

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI
BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER
AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

I.T.A. No.8722/M/2010 (Assessment Year: **2006-2007**)

I.T.A. No.8855/M/2011 (Assessment Year: **2007-2008**)

| | | |
|--|--------------|---|
| Johnson Controls (India) Private Limited, 501-502, Prime Corporate Park, Near ITC Grand Maratha, Sahar Road, Andheri (E), Mumbai – 400 099. | बनाम/ Vs. | DCIT-8(2), Aayakar Bhavan, M.K. Road, Mumbai – 40020. |
| स्थायी लेखा सं./PAN : AAACJ3132B | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |

| | | |
|------------------------------------|---|-----------------------|
| अपीलार्थी की ओर से / Appellant by | : | Shri Nishant Thakkar |
| प्रत्यर्थी की ओर से/ Respondent by | : | Ms. Rupinder Brar, DR |

सुनवाई की तारीख /Date of Hearing : 26.10.2015

घोषणा की तारीख /Date of Pronouncement : 31.12.2015

आदेश / O R D E R

PER D. KARUNAKARA RAO, AM:

There are **two** appeals under consideration. These two appeals are filed by the assessee involving the AYs 2006-07 and 2007-2008. Since, the issues raised in both these appeals either identical or inter-connected, therefore, for the sake of convenience, they are clubbed, heard combinedly and disposed of in this consolidated order. Appeal wise adjudication is given in the succeeding paragraphs of this order.

ITA No.8722/M/2010 (AY 2006-2007)

2. This appeal filed by the assessee on 14.12.2010 against the orders of the DRP / TPO / AO. In this appeal, assessee raised four grounds in toto.

3. **Ground no.1** relates to the Transfer Pricing issue. In this ground, the issue needs to be adjudicated is whether the Profit Split Method (PSM) is the most 'appropriate method' when data is not available on the CUP method as most

appropriate method. A ground was also raised on the issue of correctness of 5% as the Arm's Length Price (ALP) in benchmarking the transactions with Associated Enterprise (AE). **Similar issues are raised in the appeal for the AY 2007-2008 vide Ground no.3.**

4. We shall take up the **TP issue** first and the relevant facts in this regard are that the assessee is an indenting agent of an AE engaged in installation services of ware control systems. As per the agreement, assessee received commission @ 2% for the indenting services. Assessee is required to receive the requirements such as hardware, machinery etc from the clients in India and put orders to the AE abroad. For these services assessee receives commission @ 2%. Assessee has raised bills in the name of the clients against the payments. AY 2006-07 is the first year of such operations. In the return of income, assessee offered whole of the aforesaid 2% (ie Rs. 6,22,01,426/-) as a profit. During the proceedings before the TPO, assessee submitted that the most appropriate method in the case of indenting is the CUP method. In principle, TPO accepted the same. However, considering the absence of data at the relevant point of time, TPO adopted the PSM as most appropriate one and 50% of the said profit on the transactions was considered appropriate. Although TPO quantified the ALP @ 8.78%, eventually, the TPO rounded up the same to 10% as a profit relatable to the assessee and benchmarked the transactions accordingly. TPO quantified relatable profits at Rs. 3,20,23,110/-. The net TP adjustment suggested by the TPO on this count works out to Rs. 2,48,18,488/-. TPO also quantified the TP adjustment basing on the PSM and addition suggested on this basis (8.78% ie Rs. 2,72,38,290/- is the profit relatable to the assessee) works out to Rs. 2,10,33,668/-. During the DRP proceedings, assessee submitted that the CUP method is the most appropriate one in this kind of transactions but no data could be found for benchmarking the transactions. Therefore, assessee offered the profit of 2%, which was actually received from the AE. In this regard, assessee also submitted that the TPO failed to analyse the PSM, which he proposed to apply and finally choose to apply ad-hoc percentage of 10% as against 2% received by the assessee. On going through the submissions of the assessee, DRP observed that the TPO has not followed any standard method of TP adjustment and eventually

resorted to ad-hoc adjustment without assigning any basis. TPO's conclusion of splitting the relatable profit of 10%, AE maintained gross margin of 16%. However, the DRP did not accept the decision of the TPO. Finally, DRP concluded that *"keeping in view the detailed facts of the case and also the PSM method in view, it will be appropriate to take the assessee's share at 5% of the total profit earned by the AE at 16%, after taking into consideration the efforts made and the risk undertaken by both the parties. Accordingly, the Assessing Officer is directed to make an adjustment by taking 5% as reasonable margin of commission a pertaining to assessee's shares on the basis of PSM."* Accordingly, in the assessment order dated 30.9.2010, AO made addition our of Rs. 2.10 Crs (rounded of) on this account. In effect, the AO / TPO adopted the PSM, in principle, and adopted 5% of the receipts as profit relatable to the assessee. Aggrieved with the same, assessee is in appeal before the Tribunal vide Ground no.1 for the AY 2006-07 and vide Ground no.3 for the AY 2007-08.

5. Before us, Ld Counsel for the assessee submitted that most appropriate method in this kind of case of indenting commission cannot be PSM. For this proposition, he relied on the decision of the Tribunal in the case of Marubeni India (P) Ltd vs. DCIT [2014] 47 taxmann.com 234 (Delhi – Trib.), dated 3.6.2010, which is relevant for the proposition that *when there is no data to support the CUP method as an appropriate method for ALP studies, TNMM is the most appropriate method for determining the ALP of international transactions in the cases of companies engaged in providing agency and marketing support services.* He also mentioned that CUP method is the most appropriate, when there is no data available then the TNMM is the next best appropriate method.

6. On the other hand, Ld DR for the Revenue relied on the orders of the Revenue Authorities ie DRP / TPO / AO.

7. During the rebuttal time, Ld Counsel for the assessee filed another judgment in the case of Sumitomo Corporation India Private Limited vs. DCIT (ITA No.5095/Del/2011) wherein, in cases of indenting services, the CUP method is approved as the most appropriate method of accounting. Further, he brought our attention to the observations of the TPO and the DRP for the AY 2006-07 as well as

for the subsequent AY 2007-08 and mentioned that for want of data relating to CUP method, the Revenue Authorities resorted to PSM. Otherwise, Ld Counsel submitted that the data relating to CUP method is now available.

8. We have heard both the parties on this issue relating to the appropriate method of accounting. We find there are decisions to denounce for PSM and the choice is between the CUP and TNMM as the best appropriate method in matters of indenting international transactions. One of the decisions cited above also supports the CUP as the most appropriate method. Therefore, we are of the opinion, in principle, we agree with the Ld Counsel's argument that internal CUP is the most appropriate method in this kind of factual situation. The next limb of this issue relates to the percentage of commission in ALP studies. It is an admitted fact that the assessee offered the commission income ie 2% in accordance with the bilateral agreement with the AE. Relying on the PSM, TPO benchmarked the same applying ad-hoc percentage of 10% out of AE profit margin of 16%. Considering the unfairness of such percentage, DRP restricted the same to 5%. Before us, Ld Counsel for the assessee brought our attention to page 335 of the paper book and submitted that the rate of commission range from 1.35% (Cisco Systems (India) Private Limited (ITA No. 1410/Bang/2010) to 5% (Bayer Material Science Private Limited vs. ACIT (ITA No.7977/Mum/2010)). He also brought our attention to the Tribunal's order in the case of Sumitomo Corporation India Private Limited (supra) and submitted that this is the case where the internal CUP was approved as most appropriate, where the rate of percentage of commission of 2.26% was found to be the ALP. However, Ld Counsel for the assessee submitted that ALP in the present case may be finalised with the Bench and requested for not remanding the matter to the Revenue for one more round.

9. On the other hand, on this issue of rate of commission, Ld DR for the Revenue argued for considering 5% as an appropriate ALP as held by the Tribunal in the case of Bayer Material Science Private Limited (supra).

10. We have heard both the parties on this issue of the appropriate rate of commission and find the rate of 1.35% (in the case of Cisco Systems (supra)) and 1.49% [in the case of Hoganas India Private Limited vs. DCIT (ITA

No.1463/PN/2010] have to be rejected considering the rates approved in the case of Sumitomo Corporation (2.26%) (supra) and Bayer Material Science (5%) (supra). In our opinion, to remove the statistical error, if any, the average of these two comparables should be considered to arrive at the appropriate rate of ALP for benchmarking the impugned transactions. Accordingly, 3.63% should be appropriate rate to be adopted by the AO for calculating the adjustments to be made. Thus, we partly allow the relevant grounds of the assessee as the case may be. Accordingly, AO is directed to adopt 3.63% as appropriate rate of ALP for benchmarking the impugned transactions.

Corporate issues

11. At the outset, Ld Counsel for the assessee, bringing our attention to **Ground nos. 3 and 4** for the AY 2006-07 and Ground nos. 4 and 5 for the AY 2007-2008, mentioned that AO did not give credit to TDS properly and also has not granted interest u/s 234A after the date of issue of refund and therefore, the assessee made an application u/s 154 of the Act and the same is not adjudicated till date. In this regard, Ld Counsel for the assessee seeks directions to the AO for speedy disposal. After hearing both the parties on this issue and on going through the copy of the application made u/s 154 of the Act, we find the AO should act upon the application at the earliest possible. Accordingly, relevant grounds are **allowed in principle**.

12. **Ground no.5** is general in nature and same is **dismissed** as such.

13. **Ground no.2** relates to the addition u/s 40(a)(ia) of the Act for want of effecting TDS on the payments made, which are actually the case of **reimbursement** of expenses. In short, Ld Counsel for the assessee submitted that some employees of the company 'Genius' were now deputed to the assessee. These employees were paid salaries after complying with the TDS provisions. These expenses were reimbursed by the assessee to Genius and TDS has not affected as they are undisputedly reimbursement of expenses. Revenue Authorities did not accept the claim of the assessee and therefore, the assessee is in appeal before the Tribunal. At the outset, Ld Counsel for the assessee submitted that TDS provisions are not attracted on the payments of salaries of employees, who were deputed to

the assessee. For this proposition, he relied on the binding judgment of the jurisdictional High Court in the case of CIT vs. OCB engineers [2013] 32 taxmann.com 271 (Bombay) dated 7.3.2013 wherein the following legal proposition is laid down and the same reads as under:-

"Where assessee paid certain amount to sister concerns by way of reimbursement of salaries because their employees were deputed to assessee, there was no reimbursement to deduct tax at source while making said payments."

14. Considering the above, settled proposition on this issue, we are of the opinion that such expenditure by way of reimbursement of salaries to Genius company do not attract TDS provisions and therefore, the **provisions of section 40(a)(ia) need not be invoked**. It is nobody's case that the payments in question are not in the reimbursement of the salary of the deputed personnel by the Genius. Considering the same, we delete addition on this account and allow the Ground no.2 raised by the assessee.

15. In the result, **appeal of the assessee for the AY 2006-2007 is partly allowed**.

ITA No.8855/M/2011 (AY 2007-2008)

16. This appeal filed by the assessee on 30.12.2011 against the orders of the DRP / TPO / AO for the AY 2007-2008. In this appeal, assessee raised five grounds in toto.

17. **Ground no.3** relates to the TP issues, which were already referred and adjudicated while dealing with the appeal for the AY 2006-07. Since, the TP issues involved in this ground and that of the of the ones decided by us in the above paras for the AY 2006-07 are identical, therefore, our decision given therein squarely applies to the instant ground too. Considering the same, **Ground no.3** raised by the assessee in the instant appeal for the AY 2007-08 is **partly allowed**.

18. **Ground nos. 4 and 5** relate to the applicability of the TDS provisions. Identical issues were also decided by us in the above paragraphs of this order while

dealing with the appeal for the AY 2006-2007. Considering the same, these two grounds raised by the assessee are **allowed in principle**.

19. **Ground no.6** is general in nature and therefore this ground is **dismissed** considering its general nature.

20. That leaves **Ground nos. 1 and 2** for our adjudication. In this regard, Ld Counsel for the assessee submitted that the AO made addition of Rs. 2.98 Crs (rounded of) ie 10% of the cost of consumables and expenses for want of bills. Similarly, AO made addition of Rs. 50 lakhs out of operating and other expenses on ad-hoc basis. On these two additions, Ld Counsel for the assessee submitted that the same is in higher side and mentioned that it is not possible to submit all the bills for all the expenses to the satisfaction of the Revenue Authorities.

21. On the other hand, Ld DR for the Revenue relied on the order of the AO / DRP and submitted that the onus is on the assessee to demonstrate the genuineness of the expenses when a claim is made u/s 37 of the Act.

22. On hearing both the parties and considering the concession given by the Ld Counsel for the assessee, we are of the opinion that the decision of the DRP and the AO on this issue is fair and reasonable and the same does not call for any interference. Accordingly, these two grounds are **dismissed**.

23. In the result, appeal of the assessee is **partly allowed**.

24. Conclusively, **both the appeals of the assessee are partly allowed**.

Order pronounced in the open court on 31st December, 2015.

Sd/-

(PAWAN SINGH)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 31/12/2015
व.नि.स./ OKK, Sr. PS

Sd/-

(D. KARUNAKARA RAO)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant

2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**