

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA No.359/PUN/2016

निर्धारण वर्ष / Assessment Year :2011-12

Emerson Climate Technologies
(India) Pvt. Ltd.,
Plot No.23, Rajiv Gandhi Infotech Park,
Phase II, Hinjewadi,
Pune – 411 057.

.... अपीलार्थी/Appellant

PAN No.AAACK7291C

Vs.

The Dy. Commissioner of Income Tax,
Circle -1(2), Pune.

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.2847/PUN/2016

निर्धारण वर्ष / Assessment Year :2012-13

Emerson Climate Technologies
(India) Pvt.Ltd.,
Plot No.23, Rajiv Gandhi Infotech Park,
Phase II, Hinjewadi,
Pune – 411 057.

.... अपीलार्थी/Appellant

PAN No.AAACK7291C

Vs.

The Dy. Commissioner of Income Tax,
Circle -1(2), Pune.

.... प्रत्यर्थी / Respondent

SA Nos.45 & 46/PUN/2018
Arising out of ITA Nos.359 & 2847/PUN/2016
Assessment Years : 2011-12 & 2012-13

Emerson Climate Technologies
 (India) Pvt.Ltd.,
 Plot No.23, Rajiv Gandhi Infotech Park,
 Phase II, Hinjewadi,
 Pune – 411 057.

.... Applicant

PAN No.AAACK7291C

Vs.

The Dy. Commissioner of Income Tax,
 Circle -1(2), Pune.

.... Respondent

Assessee by : Shri Dhanesh Bafna
 Revenue by : Shri Rajeev Kumar, CIT

सुनवाई की तारीख / Date of Hearing : 19.03.2018 / 23.03.2018	घोषणा की तारीख / Date of Pronouncement: 25.04.2018
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

Both the appeals filed by the assessee are against separate orders of DCIT, Circle1-2, Pune, dated 29.01.2016 and 31.10.2016 relating to assessment years 2011-12 and 2012-13 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (in short 'the Act'). The assessee also moved captioned Stay Applications.

2. Both the appeals of assessee relating to different assessment years on similar issues were heard together and are being disposed of by this

consolidated order for the sake of convenience. Thereafter, Stay Applications relating to both the years under consideration were also heard and are also being disposed of by this consolidated order for the sake of convenience.

3. First, we shall take up the appeal in ITA No.359/PUN/2016, relating to assessment year 2011-12. The assessee has raised the following grounds of appeal:-

The grounds stated hereunder are independent of, and without prejudice to one another:

1. *On the facts and in the circumstances of the case, and in law, the Ld Dispute Resolution Panel ('DRP') and the Ld Assessing Officer ('AO'), following the directions of Ld DRP, erred in confirming the addition of Rs.10,85,12,147/- to the total income of the Appellant on account of the transfer pricing ('TP') adjustment under Section 92CA(3) of the Income-tax Act, 1961 ('the Act') by rejecting the TP analysis conducted by the Appellant.*

The Appellant prays that the TP analysis conducted by the Appellant be accepted and consequently the TP adjustment of Rs.10,85,12,147/- be deleted.

2. *On the facts and in the circumstances of the case, and in law, the Ld DRP and Ld AO, following the directions of the Ld DRP, erred in determining the arm's length price of the transaction pertaining to payment of fees for advisory and other services by the Appellant to its associated enterprises ('AEs') as 'Nil' as against Rs.10,85,12,147/- determined by the Appellant and thereby making a TP adjustment of Rs.10,85,12,147/-.*

The Appellant prays that the book value of the international transaction be accepted to be the arm's length price of the said transaction and the TP adjustment made by the Ld DRP / Ld AO be deleted.

3. *On the facts and in the circumstances of the case, and in law, the Ld DRP and Ld AO, following the directions of the Ld DRP, erred in applying Comparable Uncontrolled Price ('CUP') Method for determining the arm's length price without identifying any valid comparable uncontrolled transaction to determine the arm's length price.*

The Appellant prays that the method selected by the Appellant ought to be accepted and the TP adjustment made by the Ld DRP / Ld AO be deleted.

4. *On the facts and in the circumstances of the case, and in law, the Ld. DRP and the Ld AO, following the directions of the Ld DRP, erred in making the TP adjustment on account of payment of fees for advisory and other services ignoring that:*

- 4.1. *the Appellant had supported the claims with appropriate evidences;*
- 4.2. *there was commercial rationale and expediency in availing the services from the AEs; and*
- 4.3. *the Appellant is not required to establish the benefits arising out of the said services.*

The Appellant therefore prays that the above adjustment be deleted.

5. *On the facts and in the circumstances of the case, and in law, the Ld AO erred in initiating the penalty proceedings under Section 271(1)(c) of the Act wherein the addition sustained is merely difference of opinion and does not reflect any omission or misrepresentation of facts.*

The Appellant prays that the Ld AO be directed to drop the penalty proceedings initiated under Section 271(1)(c) of the Act.

4. The learned Authorized Representative for the assessee at the outset pointed out that the issue raised in the present appeal is squarely covered by the order of Tribunal in assessee's own case in earlier year. He pointed out that TP adjustments were made in the hands of assessee while determining arm's length price of transactions pertaining to payment of fees for advisory and other services to associated enterprises, wherein the Assessing Officer / Dispute Resolution Panel (DRP) / Transfer Pricing Officer (TPO) had taken the said transaction at Nil as against ₹ 10,85,12,147/- determined by the assessee and thereby making TP adjustment to that extent. He further pointed out that the issue raised was whether any services were provided by associated enterprises to the assessee in order to justify the payment of fees for advisory and other services by the assessee to its associated enterprises. Further, the dispute was the application of most appropriate method to benchmark transactions, wherein the TPO had applied CUP method. The learned Authorized Representative for the assessee pointed out that the assessee had applied TNMM method while taking foreign entity as tested party and had compared the margins of assessee with mean margins of selected comparables. The learned Authorized

Representative for the assessee in this regard, further submitted that some comparables may be applied and the matter may be verified by the Assessing Officer / TPO with respect to the margins of finally selected comparables.

5. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the orders of Assessing Officer / DRP.

6. We have heard the rival contentions and perused the record. The issue arising in the present appeal before the Tribunal is against determination of arm's length price of transactions pertaining to payment of fees for advisory and other services by the assessee to its associated enterprises. The assessee had paid sum of ₹ 10,85,12,147/- to its associated enterprises and had declared that no adjustments were warranted in its hands on account of said international transactions. However, the TPO made an upward adjustment of ₹ 10,85,12,147/-, which was assessed in the hands of assessee as the DRP dismissed the objections raised by the assessee against draft assessment order made by the Assessing Officer.

7. We find that similar issue of adjustment, if any, on account of payment of fees for advisory and other services by the assessee to its associated enterprises, arose before the Tribunal in assessee's own case in ITA No.2182/PUN/2013, relating to assessment year 2009-10 and vide consolidated order with appeal in ITA No.211/PUN/2015, relating to assessment year 2010-11, vide order dated 29.12.2017, the issue was deliberated upon vide paras 17 to 30. The Tribunal held that TNMM method was the most appropriate method to be applied to benchmark international transactions undertaken by the

assessee by taking foreign associated enterprises as tested party and further, the Tribunal held that the said transaction of fees paid for advisory and other services was to be benchmarked by comparing the margins of tested party i.e. foreign associated enterprises with margins of external comparables selected by the assessee, who were also engaged in providing similar advisory and related services to its entities. However, for the limited purpose of verification that the margins shown by tested party i.e. foreign associated enterprise was at arm's length price of margins shown by comparables selected by the assessee, the matter was remitted back to the file of Assessing Officer / TPO for verification.

8. The issue arising in the present appeal before us is similar to the issue which arose in earlier year and since the international transactions undertaken by the assessee were identical to the international transactions undertaken in earlier years, hence following the same parity of reasoning, we hold that TNMM method was the most appropriate method to be applied to benchmark arm's length price of international transactions of fees paid for advisory and other services by taking foreign associated enterprise as tested party. Further, the Assessing Officer is directed to benchmark the transactions by taking margins of foreign comparables which were selected by the assessee in earlier year and even in the year under consideration. However, to verify the claim of assessee that the margins shown by assessee and the mean margins shown by the comparables were within +/- 5% range, the Assessing Officer is directed to comply with the directions of Tribunal as in earlier year and compute arm's length price of international transactions. Reasonable opportunity of hearing shall be provided to the assessee by the TPO / Assessing Officer in this regard. We are referring to the observations of Tribunal in paras 17 to 30, however, for the sake

of brevity, the same are not being reproduced. Thus, the grounds of appeal raised by the assessee in assessment year 2011-12 are allowed.

