



ITA Nos.7437/Mum/2012,7666/Mum/2013 & 1126/Mum/2013  
Jotun India Private Limited  
Assessment Years: 2007-08 to 2009-2010

**आयकर अपीलीय अधिकरण “के” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“K” BENCH, MUMBAI**

श्री महावीर सिंह, न्यायिक सदस्य एवं  
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

**BEFORE SHRI MAHAVIR SINGH, JM AND**  
**SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./I.T.A. No.1126/Mum/2013  
(निर्धारण वर्ष / Assessment Year: 2007-08)

<b>Jotun India Private Limited</b> Room No.502,5 <sup>th</sup> Floor Boston House, Suren Road Behind Cinemax Theatre Andheri(East), Mumbai-400 093	<b>बनाम/ Vs.</b>	<b>Income Tax Officer 3(2)(1)</b> Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. <b>AABCJ-6665-J</b>		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

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आयकर अपील सं./I.T.A. No.7437/Mum/2012 & 7666/Mum/2013  
(निर्धारण वर्ष / Assessment Years: 2008-09 & 2009-10)

<b>Jotun India Private Limited</b> Room No.502,5 <sup>th</sup> Floor Boston House, Suren Road Behind Cinemax Theatre Andheri(East),Mumbai-400 093	<b>बनाम/ Vs.</b>	<b>Deputy Commissioner of</b> <b>Income Tax Circle-3(2)</b> Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. <b>AABCJ-6665-J</b>		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Girish Dave, Ketan Ved & Ninad Patade, Ld. AR's
Revenue by	:	Jayant Kumar, Ld. CIT DR
सुनवाई की तारीख / <b>Date of Hearing</b>	:	19/04/2018
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	04 /05/2018

**आदेश / ORDER**



**Per Manoj Kumar Aggarwal (Accountant Member)**

1. The captioned appeals by assessee for Assessment Years [AY] 2007-08 to 2009-10 contest separate orders of lower authorities. Since common issues are involved, all the appeals are being disposed-off by way of this common order for the sake of convenience & brevity.

**ITA No. 1126/Mum/2013, AY 2007-08**

2. This appeal contest *final assessment order* dated 28/10/2011 passed by Ld. Income Tax Officer-3(2)(1) [AO] u/s 143(3) *read with Section 144C* of the Income Tax Act, 1961 pursuant to the directions of *Ld. Dispute Resolution Panel [DRP]*. The Heads of effective ground raised in the appeal reads as under:-

1. *Transfer Pricing Adjustment – Payment of Project Expenses-Rs.17,246,260/-.*
2. *Transfer Pricing Adjustment – provision of Sales Support Services – Rs.74,37,000/-*
3. *Use of Multiple Year Data*
4. *Benefit of +/-5%*
5. *Initiation of penalty proceedings*
6. *General*

3.1 Facts in brief are that assessee being *resident corporate assessee* engaged in *trading of decorative paints and sales support services* was assessed u/s 143(3) at Loss of Rs.159.90 Lacs after certain *Transfer Pricing [TP] adjustment* of Rs.246.83 Lacs as against returned loss of Rs.406.73 Lacs *e-filed* by the assessee on 29/10/2007. The assessee was a 99.85% subsidiary company of *Jotun AS, Norway* which was a part of *Jotun Group*. The group was engaged in *manufacturing of paints, coatings and powder coatings*. The assessee was incorporated during March, 2006 to manufacture *liquid paints* to be used for coatings in



marine, industrial and housing sector. The impugned AY was the first year of commercial operations of the assessee. Since the plant was not set up, the assessee carried out only trading activities and was engaged in providing certain *sale support services* to its AE in the impugned AY.

3.2 The International Transactions carried out by the assessee with its *Associated Enterprises [AE]* as reported in *Form 3CEB* were referred for determination of *Arm's Length Price [ALP]* u/s 92CA(1) to *Ld. Transfer Pricing Officer [TPO]* on 11/12/2009. The international transactions carried out by the assessee during impugned AY and methods used to benchmark the same in its Transfer Pricing Study are listed below:-

<b>No.</b>	<b>Nature of Transaction</b>	<b>Value (In crores)</b>	<b>Method Used</b>
1.	<i>Purchase of Finished Goods</i>	5.38	<i>RPM</i>
2.	<i>Purchase of Fixed Assets</i>	1.20	<i>At Cost</i>
3.	<i>Receipt of Sale Support Services</i>	2.01	<i>TNMM</i>
4.	<i>Payment for project expenses and technical services</i>	1.72	<i>At Cost</i>
5.	<i>Payment of interest on ECB</i>	0.13	<i>CUP</i>

The methodology adopted by the assessee for transactions Listed at Serial Number 1 & 5 has been accepted by Ld. TPO and no adjustment has been proposed against these transactions. The *TP adjustment* against *purchase of fixed assets* as suggested by Ld. TPO has been deleted by Ld. DRP and it has been submitted that no appeal has been preferred by the revenue against the same. As evident from grounds of appeal, the issue under appeal is related with determination of *ALP* of *project expenses and sales support services*.

3.3 The assessee provided *sales support services* amounting to Rs.2.01 Crores to its *AE* situated at *Singapore* to promote its products in



India. These services were mostly in the nature of *Management Information System [MIS]* and forwarding of purchase orders received from third parties. These transactions were benchmarked using *Transactional Net Margin Method [TNMM]* with *Berry Ratio* as *Profit Level Indicator [PLI]*. To work out the *segmental results*, Ld. TPO apportioned the total cost in the ratio of *commission income* earned by the assessee to *total operating income* which has resulted into assessee's *PLI* being worked out at (-)25.37% as against *PLI* of 12% reflected by one comparable. Resultantly, the *TP adjustment* has been worked out @37.37% of commission income of Rs.2.01 crores which translated into *TP adjustment* of 74.37 Lacs against the same.

3.4 The second *TP adjustment* was related with purchase of fixed assets *viz. furniture, computers, Air Conditioners* etc. from Indian Branch of its *Singapore AE*. The same has been benchmarked by the assessee on 'cost' basis. The assessee submitted that these assets were purchased by Indian Branch for use of assessee and the same has been reimbursed on *cost- to-cost* basis and further, the same has not been capitalized in the books of Indian Branch. However, for want of requisite evidences, *ALP* of fixed assets amounting to Rs.78.38 Lacs has been determined as 'Nil' and adjustment to that extent was proposed by Ld. TPO.

3.5 The third *TP adjustment* was related with *reimbursement of Project expenses and technical services* aggregating to Rs.172.46 Lacs claimed to be reimbursed to its *AE* by the assessee on *cost-to-cost basis*. However, for want of evidences, Ld. TPO proposed *TP adjustment* of Rs.82.96 Lacs in the same.



3.6 The aforesaid three *TP adjustments* aggregating to Rs.235.72 Lacs as proposed by Ld. TPO vide its order u/s 92 CA (3) dated 25/10/2010 was incorporated by Ld. AO in the *draft Assessment Order* dated 28/12/2010 in terms of Section 92 CA(4) which was subjected to objections by assessee before Ld. DRP.

3.7 The Ld. DRP while confirming the stand of Ld. TPO opined that *ALP of total project expenses* aggregating to Rs.172.46 Lacs were to be treated as 'Nil' since the setting up of the project was a part of *shareholders activity* and the benefit thereof was to be received by the group as a whole. The aforesaid stand of Ld. DRP, in effect, resulted into enhancement of *TP adjustment* against *project expenses* by Rs.89.49 Lacs. The TP adjustment on account of *Sales Support Services* has been confirmed whereas adjustment on account of fixed assets was deleted by Ld. DRP since adequate evidences were adduced by the assessee to support its submissions. Incorporating the aforesaid adjustments, final assessment order dated 28/10/2011 has been passed by Ld. AO wherein *TP adjustments* aggregating to Rs.246.83 Lacs has been carried out on account of *Sales Support Services & Project Expenses*. Aggrieved, the assessee is in further appeal before us.

4. The Ld. Authorized Counsel for Assessee [AR], drawing our attention to the documents placed in the *paper-book*, assailed the stand of lower authorities, *inter-alia*, on the ground of violation of principle of natural justice by submitting that various evidences submitted by the assessee were not properly considered while arriving at the said adjustment. It has further been contended that enhancement has been made by Ld. DRP without providing adequate opportunity of being heard



to the assessee in violation of statutory provisions and therefore the matter require reconsideration by lower authorities. Per *Contra*, Ld Departmental Representative [DR] submitted that the assessee did not file the replies on time and did not cooperate with lower authorities and therefore the adjustment has rightly been made by lower authorities and the same need to be confirmed.

5. We have carefully heard the rival contentions and perused relevant material on record including documents placed in the *paper-book*. So far as the adjustment on account of Fixed Assets is concerned, we find that the assessee has benchmarked the same at *cost* which has been accepted by the revenue and Ld. DRP, after appreciating the evidences submitted by the assessee has deleted this adjustment altogether. It has been submitted before us that no appeal against the same has been filed by the revenue and therefore, the matter has already attained finality.

6. So far as the adjustment on account of *Sales Support Services* is concerned, the prime grievance of the assessee revolves around method of *cost allocation* between *trading activity* and *sales support services*. Upon perusal, we find that the assessee, vide its letter dated 18/10/2010 made several submissions to contest the adjustment under this head. The said submissions, in our opinion, are vital to adjudication of this issue since these submissions, besides pointing out certain errors in the computations made by Ld. TPO, contain alternative submissions as to *cost allocation* and determination of *ALP* of these transactions. The said submissions have altogether been ignored by Ld. TPO as well as Ld. DRP, since the same, *prima facie*, has been submitted by the assessee after passing-off of the order by Ld. TPO. In view of the above stated



facts and in the interest of justice, we remit this matter back to the file of Ld. AO / TPO for due consideration and re-adjudication in the light of the submissions made by the assessee. Needless to add that *ALP* of the transactions has to be computed within the framework of statutory provisions and as per methodology provided in *Rule 10B*. The assessee is directed to substantiate his stand in this regard. Ground No. 2 stands allowed for statistical purposes.

7.1 As submitted by assessee, the *project expenses* are primarily related with *travel expenses of engineers, salary, pension, insurance of the project manager, logistics for importing the material related to the project, etc.* stated to be paid by the AE on behalf of the assessee and subsequently reimbursed by the assessee on *cost-to-cost basis*. The Ld. TPO, while accepting the stand of the assessee, made a *TP adjustment* of Rs. 82.96 Lacs against the same for want of documentary evidences. The Ld. DRP, altogether taking a different view, enhanced the said adjustment viewing the transactions as part of *shareholders' activities*. The aforesaid enhancement has, *prima facie*, been made without affording adequate opportunity of being heard to the assessee in violation of principle of natural justice. The revenue is unable to controvert the aforesaid fact.

7.2 Proceeding further, we find that no plausible reasoning has been adduced by Ld. DRP while arriving at the conclusion that the expenditure incurred by the assessee was part of *shareholders' activities* and would bring benefit only to its AE particularly when the assessee has consistently submitted that the aforesaid expenditure was directly related to the project being set up by the assessee at *Ranjangaon, Pune* and the



same was reimbursed to its AE on cost to cost basis. These expenditure primarily included expenditure towards *project management* and *procurement of material* to set up the project. As per settled legal position, we find that the revenue is not to put himself into the armchair of the businessman so as to adjudge the necessity of incurring the expenditure unless it is shown that the expenditure was not at all, required to be incurred for the benefit of the assessee and the assessee, in normal circumstances, would not be willing to pay the same to independent third parties. The aforesaid proposition, known as, *benefit test*, in our opinion, has been overlooked by the Ld. DRP and therefore, Ld. DRP erred in treating the ALP of the same at 'Nil' without demonstrating that the impugned expenditure was exclusively meant to benefit the assessee's AE and the assessee, under normal circumstances, would not have been willing to pay the same to independent third parties.

7.3 Another aspect to this transaction is that upon perusal of material on record, we find that major part of the project expenses have been capitalized in the *Balance Sheet* by the assessee as *Capital Work-in-progress* and the same has not, at all, been claimed by the assessee by way of debit to Profit & Loss Account. It is to be noted that upon completion of the project, fixed asset in the shape of *manufacturing plant* would come into existence, against which the assessee shall be entitled to claim the depreciation within statutory framework. Therefore, the approach of revenue to add back the aforesaid adjustment to determine the Profit / Loss for the year was clearly fallacious in nature.



7.4 In view of the above stated facts, we have no option but to remit the matter back to the file of Ld. AO / TPO to re-appreciate the factual matrix and for *de-novo* adjudication of this issue by affording sufficient opportunity of being heard to the assessee in this regard. The assessee, in turn, is directed to substantiate his stand with necessary explanations / documentary evidences. Ground No.1 stand allowed for statistical purposes.

8. By way of Ground No. 3, the assessee has pleaded for use of multiple year data. However, we do not find much force in the same since it is settled proposition and also in terms of *Rule-10B(4)*, single year data of impugned AY has to be given preference to benchmark the transactions as against data of earlier years. This ground raised in all the three years fails. Ground No. 4 pleads for grant of benefit of +/-5%. Needless to add that whatever concessions / benefits are available to the assessee in terms of statutory provisions, the same shall be granted to the assessee. This ground raised in all the three years stands allowed for statistical purposes. Ground No. 5 is consequential in nature and do not require any specific adjudication. Ground No. 6 is general in nature. All the grounds stands disposed-off in terms of our above order.

9. Resultantly, the appeal stands partly allowed for statistical purposes in terms of our above order.

10. The assessee, in AY 2008-09, has been saddled with similar *TP adjustment* of Rs.391.82 Lacs against *Project expenses* by Ld. TPO, viewing the same as part of *shareholders activities*. The Ld. DRP has provided partial relief against the same to the extent of Rs.58.69 Lacs, being interest expenses since the same was separately benchmarked by



the assessee. Resultantly, the net *TP adjustment* as sustained by Ld, DRP amounts to Rs.333.13 Lacs which has been confirmed primarily by placing reliance on the stand of Ld. DRP in AY 2007-08. Similarly, in AY 2009-10, Ld. TPO, on similar reasoning, has proposed the aforesaid adjustment of Rs.138.75 Lacs and the same has been confirmed by Ld. DRP. Since the facts and circumstances in these years are similar to AY 2007-08 and the adjustment in these years have been made by placing reliance on the stand taken in AY 2007-08, the same stand remitted back to the file of Ld. AO / TPO on similar lines. Resultantly, these grounds of appeal for AY 2008-09 & 2009-10 stands allowed for statistical purposes. Now, we take up other grounds raised in AY 2008-09 & 2009-10.

### **ITA No. 7437/Mum/2012, AY 2008-09**

11. In this year, the assessee has been saddled with aggregate *TP adjustment* of Rs.806.87 Lacs comprising of adjustment against *import of finished goods* for Rs.415.04 Lacs and adjustment against *project expenses* for Rs.391.82 Lacs. The issue relating to *TP adjustment* of *project expenses* has already been dealt by us in *para-10* above.

12. The finished goods imported by assessee from its *AE* aggregating to Rs.556.97 Lacs have been benchmarked by him in *TP study* using *Resale Price Method [RPM]* as *most appropriate method [MAM]*. The primary argument to adopt this method was that the assessee act as distributor buying finished goods and selling it in the domestic market without adding significant value to the products. The methodology adopted by assessee, in the opinion of Ld. TPO, was not correct since *marketing efforts / costs* was a crucial factor to determine the *Profit Level*



*Indicator [PLI]* of the tested party as well as comparables. The Ld. TPO, in the alternative, adopted *Transactional Net Margin Method [TNMM]* as *MAM* with *operating profit / operating income* as *PLI*. The assessee's *PLI*, thus computed, work out to -29% as against average *PLI* of 1.53% reflected by seven comparables based on single year data which resulted into impugned TP adjustment of Rs.451.04 Lacs. The same, upon confirmation by Ld. DRP, has been assailed before us.

13. The Ld. AR has justified the adoption of *RPM* method since the same was *MAM* keeping in view the nature of activities being carried out by the assessee. It has been submitted that the revenue had no justification to reject the assessee's methodology and adopt *TNMM* method to benchmark the same without assigning bringing on record any cogent material to substantiate the same. The Ld. AR has also placed reliance on the *rule of consistency* by submitting that *RPM* method to benchmark these transactions has been accepted by the revenue in AY 2007-08 and therefore, the same should be adopted in this year also. Per *Contra*, Ld. DR submitted that the assessee was not into pure trading activity but dealing in highly sophisticated branded goods. To promote the products, it was incurring heavy marketing expenditure for its *AE* since the product was at introduction stage in the market and therefore, the aforesaid related costs were factored into *gross profit margins* earned by the assessee and therefore, *RPM* method could not be applied under the circumstances since the comparables selected by the assessee may not be operating under the similar business conditions or exposed to same business environment. Our attention has been



drawn to the financial statements of the assessee to support the submissions.

14.1 We have given thoughtful consideration to the same. So far as the *rule of consistency* is concerned, we find that the benefit of the same could not be granted to the assessee since AY 2007-08 was the first year of commercial operations of the assessee and the methodology adopted by the assessee to benchmark these transactions in AY 2007-08 has been accepted by Ld. TPO without any elaborate discussions in the order u/s 92CA(3). Our conclusion is further supported by the fact that the assessee's methodology for AY 2009-10 was not accepted by the revenue and Ld. TPO has benchmarked these transactions using *TNMM* method. However, the *TP adjustment* on this account has been deleted by Ld. DRP in that year since the adjustment fell within *safe harbor of +/-5%*. Therefore, to say that the revenue has accepted the methodology as adopted by assessee and therefore the same should be adopted in view of the rule of consistency is not a correct proposition and therefore, the same stand rejected.

14.2 Proceeding further, In our opinion, since *Resale Price Method* primarily compares *Gross Profit Margins* earned by the assessee vis-à-vis corresponding margins earned by the comparables and therefore, before applying this method, it becomes imperative to find out that the assessee as well as comparables were exposed to similar business conditions, risks and functions and were operating under similar business environment. This vital fact has not been addressed by either of the representatives or by any of the lower authorities.



14.3 A bare perusal of the financial statements for impugned AY reveals that the assessee has earned aggregate revenue of Rs.18.04 Crores including turnover of trading goods for Rs.13.34 Crores. Against the same, the assessee has claimed expenditure of Rs.28.45 Crores which broadly consist of following items:-

<b>Nature of Transaction</b>	<b>Value (In crores)</b>
<i>Cost of Goods Traded</i>	<i>9.19</i>
<i>Personnel Expenses</i>	<i>5.62</i>
<i>Operating &amp; Other Expenses</i>	<i>11.71</i>
<i>Amortizations</i>	<i>0.86</i>
<i>Financial Expenses</i>	<i>1.07</i>
<b>Total</b>	<b>28.45</b>

A bare perusal of the assessee's financials make it difficult to accept the contention that the assessee was purely a trader in nature and was not adding any value to sell the product in Indian Market since it was incurring heavy operating expenditure which gives certain strength to the stand of the revenue.

14.4 Therefore, in totality of factual matrix, we are of the opinion that few vital issues as stated above have remain to be addressed by lower authorities and the matter, in our opinion, remain inconclusive. Therefore, the issue stand remitted back to the file of Ld. AO / TPO, keeping all the issues open, for re-appreciation of factual matrix and re-adjudication in the light of submissions made by the assessee. The assessee, in turn is directed to justify the methodology adopted to benchmark the same and thereafter, justify the selection of comparables. Accordingly, this ground stands allowed for statistical purposes whereas the appeal stands partly allowed for statistical purposes.



### **ITA No. 7666/Mum/2013, AY 2009-10**

15. The sole ground raised in this year is related with *TP adjustment* against *project expenses*. The same has already been dealt with by us at *para-10*. Accordingly, the appeal stands allowed for statistical purposes.

### **Conclusion**

16. All the appeal stands partly allowed for statistical purposes in terms of our above order.

*Order pronounced in the open court on 04<sup>th</sup> May, 2018*

Sd/- <b>(Mahavir Singh)</b> न्यायिक सदस्य / <b>Judicial Member</b>	Sd/- <b>(Manoj Kumar Aggarwal)</b> लेखा सदस्य / <b>Accountant Member</b>
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मुंबई Mumbai; दिनांक Dated : 04 .05.2018  
 Sr.PS:- Thirumalesh

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

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2. प्रत्यर्थी / The Respondent
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4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
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आदेशानुसार/ BY ORDER,

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 आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai