

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: '1-2' NEW DELHI**

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**I.T.A. No. 7285/DEL/2018 (A.Y 2013-14)**

**(THROUGH VIDEO CONFERENCING)**

Samsung India Electronics Pvt. Ltd. 20 <sup>th</sup> -24 <sup>th</sup> Floors, DLF Two Horizon Centre, Sector-43, Gurgaon, Haryana-122002 PAN: AAACSS123K <b>(APPELLANT)</b>	Vs	Addl. CIT(A), Special Range-8, Room NO. 199A, 1 <sup>st</sup> Floor, C. R. Building, I.P. Estate New Delhi-110002  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Sh. Himanshu S. Sinha &amp; Sh. Bhoowan Dhupar, Adv</b>
<b>Respondent by</b>	<b>Sh. Anupam Kant Garg, CIT(DR)</b>

<b>Date of Hearing</b>	<b>01.10.2020</b>
<b>Date of Pronouncement</b>	<b>14.12.2020</b>

**ORDER**

**PER SUCHITRA KAMBLE, JM**

This appeal is filed by the assessee against the order dated 31/10/2018 passed under Section 254/143(3) read with Section 144 C of the Income Tax Act, 1961 passed by Addl. CIT(A), New Delhi, for Assessment Year 2013-14.

2. The grounds of appeal are as under:-

**GROUND OF APPEAL**

*“1. That on the facts and circumstances of the case and in law, the Ld. AO has erred in assessing the total income of the Appellant at Rs.27,96,96,74,360/- as against the returned income of Rs.*

24,95,09,04,510/-.

2. That on the facts and circumstances of the case and in law, the Ld. Dispute Resolution Panel ('DRP')/A.O/ Transfer Pricing Officer ("TPO") erred in making a transfer pricing adjustment of Rs.3,01,87,69,854/-- on account of (i) advertising, marketing, promotion ("AMP"-1T) expenses of - RS. 46,38,28,605/- and (ii) international transactions pertaining to trading segment of Rs. 2,55,49,41,249/-- alleging the same to be not at arm's length in terms of the provisions of section 92C of the Act read with Rule 10B of the Income Tax Rules, 1962 ("the Rules").

**GROUND AGAINST ADJUSTMENT MADE IN RELATION TO AMP EXPENSES**

3. That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in holding that the AMP expenditure incurred by the Appellant in India is an 'international transaction' as per the provisions of the Act.

4. That on the facts and circumstances of the case and in law, the DRP/ AO/ TPO have erred in adopting intensity based approach which is not a prescribed comparability condition under the Income-tax Rules, 1962.

5. That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO, while making adjustment of Rs. 46,38,28,605/- on account of AMP expenditure, erred in:

a. not demonstrating the existence of an 'understanding' or 'an arrangement or 'action in concert' between the Appellant and its Associated Enterprises (AEs) w.r.t. the AMP spend; and

b. not appreciating that the AMP expenses incurred by the Appellant are wholly and exclusively focused on generating domestic sales for its own business operations (and aligned with the risk profile of the Appellant) and

*the benefit arising from the incurrance of the AMP expenses by the Appellant has been received by the Appellant and the benefit, if any, resulting to its AEs is merely incidental.*

*6. That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO erred in holding that the AMP expenses incurred by Appellant has led to the creation of marketing intangibles and resulted in promotion of 'Samsung Brand' for which the Appellant should be compensated by the legal owner of the brand.*

*7. That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in not appreciating that the Appellant has used Transactional Net Margin Method ("TNMM") to benchmark its international transactions for the trading business (including alleged AMP activity, if any) and manufacturing business (including alleged AMP activity, if any), and thus, no separate aim's length analysis was required in respect of the individual elements of cost as it is inconsistent with the tenets of applications of TNMM as per Rule 10B(l)(e) of the Rules.*

*8. Without prejudice to the above, the Ld. DRP/AO/TPO have erred in classifying product-wise profitability of the Appellant between Information Technology ("IT") and Non-IT products ignoring the functional differentiation between manufacturing and trading business segments and compared the same with that of other companies which is in gross contravention of Rule 10B(2) of the Rules. In doing so, the Ld. DRP/AO/TPO erred in:*

- a. Rejecting 20 comparables in AMP-IT that are functionally comparable to the Appellant in terms of functions performed, assets employed and risk assumed without providing any cogent reasons.*
- b. Not adjudicating on the 20 comparables rejected by the TPO. The DRP has assigned TPO to record "rejection reasons" against these 20 comparable companies which is in contravention of section 144C(8) of the Act.*

9. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in wrongly computing the margin of the Appellant and the chosen comparables and the resulting quantum of AMP expenditure of both the Appellant and the comparables.*

10. *That on the facts and circumstances of the case and in law, the Ld DRP/AO/TPO erred in making AMP adjustment under IT segment without appreciating the fact that the appellant is a captive service provider, hence AMP adjustment is not warranted.*

11. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO erred in applying mark-up on the alleged incurred excessive AMP expenditure by selecting companies providing market support functions in order to determine the mark-up to be imputed on AMP adjustment.*

12. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred including sales related expenses (not being brand promotion) as part of AMP expenditure while computing the adjustment. Doing so, the DRP erred in not appreciating the fact that sales promotion expenses were allowed by DRP in AY 2011-12 and AY 2012-13.*

**PROTECTIVE ADJUSTMENT**

13. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in making protective adjustment of Rs. 13,503,642/- under AMP-IT and Rs 13,05,04,16,597/- under AMP-Non IT which is impermissible under law.*

14. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred applying the 'bright line' test as a tool to identify and benchmark the alleged AMP transaction which has no statutory mandate*

*under the Act as laid down by the Hon'ble Delhi HC in the case of Sony Ericson Mobile Communications India Pvt. Ltd. [2015] 374 ITR 118 (Delhi).*

15. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in levying a further mark up on the alleged AMP expenses incurred over and above the so-called "bright-line" limit, stating that it tantamount to services being provided by Appellant to its AEs.*

**GROUND PERTAINING TO ADJUSTMENT IN TRADING SEGMENT**

16. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in determining the arm's length price for international transactions pertaining to trading segment thereby making an upward adjustment of Rs 2,55,49,41,249/- to the taxable income of the Appellant.*

17. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in rejecting 18 comparable companies selected by the Appellant in the economic analysis carried out in the TP documentation without providing any cogent reasons.*

18. *That on the facts and circumstances of the case and in law, the Ld. DRP/AO/TPO have erred in introducing 4 new comparable companies without providing any cogent reasons.*

19. *That on the facts and circumstances of the case and in law, the Ld. TPO/AO have erred in wrongly calculating the working capital adjusted margins of the comparable companies.*

20. *That on the facts and circumstances of the case and in law, the Ld. DRP/ TPO/AO erred in computing proportionate adjustment.*

21. *That on the facts and circumstances of the case and in law, the Ld.*

*DRP/ TPO/AO have erred in not providing the benefit of arm's length range of 3 percent as provided under proviso to section 92C of the Act for the purpose of computation of arm's length price.*

22. *That on the facts and circumstances of the case and in law, the AO erred in levying consequential surtax of Rs 72,37,98,550 under section 234B of the Act.*

23. *That on the facts and circumstances of the case and in law, the AO erred in initiating penalty proceedings under section 271(1)(c) of the Act for furnishing of inaccurate particulars and concealment of income.*

3. The assessee company is engaged in the business of manufacturing and distributing various Samsung Products of Consumer Electronics & Home Appliances category. The assessee is also engaged in the business of computer software development on behalf of its AEs. The assessee filed e-return of income declaring an income of Rs. 2495,09,04,510/- on 30/11/2013. The TPO vide order dated 31/10/2017 proposed an adjustment of Rs. 770,97,36,203/- on substantive basis and Rs. 1279,94,22,725/- on protective basis. The Draft assessment order was passed on 27/11/2017 at an income of Rs. 3287,49,89,360/- against return income of Rs. 2495,09,4,510/-. The assessee filed objections before the DRP. The DRP passed direction on 30/08/2018 thereby deleting the disallowance of Rs. 21,43,48,648/- on account of Forex loss in relation to forward exchange contracts made in the draft assessment order. In view of the directions of the DRP, the TPO vide order dated 30/10/2018 recomputed the adjustment at Rs. 3,01,87,69,854/- instead of the proposed adjustment of Rs.7,70,97,36,203/- as per its earlier order dated 31/10/2017. Therefore, as per TPO order, the Assessing Officer added a sum of Rs. 3,01,87,69,854/- to the total income of the assessee on substantive basis and addition of Rs. 13,06,39,20,239/- (Non IT Segment 13,05,04,16,597/- plus IT Segment 13,50,36,42) is made on account of TP

adjustment on protective basis. Thus, the Assessing Officer assessed the total income at Rs. 2796,96,74,360/- on substantive basis and addition of Rs.1306,39,20,239/- on protective basis.

4. Being aggrieved by the assessment order, the assessee has filed present appeal before us.

5. The Ld. AR submitted that Ground No. 1 & 2 are general in nature. Hence Ground No. 1 and 2 are not adjudicated upon at this juncture.

6. As regards Ground No. 3 to 15 relating to adjustment on account of AMP, the Ld. AR submitted that this issue is squarely covered in favour of the assessee in assessee's own case from Assessment Years 2005-06 to 2012-13 and 2014-15. The Ld. AR further submitted that the TPO made adjustment on account of AMP to the IT Segment (Contract Software Segment) using the intensity based a project wherein the Selling, General and Administrative (SG&A)/sales ratio of each comparable was compared with that of the assessee. The shortfall as computed is added to the operating cost of the comparable, thereby arriving at the adjusted operating cost. At the next step, the revenues of the comparables are adjusted upwards by a mark-up based on the mean profit margin of marketing supporting companies. The quantum of operating cost is accordingly added on account of differences in intensity of Selling, General and Administrative (SG&A) spend with further corresponding upwards adjustment as mark-up to operating cost to arrive at an adjusted operating revenue. The ALP of international transaction is determined based on adjusted operating revenue and adjusted operating cost, to be compared with the assessee. The TPO also made protective adjustment based on the Bright Line Test (BLT) approached, firstly on Non-IT Segment comprising of Licensed Manufacturing Segment, Trading Segment and Network Segment as well as secondly, to IT Segment comprising of Contracts Software Development Segment. The DRP upheld the approach adopted by the TPO and directed a

modification of comparables by further directing the TPO for the inclusion of three comparables forming part of the TP Report in the Non-IT Segment namely Priya Ltd., Optiemus Infracom Ltd. and Iris Computers Ltd. and the exclusion of four comparables in the Marketing Support Services Segment namely BVG India Ltd., Just Dial Ltd., HSCC (India) Ltd. and ICRA Management Consulting Services Ltd. used for adding the mark-up on the alleged excess Selling, General and Administrative (SG&A) expenditure incurred. The DRP upheld the TPO's action of rejection of 20 comparables out of 25 comparables selected in the TP Report. The Ld. AR submitted that this issue of AMP is fully covered in favour of the assessee in the assessee's own case for nine Assessment Years i.e. A.Y 2005-06 to A.Y. 2012-13 and A.Y. 2014-15 (Being ITA Nos. 3248 & 3410/Del/2012, 5856/Del/2010, 5315/Del/2011, 1567/Del/2014, 6741/Del/2014, 868/Del/2016 & 2511/Del/2018 order dated 04.10.2019) (ITA No. 6813/Del/2017 order dated 07.01.2020 for A.Y. 2012-13) (ITA No. 9481/Del/2019 order dated 31.08.2020 for A.Y. 2014-15). The Revenue's approach is based on the existence of an international transaction covering the entire AMP expenditure of the assessee on the basis of a Marketing Development Fund (MDF) Agreement between the assessee and its parent company. This approach has remained same as in the prior years and subsequent year. The Ld. AR submitted that BLT approach used for protective assessment is untenable in law. The same is reiterated in Assessment Year 2005-06 to 2012-13 as well as 2014-15 in assessee's own case.

7. The Ld. DR relied upon the orders of TPO and the DRP. The ld. AR further submitted that the Revenue is in appeal before the Hon'ble Supreme Court and in many cases SLP have been admitted on the issue of whether AMP is an International Transaction or not. The Ld. DR relied upon the following decisions:

- (i) Addl. CIT vs. Bausch & Lomb Eyecare India (P.) Ltd. (C). [2017] 77 taxmann.com 54 (SC)

- (ii) CIT vs. Haier Appliances India (P.) Ltd. [2016] 73 taxmann.com 300 (SC) (Arising out of Sony Ericsson Mobile Communications India (P.) Ltd. vs. ACIT [2015] 347 ITR 118 (Delhi). )
- (iii) DCIT vs. Honda Suel Power Products Ltd. [2016] 71 taxmann.com 181 (SC)
- (iv) Pri. CIT vs. Gillette India Ltd. [2019] 106 taxmann.com 113 (SC)

The Ld. DR further submitted that the DRP has discussed order of Tribunals in the cases of BMW India P Ltd. AY 10-11 (TS-88-ITAT-2017 (Del), and Toshiba India Pvt. Ltd. AY 2012-13 (TS-686-ITAT-Del-TP) wherein, under similar circumstances this transaction of AMP has been held to be an International Transaction. Further, as a settled law, each assessment year is different, therefore, the Ld. DR submitted that the order of the TPO and DRP be upheld.

8. We have heard both the parties and perused all the relevant material available on record. In the present assessment year, the Revenue while making addition has relied upon the Marketing Development Fund Agreement which was similar to the earlier years and subsequent years wherein the Tribunal had decided this issue in favour of the assessee. The relevant extracts of the Tribunal's orders are as under:

- For AY 2005-06 to AY 2011-12 (Page 46 & 47 – Para 43 & 44)

*“43. In the present case we find that the Revenue has not been able to place any material to record to show or suggest that the Appellant's AMP activity was carried out at the behest of its AE, beyond what was approved and reimbursed under the MDF Agreement. No understanding or arrangement or “action in concert” can be inferred from the terms of the MDF agreement or the conduct of the assessee to show that “excessive” AMP expenditure has been incurred at the behest of the brand-owning AE. The appellant being one of the major players in the Indian market has carried out its AMP activity and function based on its own judgement and commercial realities. Revenue has not placed any material or evidence to show that there existed an understanding to incur “excessive” AMP*

*expenditure. The arrangement and understanding were limited to the amounts agreed to be paid as assistance under the MDF Agreement. The amounts incurred as AMP expenditure by the appellant under the MDF Agreement have already been received as reimbursement/assistance and have indisputably been disclosed as an international transaction in Form 3CEB and form part of the transfer pricing study conducted under Rule 10D. The AMP expenditure which is outside the ambit of reimbursement received under the MDF Agreement, has been incurred by the appellant on its own volition as per its own requirements and without any interference of the AE and have been paid to third parties.*

*44. In view of the above, we hold that the scope and value of international transaction cannot be expanded beyond the reimbursements received under MDF agreement to cover the entire gamut of AMP expenditure incurred by the assessee during the year.”*

- For AY 2012-13 (Page 21 – Para 18)

*“6. Heard the arguments of both the parties and perused the material available on record. This matter stands adjudicated by the Coordinate Bench of ITAT wherein it was held that the scope and value of the International Transaction cannot be expanded beyond the reimbursement received under MDF agreement to cover the entire gamut of AMP expenditure incurred by the assessee during the year...”*

- For AY 2014-15 (Page 21 – Para 18)

*“...We are of the considered view that merely by applying the BLT method which has no legal existence and merely on the basis of MDF agreement vide which taxpayer has received part reimbursement of the AMP expenses incurred by it duly disclosed this expenditure in Form 3CEB and in TP study, so called excessive AMP expenditure of the taxpayer cannot be treated as international transactions u/s 92B of the Act. So, we cannot infer the existence of international transactions qua AMP expenses between taxpayer and AE beyond the reimbursement already made by the AE under MDF Agreement.”*

In respect of functional-intensity the Tribunal held as under:

- For AY 2014-15 (Page 24 & 25 – Para 24 & 25)

*“24. Ld. TPO by adopting the intensity approach qua trading segment and network segment proceeded to make alternative benchmarking as a substantive adjustment. In AY 2012-13, similar adjustment was*

*made by the Id. TPO by adopting the intensity approach which was held not to be sustainable by the coordinate Bench of the Tribunal in ITA No.6813/Del/2017 for AY 2012-13 order dated 07.01.2020 in taxpayer's own case by following the order passed by the coordinate Bench of the Tribunal in taxpayer's own case in earlier years.*

*25. So, in view of what has been discussed above and by following the aforesaid order passed by the coordinate Bench of the Tribunal, we are of the considered view that scope and value of the international transactions cannot be extended to the so-called excessive expenditure incurred by the taxpayer on account of nonroutine AMP beyond the reimbursement already received by the taxpayer under MDF agreement and as such, adjustment made by the TPO on account of AMP expenses is not sustainable in the eyes of law, hence ordered to be deleted.”*

As regards to BLT approach used for protective assessment, the Tribunal held as under:

- For AY 2005-06 to AY 2011-12 (Page 49 – Para 45)

*“45. In view of the above, we hold that the “bright line” approach is untenable in law either as a way to determine the existence of an international transaction or as a method to determine the ALP of an international transaction pertaining to AMP. No international transaction can be presumed to exist merely on the basis of “bright line” of expenditure incurred by comparable companies.”*
- For AY 2012-13 (Page 18 – Para 7)

*“7. Regarding the applicability of the Bright Line Text [(BLT) (specific grounds at 11, 12 & 13)] to determine the adjustment in the AMP expenditure has been rejected by the Hon’ble Jurisdictional High Court in the case of Sony Ericsson Mobile Communications India Pvt. Ltd. in Tax Appeal No. 16 of 2014. In view of the judgment of the Hon’ble High Court, we hereby hold that no International Transaction can be presumed to be in existence and hence no addition is called for.”*
- For AY 2014-15 (Page 21 – Para 21)

*“18. So, in view of what has been discussed above, we are of the considered view that merely by applying the BLT method which has no legal existence and merely on the basis of MDF agreement vide which taxpayer has received part reimbursement of the AMP expenses incurred by it duly disclosed this expenditure in Form*

*3CEB and in TP study, so called excessive AMP expenditure of the taxpayer cannot be treated as international transactions u/s 92B of the Act. So, we cannot infer the existence of international transactions qua AMP expenses between taxpayer and AE beyond the reimbursement already made by the AE under MDF Agreement.”*

Thus, the entire issue relating to AMP raised in the present assessment year is identical to that of earlier year as well as subsequent year and there is no different facts emerging either from the order of the TPO or from the perusal of the record. Therefore, Ground Nos. 3 to 15 are allowed.

9. As regards Ground No. 16, the Ld. AR submitted that it is general ground for TNMM Adjustment made to Trading Segment. In the Trading Segment, the assessee is engaged in trading of consumer electronics, home appliances, computers and IT peripherals. To justify the arm's length price of the international transactions, comparable companies were selected by the assessee in its TP Report. The TPO recomputed the ALP by making an upward adjustment of Rs. 433,83,45,658/- in the Trading Segment. The TPO rejected all 21 comparables taken by the assessee and introduce four new comparables with OP/OR of 9.21% which was upheld by the DRP except for allowing the objection of the assessee regarding inclusion of three comparables selected by the assessee, namely, Priya Ltd., Optimus Infracom Ltd. and Iris Computer Ltd. The DRP also directed to verify and corrected the operating margins and granted working capital adjustment to the assessee. As a result of the final set comprised of 7 comparables and the OP/OR of the comparables was reduced to 7.44% adjusted for working capital as against 4.85% earned by the assessee.

10. We are adjudicating the specific grounds in the following paras hereinafter with detail discussion; hence Ground No. 16 being general is not adjudicated upon.

11. As regards Ground No. 17 & 18, the Ld. AR submitted that all four comparables which has to be excluded that of OTS E-Solutions Pvt. Ltd.,

Celkon Impex Pvt. Ltd., Micromax Informatics Ltd., United Telelinks (Bangalore) Pvt. Ltd. are functionally dissimilar. The Ld. AR submitted that OTS E-Solutions Pvt. Ltd. was held as not comparable in A.Y. 2014-15 by the Tribunal and Celkon Impex Pvt. Ltd., Micromax Informatics Ltd., United Telelinks (Bangalore) Pvt. Ltd. these comparables held as not comparable by the DRP for A.Y. 2014-15. As regards 3 comparables which has to be included that of Redington India Pvt. Ltd., Tech Pacific (India) Ltd. (Later name changed to Ingram Micro) & HCL Infosystems Ltd., these comparables are functionally similar. For Redington India Pvt. Ltd. and Tech Pacific (India) Ltd. (Later name changed to Ingram Micro), the Ld. AR submitted that these comparable companies were included by the DRP in A.Y. 2014-15 and for HCL Infosystems Ltd., the Tribunal in Assessment Year 2005-06 to 2011-12 held that if the quarterly results are available and margins can be extrapolated, this comparable can be included. The detail discussion for these comparables are as follows:

**11.1 OTS E-Solutions Pvt. Ltd.:** The Ld. AR submitted that this company is engaged in providing an Online Marketing platform by the name 'GadgetGuru' for sale of electronic products. Hence, it assumes role of an aggregator in the online marketing space (i.e. an E-Retailer). The platform additionally allows customers to give reviews and discuss various features of the products. The company sells electronic products of various brands and hence in effect is not a 'Sole-Selling Agent' of any brand, while the assessee be viewed as 'Sole-Selling Agent' of Samsung Brand in India. The Company does not perform critical functions such as Quality Control and Post Sale/Warranty support which a routine distributor such as the assessee would be expected to perform. The Ld. AR submitted that OTS E-Solutions Pvt. Ltd. was held as not comparable in A.Y. 2014-15 by the Tribunal

**11.2** The Ld. DR relied upon the order of the TPO. The Ld. DR submitted that the assessee mainly relied on website extracts and the key argument of the Ld.

AR is that OTES being an online aggregator, works on different model. However, what is important to consider that broadly the products are similar. The Ld. DR submitted that the Ld. AR also accepted in the submission that TNMM only requires broad comparability. Thus, it may be upheld as valid comparable.

11.3 We have heard both the parties and perused all the relevant material available on record. From the perusal of the records it can be seen that OTS E-Solutions Pvt. Ltd. was held as not comparable in subsequent assessment year i.e. A.Y. 2014-15 by the Tribunal. The functional dissimilarity is apparent on record and there are no changes in the present assessment year. Hence, we direct the TPO to exclude this comparable from the final list of comparables.

11.4 **Celkon Impex Pvt. Ltd.:** The Ld. AR submitted that this company is engaged in designing (In house R & D Unit) and manufacture of mobile phones. Thus, this company is only dealing with mobile phones and not dealing in any other home appliance products. The Ld. AR submitted that the DRP in subsequent year i.e. 2014-15 has excluded this comparable company.

11.5 The Ld. DR submitted that this company is engaged in trading of mobile phones and it is a single segment. In this company, the intangibles are zero. The Ld. DR relied upon the order of the TPO.

11.6 We have heard both the parties and perused all the relevant material available on record. This company is in designing and manufacturing of mobile phones while the assessee company is in trading of consumer electronics, home appliances, computers and IT peripherals which is different portfolio all together. From the perusal of the records it can be seen that Celkon Impex Pvt. Ltd. was held as not comparable in subsequent assessment year i.e. A.Y. 2014-15 by the DRP. The functional dissimilarity is apparent on record and there are no change in the present assessment year. Hence, we direct the TPO to exclude

this comparable from the final list of comparables.

**11.7 Micromax Informatics Limited:** The Ld. AR submitted that this company is a full-fledged entrepreneur dealing in business of mobile handsets and owns the brand "MICROMAX". The company undertakes all business activities and undertakes all associated business risks. The company outsources manufacturing activities to third party contractors and sells the products under its own brand name as an entrepreneur. The Ld. AR submitted that the DRP in subsequent year i.e. 2014-15 has excluded this comparable company.

11.8 The Ld. DR submitted that this company is engaged in trading of mobile phones and there is no manufacturing cost, therefore it is a trading company. Further, on analysis of annual reports, Income from sale Rs.30553 million against this purchase of traded goods Rs.24160 million. There is no cost of manufacturing as such. This proves that this company to be a trader. The Ld. DR relied upon the order of the TPO.

11.9 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that this company is also functionally dissimilar to the assessee company. The company undertakes all business activities and undertakes all associated business risks. The company outsources manufacturing activities to third party contractors and sells the products under its own brand name as an entrepreneur. The DRP in subsequent year i.e. 2014-15 has excluded Micromax Informatics Limited from the comparable list. The functional dissimilarity is apparent on record and there are no change in the present assessment year. Hence, we direct the TPO to exclude this comparable from the final list of comparables.

**11.10 United Telelinks (Bangalore) Pvt. Ltd.:** The Ld. AR submitted that this company is an entrepreneur well-known under the brand name 'KARBONN'. It

has brand owning and manufacturing through third party contractor. Thus, it is functionally dissimilar to the assessee company. The Ld. AR submitted that the DRP in subsequent year i.e. 2014-15 has excluded this comparable company.

11.11 The Ld. DR relied upon the order of the TPO. The Ld. DR submitted that this company is engaged in trading of mobile phones and it is a single segment. There are tangible assets amounting to Rs.2,80,43,188/- and intangibles are zero.

11.12 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that this company is also functionally dissimilar to the assessee company. It has brand owning and outsources manufacturing activities to third party contractors. The DRP in subsequent year i.e. 2014-15 has excluded United Telelinks (Bangalore) Pvt. Ltd. from the comparable list. The functional dissimilarity is apparent on record and there are no change in the present assessment year. Hence, we direct the TPO to exclude this comparable from the final list of comparables.

12. As relates to inclusion of the three comparables, the discussion is as under:

12.1 **Redington India Limited:** The Ld. AR submitted that this company is engaged in distribution of IT products such as computers, printers, software storage systems. This company is a leading supply chain solutions provider for global brands of IT hardware and software product.

12.2 The Ld. DR submitted that this company is a leading supply chain solution provider for global brands in IT and non-IT (consumer and digital lifestyle products) verticals, it's nature of business activities, products traded and business model itself is entirely different. Thus, the Ld. DR relied upon the

order of the TPO.

12.3 We have heard both the parties and perused all the relevant material available on record. From the perusal of records it can be seen that this company is engaged in distribution of IT products such as computers, printers, software storage systems and also a leading supply chain solutions provider for global brands of IT hardware and software product which appears to be similar to that of assessee's functions. Therefore, we direct the TPO to look into the portfolio of this company and applying the filters, this comparable i.e. Redington India Limited may be included in the final comparable list.

**12.4 Tech Pacific (India) Limited (later name changed to 'Ingram Micro'):**  
The Ld. AR submitted that this company is functionally comparable company as it is trading in IT hardware and software products. It not a service provider and earns 99.85% revenue from sale of products. This company is engaged in distribution of computers, peripherals, supplies.

12.5 The Ld. DR submitted that this company is into multifarious activities which include software and software products. Apparently focus of this company is on computers and computer related products, which is way different from the assessee's traded products. The Ld. DR relied upon the order of the TPO.

12.6 We have heard both the parties and perused all the relevant material available on record. From the perusal of records it can be seen that this company is engaged it is trading in IT hardware and software products which appears to be similar to that of assessee's functions. Therefore, we direct the TPO to look into the portfolio of this company and applying the filters, this comparable i.e. Tech Pacific (India) Limited (later name changed to 'Ingram Micro') may be included in the final comparable list.

12.7 **HCL Infosystems Limited:** The Ld. AR submitted that this company is having similar function to that of assessee's functions. This company is engaged in distribution of telecommunication and digital lifestyle products such as cellular phones, computers, printers, scanners etc. and hence functionally similar to the assessee company. This company is allowed as comparable in A.Y. 2005-06 to 2011-12 by the Tribunal.

12.8 The Ld. DR relied upon the order of TPO/DRP.

12.9 We have heard both the parties and perused all the relevant material available on record. From the perusal of records, it can be seen that this company is engaged in distribution of telecommunication and digital lifestyle products such as cellular phones, computers, printers, scanners etc. and hence functionally similar to the assessee company. Besides this fact, this company is allowed as comparable in A.Y. 2005-06 to 2011-12 by the Tribunal and there are no different facts emerging as relates to function conducted by the present assessment year to that of previous assessment years. Therefore, we direct the TPO to look into the portfolio of this company and applying the filters, this comparable i.e. HCL Infosystems Limited may be included in the final comparable list.

13. Thus, Ground No. 17 and 18 are allowed.

14. As regards Ground No. 19 relating to incorrect margin adjusted for working capital of computation of comparables. The Ld. AR submitted that the same differs from the computation given by the TPO on few counts. The TPO has not provided detailed computation in respect of the same. Thus, the Ld. AR submitted that this issue may be remanded back to the TPO with a direction to compute the same after affording the assessee an opportunity to examine the figures used by the TPO.

15. The Ld. DR relied upon the order of the TPO.

16. We have heard both the parties and perused all the relevant material available on record. From the perusal of records, it appears that the margin adjusted for working capital of computation of comparables is incorrect and the same fact was not denied by the Ld. DR during the course of hearing. Therefore, we remand back this issue to the file of the TPO with the direction to compute the margin adjusted for working capital of computation of comparables correctly. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground No. 19 is partly allowed for statistical purpose.

17. As regards Ground No. 20, relating to incorrect computation of proportionate adjustment by TPO for Trading Segment. The Ld. AR submitted that TPO after giving effect of DRP directions rightly attempted to restrict the adjustment made to the proportionate of international transactions with AEs, but the proportionate adopted by the TPO is incorrect. The TPO has not provided any calculation as to how the proportionate was right. The Ld. AR during the hearing submitted the details.

18. The Ld. DR submitted that as regards, Ground No. 20 relating to incorrect computation of Proportionate adjustment by TPO for Trading Segment, the computation provided by the assessee is apparently not correct. The base cannot be sum of operating income as well as expenditure. The Ld. DR submitted that the correct calculation needs verification by TPO.

19. We have heard both the parties and perused all the relevant material available on record. The issue of computation of Proportionate adjustment by TPO for Trading Segment is not in consonance with the computation provided by the assessee and the same needs verification. Hence, this issue is remanded back to the file of the TPO for proper verification as per the directions of the

DRP. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Ground No. 20 is partly allowed for statistical purpose.

20. As regards Ground No. 21 relating to denial of relief of +/- 3% under proviso to Section 92C (2), Ground No. 22 relating to charging interest u/s 234B & Ground No. 23 relating to penalty u/s 271 (1)(c) are consequential grounds, hence not adjudicated at this juncture.

21. In result, the appeal of the assessee is partly allowed for statistical purpose.

**Order pronounced in the Open Court on this 14th Day of December, 2020.**

**Sd/-  
(N. K. BILLAIYA)  
ACCOUNTANT MEMBER**

**Sd/-  
(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

Dated : 14/12/2020

*R. Naheed \**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	09.11.2020
Date on which the typed draft is placed before the dictating Member	11.11.2020
Date on which the typed draft is placed before the Other Member	14.12.2020
Date on which the approved draft comes to the Sr. PS/PS	14.12.2020
Date on which the fair order is placed before the Dictating Member for pronouncement	14.12.2020
Date on which the fair order comes back to the Sr. PS/PS	14.12.2020
Date on which the final order is uploaded on the website of ITAT	14.12.2020
Date on which the file goes to the Bench Clerk	14.12.2020
Date on which the file goes to the Head Clerk	