

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'C' BENCH, KOLKATA**

**[Before Sri S.S. Godara, Judicial Member & Dr. A.L. Saini, Accountant Member]**

**I.T.A. No. 278/Kol/2016**  
Assessment Year: 2011-12

**ITA No.506/Kol/2017**  
Assessment Year : 2012-13

***Epcos India Pvt. Ltd.....Appellant***  
***WBIDC Growth Center***  
***Kulia Kanchrapar Road***  
***PO Netaji Subhas Sanatorium***  
***Kalyani***  
***West Bengal***  
***[PAN: AAACI 6950 Q]***

***Joint Commissioner of Income Tax, Range-11, Kolkata.....Respondent***

**ITA No.322/Kol/2016**  
Assessment Year : 2011-12

***Deputy Commissioner of Income Tax, Circle-11(1), Kolkata.....Appellant***

***Epcos India Pvt. Ltd.....Respondent***  
***WBIDC Growth Center***  
***Kulia Kanchrapar Road***  
***PO Netaji Subhas Sanatorium***  
***Kalyani***  
***West Bengal***  
***[PAN: AAACI 6950 Q]***

**Appearances by:**

*Shri Rahul Saha & Vineet Jaiswal, A/R, appeared on behalf of the assessee.*  
*Shri P.K. Srihari, CIT, DR appearing on behalf of the Revenue.*

Date of concluding the hearing : August 16<sup>th</sup>, 2018

Date of pronouncing the order : October 30<sup>th</sup>, 2018

**ORDER**

**Per S.S. Godara, JM :-**

The instant batch of three appeals pertains to a single assessee namely M/s. Epcos India Private Limited. Former assessment year 2011-12 involves assessee's and Revenue's cross-appeals ITA Nos.278 and 322/Kol/2016 arising from the Joint Commissioner of Income Tax Range-11, Kolkata's order dt. 27/02/2016. Latter assessment year 2012-13 involves assessee's appeal ITA No. 506/Kol/2017. Relevant proceedings in the two assessment years are u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short 'Act').

Heard both the parties. Case file perused.

2. It emerges at the outset that this is the second innings of proceedings between the parties. The assessee has raised three substantive grounds in its former appeal ITA No. 278/Kol/2016 *inter alia* challenging correctness of the lower authorities action making transfer pricing adjustment of R.35,14,77,056/-, disallowance u/s 115JAA of the Act involving amount of Rs.1,48,29,182/- and denying credit of tax deducted at source amounting to Rs.22,950/-; respectively. The Revenue's appeal ITA No. 322/Kol/2016 for the very assessment year 2011-12 seeks to revive cash and trade discounts disallowance of Rs.1,00,50,239/- and Rs.1,54,82,000/-; respectively. Its further case is that the same also attracts Section 40(a)(ia) of the Act on account of non-deduction of TDS. The assessee's later appeal in ITA No.506/Kol/2017 also appears to be raising two identical substantive grounds challenging correctness of arm's length price adjustment of Rs.68,13,10,000/- as well as similar disallowance of trade and cash credit disallowance aggregating to Rs.1,49,29,364/- followed by Section 40(a)(ia) disallowance on account of non-deduction of TDS thereupon.

3.1. Case files suggest that all these cases came up before a co-ordinate bench on 05/12/2017. The said bench's order dt. 15/12/2017 restored the transfer pricing adjustment issue back to the transfer pricing officer after admitting assessee's additional evidence as follows:-

*"4. Being aggrieved by the Ld. DRP's direction, the Assessee has preferred these appeals before us for consideration of revised approach and additional evidences as submitted before the Ld. DRP (for AY 2012-13) and for A.Y 2011-12 also before us, for adjudication of the matter. The copy of submission for both assessment years were filed on 6th October, 2017. We note that the following documents have been filed as additional evidence.*

*LIST OF ADDITIONAL EVIDENCE*

- 1. Copy of organization structure of Sales Organizations' engaged In distribution activity*
- 2. Sample copies of invoices raised by Sales Organisation on the appellant and other Manufacturing units pursuant to Distributorship agreement*
- 3. Back to back listing of appellant's sales invoices with sale invoices of Sales Organisation for FY 2010-11*
- 4. Certified copies of cost profitability statements of Sales Organisations from undertaking distribution activity of appellant's products*

5. *Benchmarking report to substantiate Distributorship arrangement with each of the Sales Organisations has been undertaken at arm's length*
  6. *Copy of royalty agreement considered by the Ld. TPO in relation to exploitation of marketing and distribution rights*
  7. *Transfer pricing order of AY 2012-13 evidencing selection of Mahindra Hinoday and MMG India Pvt. Ltd. as comparable companies for benchmarking appellant's profitability under its Ferrite segment*
  8. *Certified copy of financial information showing profitability earned by the appellant under its Kalyani unit (Ferrite segment)*
  9. *Framework Service Agreement of Epcos AG with other group companies*
  10. *Individual Service Agreement in relation to IT services of Epcos AG with other group companies*
  11. *Sample copies of invoices raised by EPCOS AG on Epcos India and other group companies for provision of IT support services*
  12. *Benchmarking report with respect to the transaction pertaining to payment for business support services (IT support and Export support services)*
  13. *Copy of organization structure of EPCOS AG's IT division engaged in rendering of IT support services to group companies*
  14. *List of IT users working on IT systems, SAP and other applications*
  15. *Additional copies of mail communication along with summary of such mails showing benefits received by appellant from IT support services*
  16. *Copy of agreements entered into between EPCOS AG and other group entities in relation to export support services*
  17. *Sample copies of invoices raised by EPCOS AG on other group companies for provision of export support services*
  18. *Evidences of export support services received and consequent benefits therefrom*
  19. *Copy of annual reports of comparable companies (along with details of margin computation) selected for benchmarking the transaction of sales*
  20. *Comparable price details for benchmarking the unit price of ferrite sold by assessee to AEs for consumption purposes along with copies of third party price quotation*
  21. *English translated copies of IT agreement entered into by EPCOS AG with third party vendors*
  22. *Organization structure of Epcos AG PM team rendering Export support services to group companies*
  23. *Sample copies of debit notes raised by third party vendors on EPCOS AG*
  24. *Details of IT helpdesk tickets raised and resolved during the year FY 10-11*
  25. *Month-wise details of sales margin as paid by assessee to each of the Sales Organisations*
  26. *Distributorship agreement between EPCOS India and EPCOS Sumperk*
  27. *Cost auditor certificate showing details of capacity utilization and details of contribution earned by EPCOS, Kalyani unit from sale of ferrite for consumption to AEs for AY 11-12 and AY 12-13.*
5. *According to assessee, it has appointed the new law firm when the appeal was preferred before the Tribunal for A.Y 2011-12. The New Law firm after analysis of the original T. P study has advised the assessee to adopt transaction by transaction method, in place of entity level bench marking approach. According to the assessee, it should not be penalized for the error/mistake which occurred in the first place, because of wrong legal advice of*

*erstwhile attorneys. We note that the Hon'ble Supreme Court in N. Balakrishnan Vs. M. Krishnamurthy (1998) 7 SCC 123 wherein a similar case where there was a delay of 883 days because of the mis-handling the case by the Advocate of the petitioner, the Hon'ble Supreme Court condoned the delay taking note that the petitioner cannot be faulted due to the laches of the lawyer. Similarly, for substantial justice, the assessee should not suffer because of earlier legal advice which the assessee realizes to be wrong and ready to correct. Therefore, in the interest of justice and fair play, the transfer pricing adjustment ordered by the TPO is set aside with a direction to re-adjudicate only on the issue on which the TPO has found the assessee's transaction not at arms' length, which is to be done afresh after taking into consideration, the aforesaid documents filed before us for A.Y 2011-12 and DRP for AY 2012-13 and after hearing the assessee."*

3.1.1. The assessee thereafter filed its miscellaneous application MA Nos. 47 to 49/Kol/2018, pleading therein that the tribunal's above order had not considered the remaining corporate tax issues. Learned co-ordinate bench's order dt. 04/05/2018 recalled its earlier order by terming the said omission in "non adjudication of domestic tax issues to be a mistake apparent on record. It therefore restored these three appeals to this limited extent. It is in this backdrop of facts that all these three appeals have come up for hearing before us in the instant second round.

4. We come to the assessee's grievance regarding non-granting of section 115JAA MAT credit in assessment order dt. 27/01/2016. It transpires at the outset that the impugned sum relates to financial year 2006-07 to 2008-09 having corresponding figures of Rs.68,38,314/-, Rs.66,48,104/- & Rs.36,23,221/-; respectively, followed by set off claim of Rs.22,80,958/- in preceding Assessment year 2010-11. The assessee case therefore is that the impugned sum of Rs.1,48,29,182/- as per paper book pages 1455 to 1467 (1466) duly states MAT credit evidence. It is pleaded that the Assessing officer has erred in law as well as on facts in not granting the impugned credit. The Revenue fails to indicate any discussion of the above stated material in the lower proceedings right from draft assessment to DRP's directions. We therefore restore the instant issue back to the Assessing Officer to consider all the above details and pass a fresh order as per law after affording adequate opportunity of hearing to the assessee. Needless to say, the taxpayer shall be at liberty to place on record all relevant details for

appropriate adjudication of the issue. This substantive ground is treated as accepted for statistical purposes.

5. Next comes the assessee's latter substantive ground seeking to reverse the lower authorities action not granting TDS credit of Rs.22,952/-. Learned counsel pleads as perform-26AS issued by assessee's deductor M/s Taxus Infrastructure & Power Projects Pvt. Ltd. available at page 1469 of the paper book. Learned departmental representative's case before us is that all this requires factual verification from the assessing authority. We therefore remit the instant issue as well back to the Assessing officer for factual verification and appropriate adjudication.

The instant two latter substantive grounds as well as assessee's main appeal ITA No. 278/Kol/2016 partly succeeds for statistical purposes in above terms.

6. Next comes cash and trade discounts common issue in Revenue's cross appeal ITA No. 322/Kol/2016 its former and assessee's appeal ITA No. 506/Kol/2017 in latter assessment year (supra).

We find that the Dispute Resolution Panel restored the issue back to the Assessing Officer for factual verification in former and confirmed the impugned disallowance in later assessment year; respectively. Both the assessee and Revenue are therefore aggrieved to the above extent in their respective pleadings. We find during the course of hearing that the very issue of cash and trade discounts *vis-à-vis* TDS deduction thereupon is a recurring one so far as the instant assessee is concerned. A co-ordinate bench's order dt. 02/02/2018 in assessment years 2008-09 to 2010-11 has already accepted the very issue in taxpayer's favour as under:-

*"4. The first issue raised by Revenue in grounds no. 1 and 2 are inter- related and therefore being taken up together that the Ld. CIT(A) erred in deleting the addition made by the AO for Rs.1,00,66,944/- on account of non- deduction of TDS u/s 194H read with [section 40\(a\)\(ia\)](#) of the Act.*

*5. Briefly stated facts are that the assessee in the present case is a private limited company and engaged in the business of manufacturing and sale of soft ferrite components, DC and AC capacitors, metalized films etc. The assessee in the year under consideration has claimed expenses under the head "trade discount and cash discount" of Rs.45,71,944/- and Rs.54,95,000/- respectively. The assessee during the*

assessment proceedings explained that impugned discounts were given to its customers on account of bulk quantity purchased by them. There was a contract between the assessee and its customers which was based on principal to principal basis. As such, there was no agreement of principal and agency between the assessee and its customers therefore the discount offered to the customers cannot partake the character of commission as envisaged u/s 194H of the Act.

6. However, the AO during the assessment proceedings observed certain facts as detailed under:

- i) The amount of discount offered to the customers was subject to various terms and conditions therefore it partake the character of commission;
- ii) The amount of discount was settled by the assessee by issuing credit note to the customers. These credit notices were issued to the customers only on the happening of the particular event/ activity such as receipt of payments made by the customers. Thus, the discount offered by the assessee is in the nature of commission.
- iii) The discount was also offered to the customers on account of prompt payment made by dealers to the assessee. This again reflects that the discount is related to providing some services like prompt payment.
- iv) The amount of commission offered by the assessee is directly linked/related to its liquidity which proves that these are not normal discount offered by the assessee but represents the amount of commission.
- v) The terms and condition between the assessee and its customers is of principal and agent.

In view of the above, the AO was of the view that an amount of discount offered by the assessee is nothing but commission expenses which is liable for deduction of TDS u/s 194H of the Act. Besides the above the AO also observed that similar kind of disallowances was also made in the assessment year 2008-09. Thus, the AO made the disallowance of Rs.1,00,66,944/- only and added to the total income of the assessee.

7. Aggrieved, the assessee preferred an appeal to Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that the contract of sale between the assessee and its customers / dealers is based on principal-to-principal basis. Therefore, the transaction between the assessee and its customers represents the sale purchase activities. Thus, the discount offered cannot be terms as commission u/s 194H of the Act. The assessee in support of his claim has also relied on the judgment of Hon'ble Supreme Court in the case of [CIT vs. Ahmadabad Stamp Future Association](#) reported in 348 ITR 378 (SC). The Ld. CIT(A) after considering the submission of the assessee deleted the addition made by the AO by observing as under:

"I have carefully considered the submission put forth on behalf of the appellant along with supporting documents & case laws relied upon and perused the facts of the case including the contention of the AO in the assessment order. It is seen that the appellant has claimed deduction for cash discount and trade discount allowed to the customers for purchasing the product of the appellant in bulk quantities under section 37(1) of the Act while computing the total taxable income. The AO in his order passed u/s 143(3) of the Act has disallowed the deduction claimed on the alleged ground that similar disallowance was made in the immediately preceding year and the appeal for that year is still pending for disposal. From the perusal of the details filed by the appellant, it is observed that in the immediately preceding assessment year the disallowance of cash and trade discount was made on the alleged ground that the same being in nature of commission paid to different parties and as no tax was deducted as per the provision of TDS before making the payment under section 40(a)(ia) of the Act.

My attention was invited to the fact that the appellant has offered discounts to the customers as per the contract of sale entered into between the appellant and the customers taken place on a principal to principal basis. Further, my attention is also drawn to the decision of the Hon'ble Supreme Court in the case of [CIT vs. Ahmedabad Stamp Vendors Association](#) reported in 348 ITR 378 (S C) wherein the Hon'ble Court has held that offering of discount for purchase in bulk would partake the character of discount on transaction of sale and as such the provision of Section 194H of the Act

has no application. My attention was further invited to the fact that both the cash/trade discounts were claimed as allowable deduction and the same was also allowed in all the previous years up to assessment year 2007-08.

In the light of the above discussion and findings, perusing the facts of the case and respectfully following the principles enunciated by the Hon'ble Supreme Court (supra). I am of the considered opinion that the offering of discount for purchasing the quantity in bulk by the customers cannot be treated as payment of commission to the customers specially when the sale is happening on a principal to principal basis. Hence, I am inclined to agree with the appellant and direct the AO to allow deduction claimed for cash/trade discount amounting to INR 54,95,000/- and INR 45,71,944/- respectively while computing the total taxable income and this ground of appeal is accordingly allowed."

Being aggrieved by the Ld. CIT(A) the Revenue is in second appeal before us.

8. The Ld. DR before us vehemently supported the order of AO. Ld. DR prayed before the Bench to confirm the order of AO.

On the other hand, the Ld. AR before us filed the paper book which is running from pages 1 to 56 and submitted that the assessee company has offered the aforesaid cash/trade discount to the customers for purchasing the products in bulk quantity. Thus, the discounts were offered by the assessee company as per the contract of sale between the assessee company and its customer was based on principal to principal basis. The aforesaid discounts were allowed as business expenditure under the provision of [section 37](#) of the Act for all the assessment years except the assessment year 2008-09, where the AO has stated that offering discount on sale would pertain the character of 'commission' and as there was no deduction of tax at source from such commission, the entire amount was disallowed u/s 40(a)(ia) of the act. In this connection, it may be stated that though there are favorable decisions of various High Courts of the country that the discounts offered on sales would not partake the character of commission, there was no decision of the Hon'ble Supreme Court on this point. Now the issue has been set at rest by the decision of the Hon'ble Supreme Court in the matter of Ahmedabad Stamp Vendors Association (supra) wherein the Hon'ble Supreme Court has held that offering discount for purchase in bulk quantity would partake the character of discount on transaction of sale and as such, the provision of [section 194H](#) of the act has no application and hence, disallowance u/s 40(a)(ia) of the Act cannot be made. In view of the above submission especially in view of the binding decision of the Hon'ble Supreme Court, we would request your kind self to allow the expenditure incurred by the assessee company under the head cash/trade discount u/s 37(1) of the Act. Ld. AR further submitted that up to assessment year 2007-08 no disallowance was made on account of discount offered to the customers though the assessments were framed u/s 143(3) of the Act. It was also brought to our notice that from the assessment years 2013-14 and 2014-15 again no disallowance on account of commission expenses was made by the Revenue. Thus, keeping the principal laid down by the Hon'ble Supreme Court in the case of [Radhasoami Satsang vs. Commissioner of Income Tax](#) (1992) 193 ITR 0321 (SC) wherein it was observed in the absence of any material change in the facts, the Revenue should not take a different view in the other year. The Ld. AR in support of its claim has also filed the copy of the assessment orders pertaining to assessment years 2013-14 and 2014-15 which are placed on record.

8.1 On the principal of consistency the Ld. AR also relied on the judgment of Hon'ble Supreme Court in the case of [CIT vs. Dalmia Promoters and Developers Pvt. Ltd.](#) in Civil Appeal No. 74/2007 wherein it was held as under:

"Tax(Appeals) by its order dated 4th September, 1996 taking into account inter alia the fact that for the previous three assessment years the assessee for similar interest from such fixed deposits had been held to come within the head 'business income' and, therefore, following the principle of consistency, it was held that this would have to be for the assessment year 1993-94 as well. An appeal filed by the Revenue before the Income Tax Appellate Tribunal was dismissed on 1st October, 2004".

The Ld. AR in support of its claim also filed the copy of dealership agreement on sample basis which are placed on record. The relevant clauses of the agreement are reproduced as under:

"2. The relationship between EPCOS and the Dealer will be strictly on principal to principal basis

3. The Dealer will not be entitled to represent EPCOS in any manner or fashion as EPCOS Agent and shall have no right or authority to make any commitments of EPCOS's behalf or bind EPCOS in any respect and for any purpose whatsoever and to assign any benefits, rights or obligation herein to any other person(unless otherwise specified).

18.1. EPCOS shall sell the said Products to the Dealer at List Price ruling at the time of delivery less normal Trade Discount on such List Price which will be notified to the Dealer, from time to time. The List Prices are the maximum prices. The Dealer is, however, free to charge lower prices than the prices mentioned in the List Price.

25.1 The payments shall be made to EPCOS by the Dealers before dispatch, unless credit facility has been granted or agreed 25.2. In case credit facility is given, payment should be made as per Business Policy letter intimated to the Dealer from time to time.

The Ld. AR vehemently supported the order of Ld. CIT(A).

8. We have heard the rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon. The issue, in the instant case, relates to whether the amount of commission offered by the assessee is in the nature of commission as envisaged u/s 194H of the Act. At this juncture, we find important to refer to the meaning of commission or brokerage as provided in explanation to [section 194H](#) of the Act which reads as under:

*Explanation.--For the purposes of this section,--*

(i) "commission or brokerage" includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities;

From the above provision, it is clear that some services should be provided by the person or any other services in the course of buying and selling of goods. In the instant case, the assessee has been supplying goods to its dealers on principal to principal basis as evident from the agreement as discussed above. Therefore, we find that there was no relationship between the assessee and its customers as of principal and agents. Therefore, the amount of discount offered by the assessee cannot be termed as commission u/s 194H of the Act. Moreover, the issue of discount offered by the assessee has been duly settled by the Hon'ble Supreme Court in the case Ahmadabad Stamp Vendors Association (supra) wherein it was held as under :

"We are satisfied that 0.50% to 4% discount given to the Stamp Vendors is for purchasing the stamps in bulk quantity and the said discount is in the nature of cash discount.

In the circumstances, we concur with the impugned judgement that the impugned transaction is a sale. Consequently, [section 194H](#) of the Income-tax Act, 1961, has no application."

There is no dispute that the discount was offered by the assessee to its dealers in relation to the sales made by it to them. Thus the provisions of [section 194H](#) does not apply to the impugned discount offered by the assessee. Thus, we do not find any reason to interfere in the order of Ld. CIT(A). Hence the ground of appeal filed by the Revenue is dismissed."

6.1. Coupled with this, we find that the Assessing Officer has conducted factual verification in assessee's favour in his consequential assessment order passed in

furtherance to the Dispute Resolution Panel's direction under challenge in former assessment year 2011-12. The DRP has rejected assessee's corresponding grievance in later Assessment year 2012-13 for the sole reason that Revenue's appeal *qua* the very issue is pending before this tribunal in earlier assessment year i.e. in assessment year 2011-12 (*supra*).

6.1.1. No distinction in facts or law is indicated in either of these two Assessment years before us *vis-à-vis* the three preceding assessment years hereinabove so far as the impugned issue of cash and trade discounts is concerned. We therefore adopt the above extracted detailed reasoning *mutatis mutandis* to decline the Revenue's sole substantive grievance in former assessment year 2011-12. The assessee's very grievance in latter assessment year 2012-13 is accepted. The Revenue's cross appeal in ITA No. 322/Kol/2016 fails whereas assessee's appeal ITA No.506/Kol/2016 for assessment year 2012-13 is partly accepted. Ordered accordingly.

**7. The assessee's former appeal ITA 278/Kol/2016 is partly accepted for statistical purposes in above terms.**

**Revenue's cross-appeal ITA No. 322/Kol/2016 is dismissed.**

**Assessee's latter appeal ITA No.506/Kol/2017 is partly allowed in above terms.**

***Kolkata, the 30<sup>th</sup> day of October, 2018.***

Sd/-  
**[A.L. Saini]**  
Accountant Member

Sd/-  
**[S.S. Godara]**  
Judicial Member

Dated :30.10.2018  
{SC SPS}

*I.T.A. No. 278/Kol/2016  
Assessment year: 2011-12  
ITA No.506/Kol/2017  
Assessment year : 2012-13  
ITA No.322/Kol/2016  
Assessment year : 2011-12  
Epcos India Pvt. Ltd*

*Copy of the order forwarded to:*

**1. Epcos India Pvt. Ltd  
WBIDC Growth Center  
Kulia Kanchrapar Road  
PO Netaji Subhas Sanatorium  
Kalyani  
West Bengal**

**2. Joint Commissioner of Income Tax, Range-11, Kolkata**

**3. Deputy Commissioner of Income Tax, Circle-11(1), Kolkata**

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy  
By order

Assistant Registrar  
ITAT, Kolkata Benches