9. Now, coming to the appeal of assessee in ITA No.2847/PUN/2016, relating to assessment year 2012-13.

10. The learned Authorized Representative for the assessee pointed out that the ground of appeal No.1 raised by the assessee is general in nature. The ground of appeal No.2 raised by the assessee is against adjustment made on account of international transactions pertaining to payment of fees for advisory and other services by the assessee to its associated enterprises, wherein an upward adjustment of ₹ 9,43,77,453/- was made in the hands of assessee. The said issue is identical to the issue raised in earlier years and following the same parity of reasoning, we hold that TNMM method is the most appropriate method with foreign associated enterprise as tested party. The margins shown by the assessee need to be compared with foreign companies which are engaged in providing similar services. For the limited purpose of verifying the margins of comparables, we direct the Assessing Officer to verify the claim of assessee and compute the arm's length price of international transactions in line with our directions in earlier decisions. Reasonable opportunity of hearing shall be provided to the assessee by the TPO / Assessing Officer in this regard. The ground of appeal No.2 raised by the assessee is thus, allowed for statistical purposes.

11. Now, coming to the ground of appeal No.3, which reads as under:-

3. *On the facts and in circumstances of the case, and in law, the Hon. DRP/ Ld. AO/ Ld. TPO, erred in determining the arm's length price of the international transaction pertaining to Oracle support services segment at Rs.3,12,76,320 instead of Rs.2,79,36,320 as determined by the Appellant and thereby making an adjustment of Rs.33,40,000*

3.1. *On the facts and in the circumstances of the case and in law, while making an adjustment pertaining to Oracle support services, the Ld. DRP / Ld. AO/Ld. TPO erred in:*

- i. rejecting the Transfer Pricing study which was maintained by the Appellant in good faith and with due diligence;*
- ii. rejecting the search process followed by the Appellant;*
- iii. rejecting multiple year data followed by the Appellant;*
- iv. not following structured search process;*
- v. including certain comparable companies, which were not comparable to the business of the Appellant;*
- vi. not including certain comparable companies selected by the Appellant in its TP Study / submitted during the course of assessment proceedings which are comparable to the business of the Appellant;*
- vii. not granting working capital adjustment for the differences in level of working capital assets between the Appellant and the comparable companies;*
- viii. not granting risk adjustment for the differences in level of risk between the Appellant and the comparable companies; and*
- ix. applying safe harbor rules for the purpose of margin computation of comparable companies*

12. The learned Authorized Representative for the assessee pointed out that the issue raised vide ground of appeal No.3 is in respect of ITES segment, wherein the assessee was cost plus entity providing services with mark up of 10% on cost. The assessee had benchmarked the transactions using TNMM method. However, the TPO had applied additional filters for selection of comparable companies and accepted only two concerns from assessee's set of comparables selected. The learned Authorized Representative for the assessee pointed out that four new comparables were picked up by the TPO and the issue which is raised vide ground of appeal No.3 was against inclusion of two concerns

Excel Infoways Ltd. and Universal Print Systems Ltd. He pointed out that the concern Excel Infoways Ltd. could not be selected as it was showing fluctuating margins in preceding years. It was further pointed out by the assessee that the annual report of the said company shows that ITES and BPO segments were closed in financial year 2011-12 on account of global recession and planned to diversify into real estate business. Another distinguishing feature was the low employee cost filter. The learned Authorized Representative for the assessee pointed out that employee cost over sales ratio of the said concern was less than 25% as against employee cost of 47.75% of assessee. In this regard, the learned Authorized Representative for the assessee placed reliance on the ratio laid down by the Mumbai Bench of Tribunal in Goldman Sachs Services (P.) Ltd. Vs. ITO (2015) 69 SOT 28 (Mumbai – Trib.). In respect of second concern Universal Print Systems Ltd., the learned Authorized Representative for the assessee again pointed out that the said concern was also not comparable because of its low employee cost filter. He further pointed out that the Assessing Officer may verify the employee cost filter of the said concerns and if it were less than 25%, then the same merits to be excluded from final list of comparables.

13. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the orders of Assessing Officer / DRP.

14. We have heard the rival contentions and perused the record. The assessee had provided Oracle support services to Emerson Climate Technologies Incorporation, USA. The assessee claimed that it was providing back office support activity in the nature of ITES services to its associated enterprises, wherein it had earned mark up of 10% on cost. The assessee had

benchmarked the said transaction by using TNMM method after selecting seven external comparable companies having mean margin of 12.12%. The TPO during TP proceedings, however, applied additional filters for selection of comparable companies and retained two concerns which were selected by the assessee i.e. Jindal Intellicom Pvt. Ltd. and e4e Healthcare Services Ltd. However, the TPO introduced additional four more concerns and the final set of comparables were drawn up as under:-

Sr. No.	Name of Comparable Company	OP/TC As per TPO
1	Jindal Intellicom Ltd.	2.80%
2	Microgenetic Systems Ltd.	19.61%
3	e4e Healthcare Services Ltd.	19.48%
4	Ninestars Information Technologies Ltd.	19.57%
5	Excel Infoways Limited	41.48%
6	Universal Print Systems Limited	59.40%
	Arithmetic Mean Margin (ALP)	27.05%

15. The TPO thus, made an upward adjustment of ₹ 43,30,700/- in the segment of provision of ITES services. The DRP rejected the contention of assessee on inclusion / exclusion of certain comparables. However, it directed the TPO to adopt correct operating margins of comparable companies. Consequently, the mean margins of comparable companies was re-computed at 23.13% resulting in upward adjustment of ₹ 33,40,000/-. The assessee is in appeal against the said adjustment made in ITES segment. The plea of assessee during the course of hearing was that in case two concerns i.e. Excel Infoways Ltd. and Universal Print Systems Ltd. were excluded from the final list of comparables, then the margins shown by the assessee and mean margins of comparables were within +/- 5% range and no TP adjustment had to be made in the hands of assessee.

16. Coming to the first concern Excel Infoways Ltd., wherein the assessee points out that the said concern was not to be selected as comparable because of its fluctuating margins. The learned Authorized Representative for the assessee has filed tabulated details in this regard, wherein the margins of said concern being drastically dropped from 267.31% in earlier years to 41.48% during the year under consideration. The year-wise margins of said concern are as under:-

Financial Year	OP/TC margin
2008-09	247.74%
2009-10	267.31%
2010-11	238.71%
2011-12	41.48%

17. Further, the said concern had closed down its ITES and BPO segment in financial year 2011-12 on account of global recession. We hold that the said concern which is in the process of closing down its ITES segment and also because of the factum of fluctuating margins, could not be selected as functionally comparable to the assessee. In this regard, we find support from the ratio laid down by the Hon'ble High Court of Gujarat in Pr. CIT Vs. Allscripts India Pvt. Ltd. in Income Tax Appeal No.258 of 2016 and Pune Bench of Tribunal in TIBCO Software India Pvt. Ltd. Vs. DCIT in ITA Nos.276/PUN/2015 & cross appeal in ITA No.334/PUN/2015, relating to assessment year 2010-11, order dated 31.01.2017 and Qlogic India Pvt. Ltd. Vs. DCIT in ITA No.227/PUN/2014, relating to assessment year 2009-10, order dated 21.10.2014. Another factor which has been pointed out by the learned Authorized Representative for the assessee is low employee cost ratio of the concern Excel Infoways Ltd.

18. In the ITES segment, it is an admitted position that the same is oriented involving high employee cost. In case filter of employee cost is applied and concern is found to have low employee cost on sales ratio, then such a concern fails the filter and cannot be selected as comparable. Such is the proposition laid down by the Mumbai Bench of Tribunal in Goldman Sachs Services (P.) Ltd. Vs. ITO (supra). Applying the said proposition to the facts of present case, we find that the assessee had shown employees cost of 47.75%, whereas the learned Authorized Representative for the assessee points out that the employee cost ratio of Excel Infoways Ltd. and also of Universal Print Systems Ltd. was less than 25% and hence, such concern could not be selected as comparable.

19. The learned Authorized Representative for the assessee fairly pointed out that low employee cost to sales ratio may be verified by the Assessing Officer in respect of both the concerns. Accordingly, we direct the Assessing Officer to verify the claim of assessee in this regard and in case the employee cost to sales ratio was less than 25%, then both the concerns have to be excluded from final set of comparables. In respect of Excel Infoways Ltd., we have already held the same to be not comparable on account of its fluctuating margins. However, in case, it fails the low employee cost filter, then also the said concern cannot be picked up as comparable. Similarly, the employee cost ratio vis-à-vis sales ratio of Universal Print Systems Ltd. needs verification and in case it is less than 25%, then the said concern is not to be included in the final list of comparables. The Assessing Officer shall afford reasonable opportunity to the assessee and after verification, determine the arm's length price of international transactions.

20. In view of our decision in the paras hereinabove, the Stay Applications filed by the assessee become infructuous and are dismissed.

21. In the result, both the appeals of assessee are allowed as indicated above and the Stay Applications are dismissed.

Order pronounced on this 25th day of April, 2018.

Sd/-
(D.KARUNAKARA RAO)
 लेखा सदस्य / **ACCOUNTANT MEMBER**

Sd/-
(SUSHMA CHOWLA)
 न्यायिक सदस्य / **JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 25th April, 2018.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The DIT (TP/IT), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
 आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune