

**IN THE INCOME TAX APPELLATE TRIBUNAL "K", BENCH
MUMBAI**

**BEFORE SHRI R.C.SHARMA, AM
&
SHRI VIKAS AWASTHY, JM**

**ITA No. 345/Mum/2017
(Assessment Year: 2011-12)**

Asstt. Commissioner of Income Tax-9(2)(2), Room No. 665A, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	Emerson Electric Company (India) Pvt. Ltd., 301, Solitaire Corporate Park, 151, M.V. Road, Andheri (East), Mumbai-400023
PAN/GIR No.AAACE 1260 B		
(Appellant)	..	(Respondent)

**C.O. No. 93/Mum/2017
(Arising out of ITA No. 345/Mum/2017
(Assessment Year: 2011-12)**

Emerson Electric Company (India) Pvt. Ltd., 301, Solitaire Corporate Park, 151, M.V. Road, Andheri (East), Mumbai-400023	Vs.	Asstt. Commissioner of Income Tax-9(2)(2), Room No. 665A, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai- 400020.
PAN/GIR No.AAACE 1260 B		
(Appellant)	..	(Respondent)

**ITA No. 373/Mum/2017
(Assessment Year: 2011-12)**

Emerson Electric Company (India) Pvt. Ltd., 301, Solitaire Corporate Park, 151, M.V. Road, Andheri (East), Mumbai-400023	Vs.	Asstt. Commissioner of Income Tax-9(2)(2), Room No. 665A, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai- 400020.
PAN/GIR No.AAACE 1260 B		
(Appellant)	..	(Respondent)

Revenue by	Shri Azhar Zain VP (DR)
Assessee by	Shri Dhanesh Bafna and Shri Nishant Shah

Date of Hearing	02/12/2019
Date of Pronouncement	09/12/2019

आदेश / O R D E R

PER: R.C. SHARMA, A.M.

These are the cross appeals filed by the assessee and revenue and cross objection filed by the assessee against the separate orders of the Id. CIT(A)56, Mumbai dated 30/09/2016 for the A.Y. 2011-12 in the matter of order passed U/s 143(3)/144C of the Income Tax Act, 1961 (in short, the Act).

2. Both the appeals and C.O. were heard together and for the sake of convenience, a common order is being passed.
3. **ITA No. 373/Mum/2017 for the A.Y. 2011-12**

This appeal has been filed by the assessee wherein the assessee is aggrieved for upholding proportionate allocation of the head office expenses made by the A.O. while computing the profits of the units eligible for deduction U/s 10A/10B of the Act.

4. The Id AR of the assessee placed on record the order of the Coordinate Bench of this Tribunal in assessee's own case for the A.Y. 2010-11 dated 09/10/2019 wherein similar issue was restored back to the file of A.O. for deciding afresh after following the order of the Tribunal dated 25/09/2017 for the A.Y. 2009-10.

5. We have considered the rival submissions and carefully gone through the orders of the authorities below and found from the record that while computing business income, the A.O. has allocated head office expenses proportionately for units claiming exemption U/s 10A/10B of the Act on the basis of the turnover of the units. It was contention of the A.O. that the assessee has parked its head office expenses for the units generating taxable income without any valid reasons for not allocating these expenses to the units claiming exemption U/s 10A/10B of the Act.

6. We had carefully gone through the orders of the Tribunal in assessee's own case wherein under similar facts and circumstances, the Tribunal have restored the matter back to the file of the A.O. for fresh adjudication for the A.Y. 2009-10 vide its order dated 25/09/2017 after having the following observation:

"13. We have heard both the parties and considered the materials available on record. The AO has allocated head office expenses proportionately for units claiming exemption u/s 10A / 10B, on the basis of the turnover of the units. According to the AO, the assessee has parked its head office expenses for the units generating taxable income without any valid reasons for not allocating expense to the units claiming exemption u/s 10A / 10B. The assessee claims that head office expenditure in no way connected to the units claiming exemption u/s 10A / 10B and the units are functioning independently. Therefore, the AO was incorrect in allocating head office expenses to the units claiming exemption u/s 10A / 10B. We do not find any merits in the arguments of the assessee for the reason that on perusal of the details of expenditure incurred by the assessee it is difficult to accept explanation of the assessee that head office expenditure has no relevance to the units claiming exemption u/s 10A / 10B. The assessee is having four units based at various locations which were controlled through its headquarter. The expenditure incurred by head office like travel and conveyance, communication expenses, legal and professional charges and rates and taxes definitely is having relevance to its total business. Therefore, we are of the view that the AO was

right in allocating head office expenses to the units eligible for claiming exemption u/s 10A / 10B of the Act. We further observe that there is merit in the argument of the assessee that only net expenses of head office should be allocated to the units claiming exemption u/s 10A / 10B, because the assessee is generating other income like interest on fixed deposit and rent which may have some bearing on the functioning of its units claiming exemption u/s 10A / 10B. Therefore, we are of the view that the issue needs to be re-examined by the AO in the light of the submissions of the assessee. Hence, we set aside the issue to the file of AO and direct him to consider the issue afresh after affording opportunity of hearing to the assessee.”

7. The Tribunal have also followed the above order in the appeal filed by the assessee for the A.Y. 2010-11 in ITA No. 372/Mum/2017 and vide its order dated 09/10/2019, the Tribunal have restored the matter back to the file of the A.O. for fresh adjudication.

8. The Id DR has fairly conceded the fact that in assessee's own case for the A.Y. 2009-10 and 2010-11 the matter was restored back to the file of the A.O. As the facts and circumstances during the year under consideration are pari materia, respectfully following the order of the Tribunal in assessee's own case, the matter is restored back to the file of A.O. for deciding the issue afresh in terms of directions given by the Tribunal in its order dated 25/09/2017 for the A.Y. 2009-10.

9. In the result, appeal of the assessee is allowed for statistical purposes only.

10. **ITA No. 345/Mum/2017 & C.O. 93/Mum/2017 for the A.Y. 2010-11.**

In the appeal filed by the revenue, the revenue is aggrieved for the action of the Id. CIT(A) directing to exclude companies namely M/s Infosys Ltd., M/s Larsen and Turbo Infotech Limited and M/s Zylog Systems Limited from the final set of comparables due to large scale of operations. It was the grievance of the revenue that without giving any finding as to what should be the range of turnover of companies for selecting as comparables considering the assessee's turnover of Rs. 17.69 cores and also not applying the filter of large scale of operations to the other companies selected as comparables by the TPO, the Id. CIT(A) has directed for exclusion of these comparables.

11. The Id AR of the assessee has invited our attention to the order of the Tribunal in assessee's own case for the A.Y. 2010-11 in ITA No. 372/Mum/2017 dated 09/10/2019 wherein exactly similar ground was raised by the revenue and was decided by the Tribunal in assessee's favour.

12. We had carefully gone through the order of the Tribunal dated 09/10/2019 and found that the Tribunal have decided the very same issue and upheld the order of the Id. CIT(A) on this ground after having a following observation:

"8.1. The dispute before us is only with regard to inclusion and exclusion of certain comparables. The primary dispute lies with regard to exclusion of three comparables viz. Infosys Ltd, Wipro Ltd and L & T Infotech Ltd.

from the final list of comparables chosen by the Id. TPO. From the elaborate consideration of transfer pricing dispute by the Id. CIT(A) as reproduced hereinabove, it could be safely concluded and inferred that the Id. CIT(A) had excluded Infosys Ltd, L & T Infotech Ltd. and Wipro Ltd. from the list of comparables chosen by the Id. TPO on various parameters as detailed supra. Hence, the arguments made by the Id. DR and in the ground No.1 raised by the revenue that those three comparables were sought to be excluded only due to higher turnover is not acceptable and deserves to be dismissed.

8.2. *We also find that the Id. DR before us did not object to the exclusion of Infosys Ltd, Wipro Ltd and L & T Infotech Ltd from the list of comparables chosen by the Id. TPO due to higher turnover but had only sought to address the dispute that applying the same turnover filter, three more comparables i.e. LGS Global Ltd, Sasken Communication Technologies Ltd and Mindtree Ltd should also be excluded due to large-scale of operations from the final list of comparables. We find that these three comparables were sought to be included by the Id. TPO and which has not been disputed by the assessee. Moreover, the exclusion of these three comparables i.e. LGS Global Ltd, Sasken Communication Technologies Ltd and Mindtree Ltd does not emanate out of the orders of the lower authorities. Hence, we hold that the Id. DR is only trying to improve the case of the revenue which cannot be done before the Tribunal, which exercises only appellate jurisdiction. Accordingly, the ground No.1 raised by the revenue is dismissed.*

“13. As the facts and circumstances during the year under consideration are pari materia, respectfully following the order of the Tribunal in assessee’s own case for the A.Y. 2010-11, we do not find any infirmity in the order of the Id. CIT(A) for directing exclusion of

companies namely M/s Infosys Ltd. and M/s Larsen & Turbo Infotech Limited from the final set of comparables.

14. In respect of M/s Zylog Systems Limited, the Id CIT(A) has directed for exclusion after recording a finding to the effect that it is a giant in its area of operation and assumes greater risks translating into higher profitability. Thus, this giant sized company with advantages such as brand, intangibles etc. cannot be compared to a company such as the assessee company which is a captive unit of his AE assuming only limited risks. After recording a similar finding, the Id. CIT(A) also excluded Infosys Lt., which is already covered by the order of the Tribunal. The Id DR could not place on record any material so as to persuade us to deviate from the finding of the Id. CIT(A). Accordingly, we do not find any reason to interfere in the order of the Id. CIT(A) in this respect.

15. The next grievance of the revenue relates to action of the Id. CIT(A) for not adjudicating on the functional comparability M/s Thirdware Solutions Ltd. and M/s Kals Information Systems Ltd. with the software development service segment of the assessee.

16. The Id AR of the assessee has invited our attention to the exactly similar ground No. 2 taken by the revenue in its appeal filed before the Tribunal for the A.Y. 2010-11 and the Tribunal vide its order dated 09/10/2019 confirmed the action of the Id. CIT(A).

17. We had carefully gone through the order of the Tribunal dated 09/10/2019 and found that the Tribunal have decided the very same issue and upheld the order of the Id. CIT(A) on this ground after having a following observation:

“9. With regard to exclusion of comparables i.e. Thirdware Solutions Ltd, Persistent Systems Ltd, Tata Elxsi Ltd and Kals Information Systems Ltd. from the final set of comparables as directed by the Id. CIT(A) on the ground of functional dissimilarities, the Id. DR argued that anything related to automizing the operations in digital format tantamount to software development and accordingly, non-availability of break-up of revenue from software services and sale of software products does not affect comparability. We find that main crux of the argument of the Id. DR is that software development and sale of software products are both one and the same and cannot be construed as separate and distinct activity per se. We find that the Id DR argued admitted the fact that there is no segmental break up of revenue in respect of sale of software products and revenue derived from software development in respect of the aforesaid comparables in the annual reports of the respective comparables, but nevertheless, the same would not affect the comparability with the assessee, as according to him, both the software development and sale of software products are one and the same activity. We are unable to persuade ourselves to accept this argument of the Id. DR that there is no difference between company engaged in software development and company engaged in sale of software products. We find that the Hon’ble Jurisdictional High Court in the case of CIT vs. PTC Software (I) Pvt.Ltd. in Income Tax Appeal No.732 of 2014 dated 26/09/2016 had addressed this issue in the context of exclusion of Kals Information Systems Ltd. and Helios and Matheson Information Technology Ltd. Specific question raised before the Hon’ble Jurisdictional High Court in this regard is as under:-

“(ii) Whether on the facts and circumstances of the case, the Tribunal erred in excluding KALS Information Solutions Ltd. and M/s. Helios & Matheson Information Technology Ltd. from the list of comparables on the basis of previous years documentations of the assessee without verifying the functions performed by the comparables in the year under consideration ?”

9.1. *The Hon’ble Jurisdictional High Court addressed the aforesaid question by observing as under:-*

“10. Re. Question (ii) :

a) M/s. KALS Information Solutions Ltd. (KALS Ltd.) and Helios & Matheson Information Technology Ltd. (Helios & Matheson Ltd.) were included by the TPO in his comparability analysis. The grievance of the respondent assessee before the Tribunal was that both are functionally different from the respondent assessee and, therefore, could not be used as comparables. The respondent assessee pointed out that KALS Ltd and Helios & Matheson Ltd. are engaged in the business of selling of software products while the respondent assessee renders software services to its holding company.

(b) The Tribunal in the impugned order records that for the preceding assessment year i.e. A.Y. 2006-07, the TPO had found that KALS Ltd. and Helios & Matheson Ltd. were functionally not comparable with the respondent assessee. In the subject assessment year also, on the basis of Annual Report, it was noted that the KALS was engaged in selling of software products which is different from the activity undertaken by the respondent assessee, namely, rendering of software service to its holding company. Further, the impugned order also records that no attempt was even made by the Revenue before it to bring on record any change in the nature of activities carried out by KALS Ltd. and Helios & Matheson Ltd. in the subject assessment year, making them functionally comparable to the respondent assessee. In the aforesaid facts, the Tribunal rendered a finding of fact that KALS Ltd. and Helios & Matheson Ltd. are not comparable with the respondent assessee.

(c) Even before us, no submissions were advanced justifying the order of the Assessing Officer that the services rendered by KALS Ltd. and Helios & Matheson Ltd. are comparable for the subject assessment year with that of the respondent assessee.

(d) In the above view, as the findings of the Tribunal being one of the fact which has not been shown to be perverse, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.”

- 9.2. *Respectfully following the aforesaid decision of Hon'ble Jurisdictional High Court, we hold that sale of software products and software development services are separate and distinct and accordingly, the arguments advanced by the Id. DR are rejected in this regard. Accordingly, the aforesaid comparables i.e. Thirdware Solutions Ltd, Persistent Systems Ltd, and Kals Information Systems Ltd. deserves to be excluded from the list of comparables which had been rightly directed by the Id. CIT(A) for exclusion. With regard to exclusion of Tata Elxsi Ltd, we find from 895 to 898 of the paper book, there is no segmental data available in the annual report of the said comparable and we also find that they have got their own research and development which makes it functionally uncomparable with that of the assessee, among others, in as much as the assessee herein before us believes on research and development supplied by AE, which fact is not in dispute before us.*
- 9.3. *We also find that the Hon'ble Delhi High Court in the case of PCIT vs. Cash Edge India Pvt. Ltd in ITA No.279/2016 dated 04/05/2016 had endorsed the view taken by the Tribunal that Persistent Systems Ltd was involved in software development, software products and marketing and perhaps more importantly, published segmental data was not available. Accordingly, the said comparable has been rightly excluded by the Tribunal as per Hon'ble Delhi High Court. Accordingly, the ground No.2 raised by the revenue is dismissed."*

18. We had carefully perused the order of the Tribunal dated 09/10/2019 and found that exactly on the similar facts and circumstances, the Tribunal have confirmed the action of the Id. CIT(A) for exclusion of these companies from the set off final comparables. The Id DR has fairly conceded the fact that the issue is covered by the order of the Tribunal dated 09/10/2019 for the A.Y. 2010-11, therefore

respectfully following the order of the Tribunal dated 09/10/2019, we do not find any infirmity in the order of the Id. CIT(A) for excluding these comparables.

19. In the result, appeal of the revenue is dismissed.

20. **Now we take assessee's C.O. No. 93/Mum/2017.**

Ground No. 1 of the C.O. was not pressed by the Id AR therefore, the same is dismissed in limini as not pressed.

21. Ground No. 2 of the CO relates to the Id. CIT(A)'s action for not adjudicating on assessee's claim for working capital adjustment while determining the arm's length price of the international transaction in the nature of provision of software development services.

22. The Id AR of the assessee drawn our attention to para No. 10 of the Tribunal order dated 09/10/2019 passed in ITA No. 372/Mum/2017 for the A.Y. 2010-11 wherein similar issue has been decided in favour of the assessee.

23. We had carefully gone through the order of the Tribunal dated 09/10/2019 wherein issue with regard to working capital adjustment has been decided in favour of the assessee by the Tribunal after having the following observation:

“10. With regard to working capital adjustment sought by the assessee, we find the entire workings of working capital adjustment had been furnished before the Id. TPO by the assessee which are enclosed in page 300 of the paper book. Hence, the Id. TPO ought to have considered the same on the list of comparables chosen by him while determining the ALP of the international transactions. Hence, we hold that the Id. CIT(A) had rightly directed the Id. TPO to grant working capital adjustment on the final set of comparables pursuant to the order of the Id CIT(A). We do not deem it fit to interfere in the said order of the Id CIT(A). Accordingly, the ground No.3 raised by the revenue is dismissed.”

24. As the facts and circumstances during the year under consideration are pari materia, accordingly, we direct the A.O. to grant working capital adjustment while determining the ALP for international transaction in terms of direction given by the Tribunal in para 10 of its order dated 09/10/2019 for the A.Y. 2010-11.

25. In the result, the C.O. filed by the assessee is allowed in part in terms indicated hereinabove.

Order pronounced in the open court on 09th December, 2019.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 09/12/2019
*Ranjan

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.

3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai