at the time of the hearing."***

ITA No.3167/Del./2017, A.Y. 2010-11-Assessee's appeal

"The following grounds of appeal are mutually exclusive and without prejudice to each another.

1. Impugned order dated 07 November 2016 passed by Ld. Commissioner of Income Tax (Appeals)-44, New Delhi (hereinafter referred to as "the Ld. CIT(A)" is bad in law.

2. Grounds pertaining to Corporate Tax Matter

2.1 That the Ld. CIT(A) / AO erred on facts and in law by making the adjustment amounting to Rs. 8,17,64,429 in relation to management fee paid by the Appellant to its Associated Enterprise (AE).

2.1.1. That the Ld. CIT(A) / AO failed to give due cognizance to the detailed submissions and evidences filed by the Appellant which clearly demonstrate the nature of services availed, need of the Appellant of availing such services and the benefit reaped therefrom, and instead subjectively disallowed the expenditure purely based on presumed disposition.

2.1.2. That the Ld. CIT(A) / AO grossly erred by making the adjustment in relation to management fee paid by the Appellant to the AE without appreciating that the Learned Transfer Pricing Officer ("Ld. TPO") has already accepted that the management services rendered by the Appellant are at arm's length price.

2.1.3. ***at the Ld. CIT(A) / AO grossly erred by making the adjustment in relation to management fee paid by the Appellant to the AEs in violation of provisions of section 92C(4) of the Act without appreciating that such transaction has already been analysed by the Ld. TPO and no adverse inference has been drawn therefrom.***

2.1.4. ***2.1.4 That the Ld. CIT(A) / AO grossly erred by not appreciating that the Appellant indeed operates under a 'Market - Minus' pricing model, wherein the Appellant is assured of a guaranteed return on its entire cost of doing business (including personnel cost, advertising expenses, management fee, finance cost etc.) by way of reduction in purchase price of goods imported from the AEs.***

2.1.5. ***That the Ld. CIT(A) / AO grossly erred in not applying relevant decisions of the Hon'ble jurisdictional Tribunal and making a disallowance leading to double taxation which is contrary to the basic principles of taxation, thus bad in law.***

2.2 That the Ld. CIT(A) / AO erred in facts and law by considering the license fees paid towards purchase of computer software (to facilitate inventory, sales order and sub-contract management etc.) as an intangible asset i.e. acquisition of "right to use" the application, thereby allowing depreciation at the rate of 25% as against the Appellant's claim of 60% in the return of income.

2.3 That the Ld. CIT(A) / AO grossly erred by disallowing the Appellant's claim of brought forward losses

amounting to Rs. 26,85,56,128 collectively for AY 2006-07 and AY 2007-08, thereby ignoring the fact that the matter is pending before the Hon'ble Tribunal for disposal.

2.4 That the Ld. AO grossly erred in not giving the full credit for tax withheld at source and self- assessment tax deposited by the Appellant while computing the tax demand due from the Appellant.

2.5 That the Ld. AO erred on facts and in law by levying interest under section 234B and section 234C of the Act.

2.6 That the Ld. AO erred on facts and in law by initiating penalty proceedings under section 271(l)(c) of the Act, which is bad in law.

3. <u>Grounds pertaining to Transfer Pricing Matters</u>

3.1 That the Ld. CIT(A) / TPO erred in not following the Central Board of Direct Taxes (CBDT) Instruction 3/2016 and making a transfer pricing adjustment under Chapter X of the Act in respect of specific domestic expenses relating to advertising, marketing and promotion ("AMP")

3.1.1. ***That the Ld. CIT(A) / AO erred in ignoring the fact that the Appellant (being the sole distributor of Michelin products in India) is the primary and only direct beneficiary of the AMP expenses incurred by it and any benefit what-so-ever which may have been derived by the AEs is purely incidental.***

3.1.2. ***That the Ld. CIT(A) / TPO erred on facts and in law by conveniently ignoring that the Appellant (which operates as a limited risk distributor) operates under a 'Market - Minus' pricing model, wherein it is reimbursed / remunerated for all its costs (including personnel cost, AMP expenses, finance cost etc.) along with an appropriate / arm's length mark-up.***

3.1.3. ***That the Ld. CIT(A) grossly erred in not applying relevant decisions of Hon'ble High Court***

and further in applying the decision of Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Private Limited (ITA No. 16/2014) and issuing directions to re-compute the arm's length adjustment in respect of import of finished goods for resale from the AEs after including the AMP expenditure locally incurred by the Appellant, without appreciating that the transaction relating to import of finished goods has already been analyzed by the Ld. TPO and no adverse inference has been drawn therefrom.

3.1.4. That the Ld. CIT(A) grossly erred by directing the Ld. AO / TPO to adjust the freight expenses debited in profit and loss account of the Appellant, to compute the adjusted gross profit margin in relation to the transaction of import of finished goods for resale, ignoring the provisions of Accounting Standard ("AS") - 2.

The above grounds are independent and without prejudice to each other.
The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal."

ITA No.3125/Del./2017, A.Y. 2010-11-Revenue's appeal

1. ***Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in holding that Resale Price Method (RPM) was most appropriate method without appreciating a fact that gross profit as disclosed in the Annual Report of the companies including assessee and comparables were computed without considering advertisement, marketing and business promotion expenditure (AMP expenditure) and application of RPM would require multiple comparability adjustments leading to unreliable arm's length price?***

2. ***Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in holding RPM as most appropriate method to compute the arm's length price of AMP expenditure without taking into account that AMP expenditure adds value to the product by enhancing its saleabil ty accordingly, RPM was not most appropriate method to determine arm's length price (ALP) of AMP expenditure i.e. marketing intangibles?***

3. ***Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in holding RPM as most appropriate method to determine ALP of AMP expenditure even when the AMP expenditure effects net profit instead of gross profit?***

4. ***Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in holding RPM as most appropriate method without considering the amended provisions of section 92 of the Income Tax Act, 1961 (the Act) which makes a departure from profit determination to price determination and that AMP services rendered by the AE needs to be benchmarked separately?***

5. ***Whether on facts and in circumstances of the case, Ld. C1T(A) is legally justified in rejecting the Bright Line Test (BLT) in benchmarking the AMP expenditure without considering a fact that BLT was not used as method to determine arm's length price but was used as economic tool to compute the cost of services rendered by the assessee requiring arm's length remuneration?***

6. ***Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in observing that benefit to the AE due to AMP expenditure is only incidental and not intentional?***

7. ***Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in holding that if mi comparison, the gross profit are***

found to be comparable then no adjustment is warranted on account of AMP expenditure by ignoring a legal position that separate benchmarking of each international transaction is stipulated under the transfer pricing provision as well as under international guidance?

8. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in ignoring a iega position that provisions of services of market development (services of carrying out advertisement, marketing and business promotion) are international transactions under subclause (d) of clause (i) of explanation to section 92B(2) of the Act are intended to promote t ie brand as well as sale of product requiring determination of arm's length price of provision of these services separately?

9. Whether on facts and in circumstances of the case, Ld. C1T(A) is legally justified in holding that su e discount/ trade discount are not covered under sub-clause (d) of clause (i) of explanation to section 92B(2) of the Act by ignoring a fact that sale discount/ trade discount were intended to promote the brand of product as well as its sale by creating distributor's loyalty accordingly these expenditures were squarely covered under the provisions of market development services leading to generation of marketing intangibles under Explanation below section 9213(2) of the Act?

10. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in deleting disallowance of Rs. 4,78,89,110/- u/s 37(1) of the Act on account of advertising and publicity expenses even when the assessee had not discharged its initial onus u/s 37(1) of the Act that expenditure was not capital in nature?

11.Whether on facts and in circumstances of the case, Ld. C1T(A) is legally justified in deleting disallowance of Rs. 4,78,89,110/- u/s 37(1) of the Act on account of advertising and publicity expenses ignoring the fact that the expenses incurred by the assessee have created marketing intangibles the capital asset as defined under Explanation below section 92B(2) of the Act?

12.Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in deleting disallowance of Rs. 9,90,383/- on account of provision for impairment of stocks' ignoring the fact that the expenses claimed in profit & loss account were in nature of uncertain liability and hence, was not allowable u/s 37(1) of the Act?

13. That the appellant craves leave to add, amend, alter or forgo any ground/s of appeal either before or at the time of hearing to appeal."

BRIEF FACTS

ITA No. 5774/DEL/2014 OF A.Y. 2009-10- ⟹ Taxpayer's appeal
AND
ITA No. 6128/DEL/2014 OF A.Y. 2009-10- ⟹ Revenue's appeal

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Michelin India Pvt. Ltd. is into import and resale (or trading) of tyres for passenger cars, trucks and buses under the brand name 'Michelin'. During the year under assessment, the taxpayer entered into International Transaction with its Associate Enterprises (AE) as under :-

Sl. No	*Nature of transaction*	*Value of transaction*	*Benchmarking by the Assessee*
1	*Import of finished goods for resale*	*1147841543*	*RPM- The GP/Sales of the assessee has been worked out at 40.29%*
2.	*Provision of marketing support services*	*41813397*	*TNMM-OP/OC has been worked out to be 12.07% as against 8.69% of the comparables*
3.	*Availing of managerial services from AE's*	*54698578*	*AEs have been chosen as the tested party and OP/OC has been worked out at 2% as against 16.18% of comparables in the Asia Pacific Region.*
4.	*Reimbursement of expenses by AE to assessee*	*2763814*	*No benchmarking required as cost recharge only*
5.	*Reimbursement of expenses by assessee to AEs*	*4005143*	
6.	*Export of Finished Goods to AEs*	*4364120*	*No benchmarking required*

4. The Ld. TPO has not drawn any adverse inference on the economic and functional analysis of the taxpayer qua the aforesaid transactions and found the same and arm's length.

5. However, the Ld. TPO noticed that the taxpayer has incurred huge Advertisement, Marketing and Promotional (AMP) expenses to expand the reach of the AE's brand in India. The taxpayer has also created marketing intangible in favour of its AE and called upon the taxpayer to explain as to why the huge AMP expenses should not be subjected to benchmarking as international transaction.

6. Declining the contentions raised by the taxpayer, the Ld. TPO reached the conclusion that assessee being a distributor has undertaken the marketing activities on behalf of its AE to create intangible in its favour and has not paid any royalty and after applying the Resale Price Method (RPM) on the trading activities treated the incurring of AMP expenses and the resultant creation of marketing intangibles as a separate international transaction and benchmarked the same separately. Ld. TPO selected three companies in A.Y. 2009-10 as comparables namely ; **Dunlop India Ltd.; T V S Srichakra Ltd. ; Krypton Industries Ltd.** Having AMP/ Sales ratio of 4.79% as against 11.30% in case of the taxpayer which is into similar activities.

7. Ld. TPO applied bright line test and computed the arm's length of AMP i.e. the bright line at 4.79% of sales. The taxpayer spent AMP expenses to the tune of Rs. 25,08,53,510/- and Ld.

TPO computed the amount in excess of the arm's length amount of AMP at Rs. 144,586,263/-. The Ld. TPO has also applied the mark-up of 13% on the cost of CPM (15% assured markup on all costs minus 2% = 13%) and computed arm's length price of AMP expenses as under :-

Arm's length margin for markup

Arm's Length AMP Expenses (A)	***10,62,67,247***
AMP expenses incurred by the assessee(B)	***25,08,53,510***
Expenditur incurred oncreation of intangibles (B-A)	***14,45,86,263***
Mark up @ 15%	***2,16,87,939***
ALP of AMP expenses	***16,62,74,202***
Reimbursement assured	***14,74,77,988.3***
Difference	***1,87,96,214***

8. Assessing Officer while examining the corporate tax perused the notes to account and profit and loss account and noticed that the taxpayer has paid Rs. 54,698,578/- as management fee to its AE i.e. Michelin Asia Pacific Pte. Ltd. ('MAP'). AO perused the service agreement to know the nature of the services provided by MAP to the taxpayer and reached the conclusion that the assessee has incurred huge brought forward cost and establishment cost which include salary and wages of 14.60 crore as compared to 9.21 crore of last year. Taxpayer has also incurred legal and professional expenses of Rs. 2.58 crore as against 1.43 crore of last year,

travelling expenses of directors and others to the tune of Rs. 6.85 crore. All these facts goes to prove that the taxpayer has full team of management and has incurred huge expenses on them and they are taking care of different departments. As such payment of management fee is clear diversion of income and as such is not a genuine business claim but put forth to avoid the tax liability and thereby disallowed the same.

9. AO also disallowed taxpayer's claim of brought forward losses to the tune of Rs. 6,50,98,677/- collectively for A.Y. 2005-06 and 2006-07.

10. Assessing Officer also made disallowance of Rs.5,31,75,329/- being 50% of the expenditure claimed by the taxpayer on account of advertisement and publicity expenses by treating the same capital in nature. AO also made disallowance of Rs. 12,83,663/- on account of impairment of stock on the ground that claim of a provision which is neither ascertained nor is in fact the liability of the taxpayer.

BRIEF FACTS

ITA No. 3125/DEL/2017 OF A.Y. 2010-11 ⟹ Revenue's appeal
AND
ITA No. 3167/DEL/2017 OF A.Y. 2010-11 ⟹ Taxpayer's appeal

11. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Michelin India Pvt. Ltd. is into

import and resale (or trading) of tyres for passenger cars, trucks and buses under the brand name 'Michelin'. During the year under assessment, the taxpayer entered into International Transaction with its Associate Enterprises (AE) as under :-

Sl. No	*Nature of transaction*	*Value of transaction*	*Benchmarking by the Assessee*
1	*Import of finished goods for resale*	*1,807,259,401*	*RPM- The GP/Sales of the assessee has been worked out at 40.11% vis-à-vis the comparable companies at 9.19%*
2.	*Provision of marketing support services*	*27,197,616*	*TNMM-OP/OC has been worked out to be 10% as against 7.32% of the comparables*
3.	*Availing of managerial services from AE's*	*81,764,429*	*AEs have been chosen as the tested party and OP/OC has been worked out at 2% as against 16.33% of comparables in the Asia Pacific Region.*
4.	*Reimbursement of expenses by AE to assessee*	*1,455,243*	*No benchmarking required as cost recharge only*
5.	*Reimbursement of expenses by assessee to AEs*	*22,584,909*	

12. The Ld. TPO has not drawn any adverse inference on the economic and functional analysis of the taxpayer qua the aforesaid transactions and found the same and arm's length.

13. However, the Ld. TPO noticed that the taxpayer has incurred huge Advertisement, Marketing and Promotional (AMP) expenses to expand the reach of the AE's brand in India. The taxpayer has also created marketing intangible in favour of its AE and called upon the taxpayer to explain as to why the huge AMP expenses

should not be subjected to benchmarking as international transaction.

14. Declining the contentions raised by the taxpayer, the Ld. TPO reached the conclusion that assessee being a distributor has undertaking the marketing activities on behalf of its AE to create intangible in its favour and has not paid any royalty and after applying the Resale Price Method (RPM) on the trading activities treated the incurring of AMP expenses and the resultant creation of marketing intangibles as a separate international transaction and benchmarked the same separately. Ld. TPO selected five companies in A.Y. 2010-11 as comparables namely **Dunlop India Ltd. ; T V S Srichakra Ltd. ; Krypton Industries Ltd. ; Eco Wheels Private Limited ; Falcon Tyres Limited.** Having AMP/ Sales ratio of 3.05% as against 11.30% in case of the taxpayer which is into similar activities.

15. Ld. TPO applied bright line test and computed the arm's length of AMP i.e. the bright line at 3.05% of sales. The taxpayer spent AMP expenses to the tune of Rs.335,999,199/- and Ld. TPO computed the amount in excess of the arm's length amount of AMP at Rs. 222,416,487/-. The Ld. TPO has also applied the mark-up of 12.88% on the cost of CPM (14.88%- assured markup

on all costs minus 2% = 12.88%) and computed arm's length price of AMP expenses as under :-

Arm's length margin for markup	***14.88%***
Arm's Length AMP Expenses (A)	***113,582,711***
AMP expenses incurred by the assessee(s)	***335,999,199***
Expenditure incurred on creation of intangibles (B-A)	***222.417.498***
Mark up @ (12.88%=14.88%-2%)	***28,647,243***

16. Assessing Officer disallowed the claim of payment of Management Fee of Rs. 8,17,64,429/- excluding tax and cess made to M/s. Michelin Asia Pacific Pte Ltd. (AE) u/s 37(1) on the ground that aforesaid expenditure has not been incurred wholly and exclusively for the purpose of business.

17. Assessing Officer also disallowed taxpayer's claim of brought forward losses to the tune of Rs. 26,85,56,128/- collectively for AY 2005-06 and 2006-07. Assessing Officer disallowed the amount of Rs.4,78,89,110/- claimed by the taxpayer on A/c of advertisement and publicity expenses u/s 37(1) of the Act being 50% of Rs.9,57,98,219/- by treating the same being capital in nature on the ground that the same is not incurred wholly and exclusively for the purpose of business of the assessee as it is benefiting the assessee in the long run.

18. AO has also made disallowance of Rs. 9,90,383/- claimed by the taxpayer as provision for impairment on the ground that the same is not ascertained liability and also on the ground that the taxpayer has tried to take over the responsibility of its manufacturer i.e. its AE.

19. The taxpayer carried the matter before Ld. CIT(A) by way of filing appeals in A.Y. 2009-10 and 2010-11 who has partly allowed appeal for both the years. Feeling aggrieved the taxpayer as well as revenue have come up before the Tribunal by way of filing the cross appeals.

20. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

CORPORATE TAX GROUNDS

Ground No. 1 of ITA No. 5774/Del/2014, A.Y. 2009-10
AND ⟹ **Taxpayer's Appeal**
ITA No. 3167/Del/2017, A.Y.2010-11

21. Aforesaid grounds no. 1 of both the appeals are general in nature, hence, need no specific findings.

Ground No. 2.1, 2.2, 2.3 of
ITA No. 5774/Del/2014, A.Y. 2009-10
AND ⟹ **Taxpayer's appeal**
Ground No. 2.1, 2.1.1, 2.1.2, 2.1.3,
2.1.4, 2.1.5 of ITA no. 3167/Del/2017, A.Y. 2010-11

22. Ld. AR for the taxpayer challenging the impugned disallowance of management fee of Rs. 5,46,98,578/- and Rs. 8,17,64,492/- of AY. 2009-10 and 2010-11 respectively by the Ld. CIT(A)/ AO contended that this issue has already been decided in favour of taxpayer in its own case in **ITA No. 2415/Del/2014, A.Y. 2008-09.** However, Ld. DR for the revenue filed written submissions which have been made part of the judicial file contended that facts of cases at hand are largely distinguishable than the case decided in AY 2008-09 and further contended that the deficiency and shortcomings brought out by the department in the documents/ evidences in form of service agreement and mail exchanges furnished by the assessee have not been appreciated by the tribunal. However, on putting specific queries the Ld. DR has failed to bring on record distinguishable facts of the cases at hands vis-à-vis case of the taxpayer of A.Y. 2008-09.

23. We have perused the order passed by the tribunal in assessee's own case in A.Y. 2008-09 and facts are identical. Coordinate Bench of Tribunal vide order dated 22nd June, 2020 passed in **ITA no. 2415/Del/2014, A.Y. 2008-09** deleted the disallowance of management fee made by the Ld. CIT(A)/AO by returning following findings :-

"8. Briefly in the facts of the case the assessee for the year under consideration had filed original return of income on 30.09.2008 declaring total income at NIL. The assessee then filed revised return of income on 14.10.2008 declaring total income of Rs.13,12,461/-. The assessee company was incorporated on 12.11.2003 as a result of joint venture between the Michelin Group, France and Appolo Tyres Ltd. in India. The said joint venture was formed to carry out the business of manufacturing and trading of tyres and tubes for trucks and buses and passengers cars. The Assessing Officer made reference to the Transfer Pricing Officer (in short "TPO") u/s 92CA(1) of the Act. The TPO passed the order u/s 92CA(3) of the Act and no transfer pricing adjustment was proposed. The Assessing Officer thereafter, noted that the assessee during the year under consideration had paid management fees of Rs.1.76 crores (approx.) to its Associated Enterprises (in short "AE") Michelin Asia Pacific Pte. Ltd. (in short "MAP"). The Assessing Officer further noted that during the preceding year, the amount of expenditure debited was Rs.1.39 crores (approx.). Another aspect which was noted by the Assessing Officer was that the assessee was incurring huge operating expenses i.e. salary and wages of Rs.9.21 crores, professional and legal charges of Rs.1.43 crores and all kind of other managerial and establishment expenses, which were included in total operating expenses of Rs.49.96 crores. The assessee was asked to furnish complete details of management services provided by MAP Singapore alongwith the copy of Agreement and date-wise activities to establish its case of services being provided by the said concern. In response thereof, the assessee pointed out that it had availed certain management support services from its AE. The said services are enlisted at page 2 & 3 of the assessment order. The assessee stressed that the managerial services availed constitute relevant business assistance received by the assessee from MAP Singapore to undertake its operation in a more efficient way.

9. Reliance was placed on various decisions for the allowability of the said claim. The Assessing Officer notes as under:-

> ***"…….In the above mentioned Agreement, it appears that the assessee has received advices in the matter of variety of fields, which include general business and administration service, economic planning and accounting services, industrial assessment services, marketing training and planning, training and personnel services, financial advisory services, economic and investment research and analysis, credit control and administration, product distribution planning and logistics services, quality control services, legal services, information & telecommunication services….."***

10. The Assessing Officer observed that submissions of the assessee were not correct as the assessee had incurred huge personnel cost and establishment cost. He also observed that from the details filed, it appears that the assessee had full team of management consisting of Mr. Jean Paul Caylar as Director and Mr. Herve Dub, as Director. The assessee had incurred huge expenses on their salaries and other perquisites. The Assessing Officer further observed that against total turnover of Rs.132.81 crores, the assessee had incurred operating expenses of Rs.49.97 crores where the assessee was only a trading company and had not established any manufacturing plant in India so far. The claim of the assessee in the form of management fee was not genuine claim as per the Assessing Officer. It was held to be a clear diversion of income and the claim of the assessee was held to be non genuine business claim and the same was disallowed and added to the total income of the assessee. Another point which was raised by the ITA Nos.2415 & 2946/Del/2014 Assessment Year 2008-09 6 Assessing Officer relying on different decisions and it was observed that the payments made to the related parties should be reasonable in accordance to the market conditions.

11. Before the CIT(A), it was contended by the assessee that the managerial services constitutes genuine business assistance needed by the assessee to conduct its business operations in more efficient way. It was also pointed out that over the period of years, there was consistent reduction in loss recorded by the assessee and it resulted in profitability during the year which was because of the benefits derived by the assessee from the support services availed from the group concerns. It was also explained that the management services were availed in the form of online services through e-mail or online access and workshop/conferences organized by the AE for the Indian entity. The CIT(A) was of the view that the issue raised in the present appeal stands covered by the order of CIT(A) in Assessment Year 2007-08 and since the assessee has not furnished sufficient documents to prove its availment of benefit, the expenditure needs to be added in the hands of the assessee. The assessee is in appeal against the order of CIT(A).

12. The Ld.AR for the assessee pointed out that the assessee was a trading company and its operating expenses were to the tune of 40% of the total turnover. In para 3.2 of the assessment order, the Assessing Officer talks about the nature of expenses incurred by the assessee. The Ld.AR for the assessee stressed that routine support services were provided by the AE to the assessee for better management of the business and sufficiency and benefit of such services provided by the AE, could not be seen or gone into by the Assessing Officer. He further stressed that the TPO had accepted the transaction to be at arm's length. It was further pointed out by the Ld.AR that the expenses were incurred from year to year; and once the expenditure has been incurred, it is not necessary to prove whether any benefit arose to the assessee or not. He further pointed out that the department case was that the evidences filed by the

assessee for availment of support services were not sufficient and adequate. In such scenario, he stressed that the same does not warrant entire disallowance of expenses. He further stated that the losses had reduced over the period of years hence, the assessee had benefited from availment of such support services from its AE. The Ld.AR then referred to the additional evidence filed by the assessee. He also pointed out that though the Tribunal had decided the issue against the assessee but the same was on the premises that only one bill for the month of March 2008 was filed. He also brought to our notice that Miscellaneous Application was filed and pending against the order of the Tribunal relating to Assessment Year 2007-08. However, he stated that he was ready to argue the appeal for the instant assessment year.

13. The Ld.DR for the Revenue pointed out that undoubtedly TPO had examined the arm's length price of international transaction but the Assessing Officer can also conduct inquiry and carry out the exercise as he was within his rights to do so. Replying to the plea of the assessee that the reduction in losses are also attributable to the support services availed by the assessee, the Ld. DR for the Revenue pointed out that these were corroborating statement. Referring to the order of CIT(A), the Ld.DR pointed out that it has been noted that the existence of services was not doubted but the question was whether services were availed or not and such availment of services was questioned by the authorities below.

14. The Ld.AR in reply pointed out that documents were before the authorities below and the same support the availment of services and the support the claim of services from the AE. He again pointed out that where sufficiency of the availment of services and its price had been examined by the TPO, there was no merit in the order of the Assessing Officer in this regard.

15. When the matter was fixed for certain clarification before the Bench, the Ld.AR for the assessee pointed out that Tribunal in MA No 479/Del/2019, vide its order dated 19.02.2020 had recalled its own order relating to Assessment Year 2007-08, on the ground that multiple factual errors had crept in the order; hence, there was mistake apparent on record and the order of the Tribunal was thus recalled.

16. We have heard the rival contentions and perused the record. The issue arising in the present appeal filed by the assessee is against the deduction claimed on account of management fee paid to MAP, Singapore at Rs.1.76 crores (approx.). The assessee had entered into an Agreement with MAP, Singapore, for availing the services. Availment of services from AE were in the following fields:-

- ***"General business and administration services: Assistance in the field of general business and corporate affairs and facilitates internal and external contacts.***
- ***Economic planning and accounting services: Assistance in economic plans, accounting and results analysis. As an enterprises functioning in the highly competitive tyre***

industry, the Assessee requires external assistance to meet its goals, and improve profitability.

- ***Industrial assessment services other than technical assistance: Management of the creation modification and maintenance of industrial tools.***
- ***Marketing training and planning: Assistance in developing marketing strategy and determining actions to be taken. • Training and personnel services: Assistance in ensuring proper recruitment, training and human resources management.***
- ***Financial advisory services: Expertise in all the financial aspects of the business of the beneficiary.***
- ***Economic and investment research and analysis: Assistance in financial and economic analysis.***
- ***Credit control and administration: Assistance in the selection of source of funds.***
- ***Product distribution planning and logistics services: Assistance in the management of products flows, determine resources necessary to ensure the efficient supply of products in a timely manner.***
- ***Quality control services: Expertise on quality assurance in all the fields of activity from the development of products to the service to final client.***
- ***Legal services: Legal services in all matters including but not limited to corporate, tax, intellectual property. commerce, finance, partnership, all legal aspects of business.***
- ***Information and Telecommunication services: Assistance in technical definition, implementation and maintenance of computers and telecommunication systems. Support operations management in identifying process evaluation requirements and in implement organizational changes."***

17. The claim of the assessee before us is that the said managerial services were availed by the assessee from its AE in order to enable it to undertake its operation in more efficient way. The case of the Revenue on the other hand is that the assessee had received advise in the matter of variety of fields, which include general business and administrative service, economic planning and accounting services, industrial assessment services, marketing training and planning, training and personnel services, financial advisory services, economic and investment research and analysis, credit control and administration, product distribution planning and logistics services, quality control services, legal services, information & telecommunication services. On the other hand, the Assessing Officer also notes that the assessee had incurred huge personnel cost and establishment cost of Rs.9.21 crores (approx.), legal and professional of Rs.1.34 crores (approx.), travelling expenses of Directors and others of Rs.4.91 crores (approx.). Another point which was the basis for disallowance in the hands of

the assessee, was the managerial salary and perquisite paid by the assessee to its Directors. The Assessing Officer has time and again pointed out that the operating expenses were to the tune of 40% and over which again the assessee has claimed the management fee of Rs.1.76 crores (approx.). The Assessing Officer holding that payment of management fee was clear diversion of payment also observed that the group company were paid in the name of management fee though there were sufficient management directors in the assessee's company. He was of the view that though it is claimed as a charge on the taxable income but infact it was application of income and the said claim was not genuine business claim.

18. At this juncture, we need to see whether the Assessing Officer had exceeded the jurisdiction cast upon him, while deciding the issue of allowability of claim of management fees paid by the assessee to its AE. In the first instance, it is for the businessman to decide its course of carrying on the business and in such course, for availing management services from its AE. The Assessing Officer cannot sit in judgment, with such decision of businesssman to hold that the group companies were being paid in the name of management fee, though there were sufficient management personnel available. Such observation cannot be the basis for benchmarking the allowability of the expenditure in the case of the assessee. The benefit, if any, arising to the assessee against the availment of such support services is not necessary to be proved by the assessee. The assessee in its wisdom to carry on its business, where the business has worldwide presence, needs to keep its standards high and to maintain similar terms and conditions, not only for running business but for providing services to customers, has to avail such management advices and services from its AE. In the present scenario where the assessee is dealing in items, which were available in international market also, then same practice has to be adopted worldwide and hence the necessity of availment of management services. Merely because the assessee was increasing expenditure on its personnel and other expenses, cannot be the yardstick for deciding whether assessee had any need to avail the services. It is outside the domain of Assessing Officer to traverse in such direction. The Assessing Officer categorically states that assessee had availed services in various fields, but it is outside his domain to decide whether there was any necessity to avail such services or not. The assessee having availed the support services for its day to day running of business, is entitled to claim the expenditure. Hence, we hold so. In this regard, we must also look to the other side of the picture that the losses arising to the assessee in the earlier year/s have consistently reduced and had resulted in profitability during the year, which is clearly apparent from the following chart:-

AssessmentYear	***(Loss)/Income as per book***	***Returned (Loss)/Income***
2006-07	***(28.11) crores***	***(24.18) crores***
2007-08	***(16.05) crores***	***(8.42) crores***
2008-09	***11.10 crores***	***0.13 crores***

19. The increase in the profitability of the assessee during the year itself establishes the case of the assessee that the availment of support services from the AE has benefitted the business of assessee and hence expenditure is business expenditure. Now, coming to the next aspect of the assessee i.e. the evidences of availment of support services from the AE. The assessee before us has furnished evidences in the form of additional evidences to establish its case of availment of services. Such evidences are available at pages 1 to 66 of the Paper Book filed by the assessee in this regard. The assessee had also filed evidences before Assessing Officer/CIT(A) which are noted by them. The sufficiency of availment of services can be gone into by Assessing Officer, but where evidences have been filed, the Assessing Officer cannot sit in judgement as to allowability of expenditure on the surmise that assessee is already increasing expenditure upto 40%. There is no merit in the stand of the authorities below. Thus, grounds of appeal no.2 & 3 raised by the assessee are allowed."

24. So, following the order passed by the co-ordinate bench of the tribunal, we are of the considered view that when the assessee has proved on file that it has availed off the support services from its AE to run its business, it is entitled to claim expenditure. A.O./ CIT(A) was not empowered to decide if there was any necessity for the taxpayer to avail such services. So the ground raised by taxpayer in its appeal for A.Y. 2009-10 and 2010-11 are allowed and disallowance made stands deleted.

Ground No. 2.4 of ITA No. 5774/Del/2014, A.Y. 2009-10 ⇨ **Taxpayer's Appeal**

25. AO/ CIT(A) have disallowed set off of brought forward losses to the tune of Rs. 6,50,98,677/- collectively for A.Y. 2005-06 and A.Y. 2006-07. AO/CIT(A) have disallowed set off losses

by ignoring the fact that the matter is pending before the Tribunal for disposal. So, this issue is remitted back to the AO to verify the facts and grant the set off claimed by the assessee if admissible.

Ground No. 2 of ITA No. 6128/Del/2014, A.Y. 2009-10
AND ⇨ **Revenue's Appeal**
Ground No. 12 of ITA No. 3125/Del/2017, A.Y. 2010-11,

26. Ld. DR for the revenue challenged the impugned deletion of addition of Rs. 12,83,663/- and Rs. 9,90,383/- for A.Y. 2009-10 and 2010-11 respectively by the Ld. CIT(A) by relying on the order passed by the Tribunal. However, Ld. AR for the taxpayer brought to the notice of the bench that this issue has also been decided by the Tribunal in taxpayer's own case in A.Y. 2009-10. This fact has not been controverted by the Ld. DR.

27. We have perused the order of the Co-ordinate Bench of Tribunal passed in assessee's own case bearing **ITA No. 2946/Del./2014 for A.Y. 2008-09** in favour of the taxpayer by upholding the order passed by Ld. CIT(A) by returning following findings :

> ***"21. The first issue raised by the Revenue vide Ground of appeal No.1 is against the deletion of disallowance made of Rs.27,83,732/- on account of impairment of stock.***
> ***22. Briefly in the facts of the case the assessee in the books of accounts had been recording the value of closing stock as per Accounting Standard- 2 (in short "AS-2") i.e. stock to be valued at net realizable value cost, whichever is lower. The said accounting treatment was followed by the assessee since commencement of its business activities. The Assessing Officer disallowed the said claim vide para 4 of the assessment order; the provision for impairment***

of stock of Rs.27,83,732/- on the ground that this was not a ascertained liability. The Assessing Officer also noted that similar disallowance was made in the earlier years and hence disallowed the amount in the year under consideration.

23. The CIT(A) noted that the disallowance made in the Assessment Year 2007-08 has been deleted by the CIT(A) and also noted from the details that as per AS-2, the assessee had booked cost or realizable value whichever was less and the net realizable value was based on last actual sale price of the product. Further, weighted average cost was computed by the assessee. The CIT(A) allowed the claim of the assessee against which the Revenue is in appeal.

24. The Ld.DR for the Revenue pointed out that before the CIT(A), certain details were filed which was not examined by the Assessing Officer. The Ld.AR for the assessee further pointed out that nothing fresh was filed during the year and the said provision was made as was being made in the earlier years.

25. We have heard the rival contentions and perused the record. Where the assessee is following the systemized way of recognizing the value of stock at the close of the year i.e. as per AS-2 of Accounting Standard and the cost of the closing stock is declared on the basis of cost or net realizable value, whichever is less. Hence, there is no merit in the aforesaid disallowance made in the hands of the assessee. We uphold the order of the CIT(A). Ground of appeal No.1 raised by the Revenue is thus dismissed."

28. AO has disallowed this claim made by the taxpayer on the ground that the provision for impairment of stock was not ascertained liability. Following the order passed by Co-ordinate Bench of the Tribunal, we are of the considered view that when the AO has not questioned the method of recognizing the value of stock at the close of the year i.e as per AS-2 of Accounting Standard and the stock or net realizable value, whichever is less, the disallowance on the basis of surmises is not permissible. Hence, we find no scope to interfere into the findings returned by

Ld. CIT(A) and accordingly, aforesaid grounds in A.Y. 2009-10 and A.Y. 2010-11 raised by the Revenue are dismissed.

Ground. No. 1 of ITA No. 6128/Del/2014,
A.Y. 2009-10 ⟹ **Revenue's Appeal**

AND

Ground No. 10 & 11 of ITA No. 3125/Del/2017
A.Y. 2010-11

29. Revenue has challenged the deletion of addition of Rs.5,31,75,329/- and Rs. 4,78,89,110/- for A.Y. 2009-10 and 2010-11 respectively by Ld. CIT(A) made by the AO on account of advertising and publicity expenses by treating the same as revenue in nature. Ld. AR for the assessee contended that this issue has also been decided in favour of the taxpayer by the tribunal in taxpayer's own case for **A.Y. 2008-09 in ITA No. 2415/Del/2014** and this fact has not been controverted by the Ld. DR.

30. We have perused the order passed by the Co-ordinate Bench by the Tribunal in A.Y. 2008-09 deleting the addition by the Ld. CIT(A) made by the AO on account of AMP expenses by treating the same as capital expenses. The Ld. CIT(A) in 2008-09 has deleted the addition by treating the expenditure being revenue in nature, which order has been upheld by the co-ordinate bench of tribunal by returning following findings :-

> ***"26. The second issue raised by the Revenue is against the order of CIT(A) in deleting the addition of Rs.3.36 crores (approx.) made on account of AMP expenses. The assessee during the year under consideration had claimed expenses of Rs.6.72 crores (approx.) on***

account of advertisement and publicity, as against the claim of Rs.4.44 crores (approx.) made in the last year. The Assessing Officer asked the assessee to provide the requisite details as to whether the said expenses would lead to establishment and promotion of "Michelin" brand in India. The Assessing Officer was of the view that where the brand is owned by the parent company, then they should contribute towards advertisement and marketing expenses incurred by the assessee, on the surmises that expenses were incurred for establishment and promotion of the international brand "Michelin" which was not the property of the assessee. Reference was made to the OECD Guidelines in this regard and since the assessee had not received any compensation from its AE and the advertisement was generating benefits to the AE who owned the brand; the Assessing Officer held that 50% of the expenses should be disallowed in the hands of the assessee as capital in nature. the Assessing Officer held the disallowance is to be made on account of two reasons, first it is not incurred wholly and exclusively for the purposes of the business of the assessee and second, it is benefitting the assessee in long run and hence capital in nature.

27. The CIT(A) after considering the written submissions of the assessee observed that even if some enduring benefit arose out on such expenditure but without specifically establishing the fact, the addition could not be made on the basis of presumption. Reliance was placed on the decision of CIT vs Berger Paints (2002) 254 ITR 503 (Cal.) and the addition made by the Assessing Officer was deleted. The assessee had also relied on the decision of Tribunal in the case of Nestle India Ltd. vs DCIT [2009] 27 SOT 9 (Delhi), which was upheld by the Hon'ble Delhi High Court wherein the advertisement expenses were treated as revenue expenses. The CIT(A) applied the said ratio also and allowed the claim of the assessee.

28. The Ld. DR for the Revenue pointed out that in Assessment Year 2007- 08, the disallowance was made in the hands of the assessee on account of TP adjustment whereas in the present case, the aforesaid disallowance was made u/s 37(1) of the Act hence, the decision of Tribunal for the preceding year is not binding.

29. The Ld.AR for the assessee pointed out that the issue raised was whether any adhoc disallowance can be made in the hands of the assessee out of advertisement and publicity expenses which had been struck down by the Hon'ble Delhi High Court in the case of Nestle India Ltd. vs DCIT (supra).

30. We have heard the rival contentions and perused the record. The assessee was engaged in the trading of world renowned tyres of cars and the expenditure made by the assessee benefitted its business in India. The issue which arises vide Ground No.2 raised by the Revenue is against the allowance of particular expenditure or its part disallowance as made by the Assessing Officer. The expenditure in question was advertisement expenses, wherein the assessee during the year under consideration had claimed

expenditure totaling to Rs.6.72 crores (approx.) as against Rs.4.44 crores (approx.). The assessee is a trader in tyres of "Michelin" brand in India. The assessee claimed that it was incurring said expenditure wholly and exclusively for carrying on its business in India. Similar expenses to the tune of Rs.4.44 crores (approx.) were also incurred in the earlier years and no disallowance u/s 37(1) of the Act was made in the hands of the assessee in the earlier years. However, transfer pricing adjustment was made on account of aforesaid expenditure incurred on advertisement and publicity. The Tribunal in assessee's own case relating to Assessment Year 2007-08 in ITA Nos.3166 & 3306/Del/2013 vide order dated 30.04.2019 has deleted the aforesaid adjustment on account of advertisement and publicity. In the instant Assessment Year, the Assessing Officer however, was of the view that the expenditure incurred by the assessee needs to be disallowed on two counts i.e. first it was not incurred wholly and exclusively for the purpose of business and second it was benefiting the assessee in long run hence, capital in nature. The limited issue which arises is whether the said expenses are to be allowed in entirety in the hands of the assessee.

31. The aforesaid expenditure under the head advertisement & publicity has been incurred by the assessee for the following purposes:-

I. Dealer signage and boards;
II. Printing of Brochures, tyre technical guides, merchandise;
III. Product Launches;
IV. Print adverts in newspapers and magazines;
V. Seminars and Exhibitions;
VI. Hording etc;

32. This fact was brought to the knowledge of the Assessing Officer, but has not been considered by the Assessing Officer. Looking at the nature of expenses incurred, it is apparent that the same primarily pertain, to sales promotion of the products in Indian market. The expenditure being essentially incurred with the object to boost the sales of the assessee though the brand is owned by the AE does not warrant any disallowance in the hands of the assessee. Whether the expenditure has been incurred wholly and exclusively for the purpose of business, hon'ble Apex Court in the case of Chandulal Keshavlal 38 ITR 601, had observed as under:-

"……in deciding whether a payment of money is a deductible expenditure, one has to take into consideration questions of commercial experience and principle of ordinary commercial trading. Another test is whether the transaction is properly entered into as a part of the Assessee legitimate commercial undertaking in order to facilitate the carrying on of its business and it is immaterial that the third party also benefits thereby…..;

33. Further, the Delhi Tribunal of ITAT in Nestle India Ltd. vs DCIT 111 TTJ 498 (Del. Trib.) had held as under:-

> ***"22…….. The expenditure incurred by the Assessee company on advertisement/sales promotion of***

some Nestle Products in India may give rise to certain benefit to Nestle SA, but this cannot be a ground to disallow the claim of the Assessee, once it is established that the expenditure in question has been incurred by the Assessee for the purpose of business of the Assessee in as much as the expenditure by the Assessee on advertisement/sales promotion has direct nexus with the earning of income by the Assessee."

The appeal of the Revenue against the same has been dismissed by Hon'ble Delhi High Court.

34. In the entirety of the facts and circumstances of the case, the entire expenses on advertisement and publicity need to be allowed in the hands as business expenditure of the assessee."

31. Following the order passed by co-ordinate bench of tribunal and in view of the facts and circumstances of the case, we are of the considered view that Assessing Officer has merely made disallowance by following order passed in A.Y. 2008-09 in which taxpayer has incurred identical AMP expenditure for the purpose of Dealer signage and boards; Printing of Brochures, tyre technical guides, merchandise; Product launches; Print advertisements in newspapers and magazines; Seminars and Exhibitions; Hoardings, etc. which was deleted by the Ld. CIT(A) and order of Ld. CIT(A) was upheld by the tribunal. We find no scope to interfere into the findings returned by Ld. CIT(A). Moreover, it is beyond comprehension as to how the AO quantified 50% of the AMP expenses as capital in nature and remaining 50% as revenue in nature. So, aforesaid grounds A.Y. 2009-10 and A.Y. 2010-11 raised by the revenue are hereby dismissed.

Ground No.2.2 of ITA No. 3167/Del/2017, A.Y. 2010-11 ⟹ Taxpayer's appeal

32. Taxpayer has challenged grant of depreciation on computer software @ 25 % as against taxpayer's claim of 60% in the return of income on the ground that AO/ CIT(A) have erred in considering the license fees paid towards the computer software purchase as an intangible assets i.e. acquisition of right to use the application. The Ld. AR for the taxpayer contended that depreciation @ 60% on the license fee paid to Oracle is towards computer software provided by Oracle to facilitate inventory management, order management, sub-contract management etc. and is eligible for depreciation @ 60% as per Appendix 1 of the Rule 5 of Income Tax Rules which include computer software in the depreciation of computer. Because software contained in a disk is tangible property by itself. Since the taxpayer's ownership of limited right over the computer software purchased from Oracle by making payment of license fee is a tangible assets, it is entitled for depreciation @ 60% as per definition of "Plant" given in new Appendix 1 of Rule 5 effective from A.Y. 2006-07 of the Income Tax Rule, 1962.

33. So, we are of the considered view that AO/CIT(A) have erred in allowing the depreciation on the license fee paid towards computer software @ 25% as against 60% . So, AO is directed to grant depreciation @ 60% on the license fee paid to Oracle by clubbing the said payment with computer and software. So, Ground No. 2.2 of ITA No. 3167/Del/2017, A.Y. 2010-11 raised by the taxpayer is allowed.

Ground No. 2.4 of ITA No. 3167/Del/2017, A.Y. 2010-11 ⟹ Taxpayer's Appeal

34. Ld. AR for the taxpayer contended that AO has not given the full credit for tax deducted at source (TDS) and self-assessment tax deposited while computing the tax demand. We are of the considered view that when taxpayer has brought on record the evidence for deducting the TDS and self tax deposited while computing the tax demand the AO is directed to verify the facts and to provide full credit of TDS and self-assessment tax deposited by the taxpayer in its computation of income. Consequently, Ground No. 2.4 ITA No. 3167/Del/2017, A.Y. 2010-11, Taxpayer's Appeal is determined in favour of the assessee.

TRANSFER PRICING ISSUES

Ground No. 3.1 to 3.8 of ITA No. 5774/Del/2014,
AND ⟹ Taxpayer's Appeal
Ground No. 3.1, 3.1.1 to 3.1.4 of ITA No. 3167/Del/2017,
A.Y. 2009-10 and A.Y. 2010-11 respectively

Ground No. 1 to 9 of ITA No. 3125/Del/2017, ⟹ Revenue's Appeal

A.Y. 2010-11

35. Taxpayer in ITA No. 5774/Del/2014, A.Y. 2009-10 by moving two separate applications for admitting additional supporting evidence to introduce Resale Price Method (RPM) analysis as per the order passed by Ld. CIT(A) in assessee's own case for A.Y. 2010-11 and for admission of additional ground no. 3.9, which is as under :

> ***"3.9 "Without prejudice to any other ground and also to our contention that no addition on account of advertisement, marketing and promotion (AMP) expenses is justified in Appellant's case, authorities have failed to adopt similar methodology as applied by Hon'ble CIT(A) for A.Y. 2010-11"***

On the grounds inter alia that u/s 255 of the Income Tax Act, read with rule 29 of the Income Tax Appellate Tribunal Rules, 1963, Tribunal if so requires entertain additional evidence and that additional ground sought to be raised is regarding issues which are found necessary for adjudication of the issue at hand.

36. The Ld. DR for the revenue opposed both the applications move by the taxpayer for leading additional evidence and for raising additional ground on the ground that this evicence was well within the notice of the taxpayer, since very beginning and that the evidence sought to be brought on record by the taxpayer has never been put up before the Ld. TPO/CIT(A) and that merely on the

basis of rule of consistency additional ground cannot be raised and made a request for dismissal of both the applications.

37. We are of the considered view that so far as the question of admitting the additional evidence brought on record by the taxpayer is concerned when revenue on its own in A.Y. 2010-11 in taxpayer's own case on identical facts have decided the RPM analysis, the working based on RPM method is necessary to adjudicate at the controversy at hand once for all otherwise it will lead to multiplicity of the proceedings.

38. The contention of the Ld. DR that this evidence was not examined by TPO is not sustainable because every additional evidences, if admitted, is required to be examined by the TPO/AO to decide the issue at controversy. So far as question of entertaining the additional ground raised by the taxpayer is concerned again, we are of the considered view that for complete appreciation of facts on record and deciding the issue in controversy additional ground raised, which has arisen only after the order passed by the tribunal in A.Y. 2010-11 in taxpayer's own case in the similar set of facts and circumstances, is allowed. So, both the applications moved by taxpayer are allowed without prejudice to the merits of this case.

39. So far as Ground No. 3.1 to 3.8 and additional Ground No. 3.9 raised by taxpayer in A.Y. 2009-10 are concerned the taxpayer

has brought on record additional evidence giving working of adjustment on the basis of RPM analysis by following order passed by CIT(A) in A.Y. 2010-11 by relying upon decision of **Soni Ericsson Mobile Pvt. Ltd. 374ITR 118,** rendered by Hon'ble Delhi High Court which need to be examined by the TPO. Since, revenue is required to follow the rule of consistency in the identical facts and circumstances of the case these grounds are remitted back to the TPO to decide afresh in view of additional evidence brought on record by the assessee by following order passed by Ld. CIT(A) in taxpayer's own case for A.Y. 2010-11 which is based upon the decision rendered by Hon'ble Delhi High Court in case of Soni Ericsson (supra).

40. However, the Ld. AR for the taxpayer contended that freight need not considered for adjustment as it is outward freight and not freight for import of material distributed, hence not operating from transaction perspective. We are of the considered view that outward freight for import of material distributed can only be considered for adjustment and not outward freight in India. Ld.TPO is to verify this fact and if the freight is for outward freight in India it need not be considered for adjustment. Consequently, Ground No. 3.1 to 3.8 raised by the assesee in A.Y. 2009-10 are allowed for statistical purpose.

41. Taxpayer raised grounds no. 3.1, 3.1.1 to 3.1.4 in A.Y. 2010-11 for directing the TPO by Ld. CIT(A) to adjust the separate expenses debited to profit and loss account of the taxpayer in order to compute the adjusted profit margin in relation to transaction of import of finished goods for resale by ignoring the provision of Accounting Standard 'AS-2'. We are of the considered view that when the taxpayer claimed that the freight need not be considered for adjustment as it is outward freight in India and not freight for import of material distributed, it is not to be considered for adjustment as directed by Ld. CIT(A). AO/ TPO is to verify this fact and provide adjustment of the freight expenses debited in the profit and loss account of the taxpayer to compute the adjusted gross margin only if it relates to import of finished goods for resale. Consequently, Ground No. 3.1 and 3.1.1 to 3.1.4 are determined in favour of the taxpayer.

42. Revenue by raising Ground No. 1 to 9 in ITA No. 3125/Del/2017, A.Y. 2010-11 challenged the order of Ld. CIT(A) in applying the Resale Price Method (RPM) as RPM was not the Most Appropriate Method (MAM) to determine arm's length price (ALP) of AMP expenditure i.e. marketing intangibles. Revenue has also challenged the rejection of Bright line Test (BLT) in benchmarking the AMP expenditure without.

43. We have perused para 11.3 of the order passed by the Ld. CIT(A) qua the grounds raised by the revenue before the Tribunal directing the AO/TPO to recompute the arm's length adjustment in respect of import of finished goods for resale from the AE taking RPM as the most appropriate method which are as under :-

> ***"I have considered the findings of the AO, written submission and oral arguments of the Ld. AR carefully.***
>
> ***From the facts of the case it is evident the appellant is entering huge AMP expenditure which will definitely lead to strengthening brand building namely Michelin India owned by the AE. I am not going into the question as to whether AMP expenditure can be considered as international transaction as per the decision of Hon'ble Delhi High Court in various decision such as Whirlpool India (ITA No. 228/2015).***
>
> ***I am relying on the decision on the jurisdictional High Court in the case of Sony Eracssion Mobile Pvt. Ltd. cited at 374/14- 12-11 where Hon'ble High Court has held that gross profit margin should be computed after including AMP expenditure when RPM is considered as most appropriate method. In Present case also RPM is considered as the most appropriate method for import segment for resale. Accordingly the decision of Hon Delhi High Court in the present case will apply. The relevant portion of High Court is reproduced as under:-***
>
> ***"However, it would be wrong to assert and accept that gross profit margins would not inevitably include cost of AMP expenses. The gross profit margins could remunerate an AE performing marketing and selling functions. This has to be tested and examined without any assumption against the assessed. A finding on the said aspect would require detailed verification and ascertainment.***
>
> ***An external comparable should perform similar AMP functions. Similarly the comparable should not be the legal owner of the brand name, trade mark etc. In case a comparable does not perform AMP functions in the marketing operations, a function which is performed by the tested party, the comparable may have to be discarded. Comparable analysis of the tested party and the comparable would include reference to AMP expenses. In case of mismatch, adjustment could be made when the result would be reliable and accurate. Otherwise, AMP method should not be adopted. If on comparable analysis, including AMP expenses, gross profit margins match or are within the specified range; no transfer pricing adjustment is required. In such cases the gross profit margin includes the margin or compensation for the AMP***

expenses incurred. Routine or no routine AMP expenses would not materially and substantially affect the gross profit margins when the tested party and the comparable undertake similar AMP functions. "

While computing AMP expenses I direct the AO/TPO to exclude sales discount/ trade discount given to sub distributors or retailers. As per decision of Hon'ble Delhi High Court in the case of Sony Eracssion Mobile communications Pvt. Ltd. Further, I have perused audited financials of the company which is a part of the paper book. As per schedule 13. The appellant has incurred expenses of Rs. 18,70,40,561/- as freight which are mostly related to imports of goods. Therefore, I direct AO /TPO to treat freight expenses for computing gross profit margin. Similar items should be given same treatment while computing gross profit margin of the comparables.

AO/TPO is directed to recompute arm's length adjustment in respect of import of finished goods for resale from the AE taking RPM as the most appropriate method. As a result all grounds of appeals are partly allowed."

44. We are of the considered view that Ld. CIT(A) has passed order following the decision rendered by Hon'ble Delhi High Court in case of **Soni Ericssion Mobile Pvt. Ltd. (supra)** wherein it is held that gross profit margin should be computed after including AMP expenditure and RPM is considered as the most appropriate method for import segment for resale. So far as question of rejecting Brightline test (BLT) by the Ld. CIT(A) in A.Y. 2010-11 is concerned it has been rejected in a number of judgments by the Hon'ble High Courts on the ground that "brightline test" has no statutory mandate for benchmarking AMP expenses.

45. So, we are of the considered view that there is no scope to interfere in the finding returned by Ld. CIT(A) by following the

decision rendered by Jurisdictional High Court in case of **Soni Ericsson Moble Pvt. Ltd.** (supra). However, we are of the considered view that as discussed in the preceding para outward freight in India except the freight for import of material distributed be not considered for adjustment as it is not operating from transaction perspective. So Ground No. 1 to 9 raised by the revenue in ITA No. 3125/Del/2017 of A.Y. 2010-11 are dismissed.

46. In view of what has been discussed above appeal filed by the assessee for A.Y. 2009-10 and 2010-11 are partly allowed for statistical purposes and appeal filed by the revenue for A.Y. 2009-10 and 2010-11 are dismissed.

Order pronounced in open court on 24th December, 2020

Sd/-	Sd/-
(ANIL CHATURVEDI)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 24th December, 2020
Binita

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A)
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.

Date of dictation	11-15/12/2020
Date on which the typed draft is placed before the dictating Member	17/12/2020
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	