

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J" MUMBAI**

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3577/MUM/2017
Assessment Year: 2007-08**

Agilent Technologies India
Private Limited (Successor to
Varian India Private Limited –
India Branch),
G 01, Prime Corporate Park,
230-231, Opposite Blue Dart
Centre, Sahar Road, Andheri
(East), Mumbai-400099.
PAN No. AAACV3294Q
Appellant

Vs. Deputy Commissioner of
Income Tax (International
Taxation) Range 4(3)(1),
1st Floor, Scindia House,
Ballard Estate, Room No. 108,
Nariman Point,
Mumbai-400021.

Respondent

Assessee by : Mr. Devendra Gulati, AR
Revenue by : Mr. Udal Raj Singh/Mr. A. Mohan, DR

Date of Hearing : 20/01/2020
Date of pronouncement : 20/03/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2007-08. The appeal is directed against the order passed by the Commissioner of Income Tax (Appeals)-58, Mumbai [in short 'CIT(A)'] and arises out of assessment completed u/s 254 r.w.s. 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under :

1. On the facts and in the circumstances of the case and in law, the AO erred in passing the assessment order u/s. 254 r.w.s 143(3) of the Income-tax Act, 1961 ('Act') in the name of Varian India Pvt. Ltd.- India Branch, an entity not in

existence on the date of passing the order, on account of closure of the Branch and subsequent purchase of its assets and liabilities by Agilent Technologies India Private Limited.

2. Without Prejudice to Ground No. 1, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the AO in computing the commission income amounting to Rs.57,27,233/- on the reimbursement of expenses received by the Appellant from its Associated Enterprises.
3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in levying interest under section 234B of the Act.

3. Briefly stated, the facts of the case are that the appellant filed its return of income for the assessment year (AY) 2007-08 on 26.10.2007 declaring total income of Rs. Nil. It is engaged in the business of trading in analytical instruments, laboratory equipment and other related products. For marketing rights in India, Nepal and Sri Lanka, it entered into agreements with three AEs i.e. Varian BV, Netherlands, Varian Germany and Varian SPA Italy. Under the terms of agreement, in addition to marketing of products, the appellant is also required to offer services relating to installation and other subsequent sales services. It is compensated in terms of higher commission rate on account of significant services rendered. During the year under consideration, the AO observed that the appellant had received certain reimbursements from the AEs on account of purchase of local components totalling to Rs.2,66,67,766/- required during the course of installation of the AE products. As per him, these amounts had not been included in the gross sales for the purpose of computing commission income due to the appellant. The AO further observed that the commission to the appellant was liable to the computed on the basis of achieved/quoted price of the project less discounts given. The AO also concluded that the parts procured locally also formed a part of

the overall sales consideration and hence, these costs should have been included in the gross sales for computing the commission receivable to the appellant. The AO, accordingly, included the amount of re-imburement as a part of the gross sales for the purpose of computing commission due to the appellant. The order of the AO was upheld by the Dispute Resolution Panel (DRP). The assessee preferred an appeal before the Tribunal. We find that the Tribunal restored the matter to the file of the AO with specific directions.

In the assessment passed u/s 254 r.w.s 143(3) dated 29.12.2014, the AO has contested the observation of the Tribunal that the earlier assessment order did not take into account the annexures with DRAs (Distribution Agreements) which define that the amount of sale consideration liable to be adopted for the purpose of computing commission would exclude locally procured parts. In the light of the other provisions of the agreement, he held that the cost of local components was required to form a part of gross sales for computing commission. Further, the contract value negotiated by the AEs with the customers includes the entire package and represents the gross value for which services are rendered. The additional supplies locally procured also form a part of total cost of equipment and there is no reason to exclude these from sale consideration and hence, should be included in the total value over which commission needs to be computed. The AO relied on para 5 of the agreement (Sales and Payment) between the appellant and Varian AG to conclude that sales consideration represents price in quotation less discounts. Further, he relied on para 3 of the agreement (Compensation to Varian India) between the appellant and Varian AG, wherein it has been mentioned that Varian India shall be entitled to a commission as specified

in Schedule A on the sales value net of freight, insurance and other charges. He accordingly concluded that the only deduction from the sales value is freight, insurance and other charges. Further, the AO held that the other charges would be similar in nature to freight and insurance and cannot be expanded to include cost of components sourced locally. Reliance is also placed by the AO on the annexed Schedule of rate of commission and thereafter observed that in the agreement with Varian Italy, Varian BV and Varian AG, in the case of "Seller to End Customer Direct Sales" the "commission rate applied to achieved price" is 20% and therefore, there is no exclusion for any amount relating to reimbursement made. The AO further held that the Schedule refers to local content as 'where the contractor's commission order requires procurement of local non-Varian content, commission will not be payable on this local content'. Thus he concluded that since the appellant has not produced any such commission order to demonstrate the determination of such local content, in spite of specific request, its claim to exclude these amounts cannot be accepted. Further relying on para No. 7.2 and 7.2.1 of the agreement with Varian Italy and Netherland, the AO held that the obligation of the appellant does not include providing non-Varian products as part of its overall obligations without any commission being charged.

To summarize, the AO rejected the claim of the appellant that the local component cost should be excluded from the total sales value while computing its commission income. The AO proceeded to compute the commission in line with the order passed earlier.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 03.01.2017, the Ld. CIT(A) observed that agreements with Varian Spa and Varian BV, Netherlands

contain clause relating to modalities of computation of commission and exclusion of local content while computing commission ; the agreement with Varian Germany does not have such clause.

In respect of agreement with Varian Spa and Varian BV, Netherland, the Ld. CIT(A) observed that (i) the agreement has a separate annexure detailing the modalities of computation of commission, (ii) while the computation of commission is based on achieved price/list price, it is categorically mentioned that the procurement of local content required to be fulfill the contract is not liable to be included for computing commission, (iii) discussion in the main body of the agreement is with reference to computation of list price/achieved price ; however, the final computation has to be in accordance with Schedule ; hence, the Schedule provides certain additional specific directions with reference to computation of commission after the necessary adjustments to the billed price as mandated in the main agreement ; (iv) in respect of Varian BV, out of total reimbursement of Rs.2,51,48,510/- from this AE, an amount of Rs.1,71,14,781/- relates to rendering of services while the remaining amount of Rs.80,33,729/- relates to purchase of additional materials and (v) the amount spent on purchase of local components is not liable for inclusion in the gross turnover for computing commission.

With the above observations, the Ld. CIT(A) directed the AO to include the amount of Rs.1,71,14,781/- as part of gross sales for computing commission payable to the appellant.

In respect of Varian Spa, it is further observed by the Ld. CIT(A) that the reimbursements relate to import duty and clearing charges and these are liable to be excluded while computing the price on which commission is

to be computed and accordingly, he directed the AO to exclude the said amount for purpose of computation of commission.

In respect of agreement with Varian Germany, the Ld. CIT(A) observed that the term used is 'sales value net of freight, insurance and other charges' and hence the character of 'other charges' has to be in the nature of shipping costs, a genre to which freight and insurance belonged. Further holding that the appellant cannot import the price of local content into 'other charges', the Ld. CIT(A) came to a finding that since shipping costs include a number of other expenses in addition to freight and insurance i.e. demurrage, port expenses, agent expense, the 'other charges' included in the above sentence will have a connotation which is relatable to transportation of material and nothing extra and hence purchase of local content while installing the instruments at a client's place cannot be said to be includible in the term 'other charges' which specifically relate to charges linked with shipping.

Thus the Ld. CIT(A) held that only expenses in the nature of clearing charges, freight and insurance are liable to be excluded while determining the commission. Therefore, he upheld the determination of this amount at Rs.9,91,939/-.

To summarize, in respect of Varian BV, the amount is reduced to Rs.1,71,14,781/-; in case of Varian SPA the amount is reduced to zero and in case of Varian Germany, the amount adopted by the AO is upheld by the Ld. CIT(A).

5. Before us, the Ld. counsel for the appellant, relying on the agreement with AEs submits that the purchase of local content is liable to be excluded from the sales value for purpose of commission in respect of sale of

products supplied by its AEs. Further, it is stated that any expenses incurred for freight, taxes, other charges including procurement of materials by the appellant were reimbursed at cost. Thus it is stated that the appellant was reimbursed at cost only for the amounts which were incurred by it and hence, the amount of reimbursement is separately reflected as 'other income' in its financial statement. Elaborating further, it is stated that the appellant had credited Rs.1,58,37,595/- in its financial statements towards reimbursement of expenses and for tax purposes it had offered the same to tax in the return of income filed for the year under consideration. Also it is argued that the reimbursement expenses were pure reimbursement of expenses incurred by the appellant on behalf of VGCs ; the appellant debited its financial account with expenses incurred on behalf of VGCs and subsequently, on receipt of credit note from VGCs, it credited the same under the head 'Other Income' in its financial accounts. It is thus argued that as the same were in the nature of pure reimbursement, the same was not included for the purpose of calculation commission.

Referring to clause 5(A) of the DR agreement with Varian Italy, the Ld. counsel submits that the said clause is exactly similar in the case of DR agreement between the appellant and Varian Netherland. In the case of the DR agreement between the appellant and Varian Germany, it is explicitly agreed that the appellant shall be entitled to the commission on the sale value, net of freight, insurance and other charges.

Finally, the Ld. counsel submits that the transaction between the appellant and VGCs should be governed in accordance with the terms of DR agreements; the commission income is to be computed on the 'prices' net of discounts; the 'prices' are net to VGCs and do not include any expenses incurred by the assessee in connection with freight, duties, travel cost and

local purchase of material (ancillary to the main equipments sold by VGCs). Therefore, it is argued that the appellant has rightly computed its commission as per the said DR agreements.

6. On the other hand, the Ld. Departmental Representative (DR) submits that in case of agreement with Varian SPA and Varian BV, Netherland, discussion in the main body of the agreement is with reference to computation of list price/achieved price ; however, the final computation has to be in accordance with Schedule ; hence, the Schedule provides certain additional specific directions with reference to computation of commission after the necessary adjustments to the billed price as mandated in the main agreement. In respect of agreement with Varian Germany, the Ld. DR submits that the term used is 'sales value net of freight, insurance and other charges' and therefore, 'other charges' has to be in the nature of shipping costs, a genre to which freight and insurance belong. Thus it is stated that shipping costs include a number of other expenses in addition to freight and insurance i.e. demurrage, port expenses, agent expense and hence purchase of local content while installing the instruments at a client's place cannot be said to be includible in the term 'other charges' which specifically relate to charges linked with shipping. The Ld. DR thus supports the order passed by the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

As regards the 1st ground of appeal, we find that the AO has made the assessment u/s 254 r.w.s. 143(3) in the name of "M/s Varian India Pvt. Ltd.-India Branch". In the Form 35 filed before the CIT(A) dated 06.02.2015, the appellant has clearly stated the name of "M/s Varian India

Pvt. Ltd.-India Branch". In the grounds of appeal and statement of facts filed before the CIT(A), the assessee has clearly stated the name of "M/s Varian India Pvt. Ltd.-India Branch". Therefore, there is no merit in the 1st ground of appeal and the same is dismissed.

Now we turn to the 2nd ground of appeal. The ITAT 'L' Bench, Mumbai in assessee's own case for the impugned assessment year in ITA No. 8950/Mum/2010 *vide* order dated 28.02.2014 held that :

"10. We have heard the rival submissions and also perused the relevant material placed on record. The department's case is that for the purpose of calculation of commission, the reimbursement of expenses, which has been received by the assessee has to be included in the gross sale value, as the commission is payable on the entire sales executed by the assessee including the part/equipment procured locally. In other words, the commission is receivable on the reimbursement of the expenses, because it is directly linked with the sales. Whereas, the assessee's case is that, the reimbursement is on account of cost of procurement of the local equipments which are required to fulfill the entire sale contract and such a cost incurred on procurement of local content/equipments cannot be included for the payment of commission. The commission receivable is only on the Varian products sold and not on the cost of locally procured equipments. From the perusal of the agreement as has been referred by the Id. Assessing Officer as well as by the Id. Counsel, it is seen that the entitlement of the assessee for the commission receivable has been specified in Schedule 'A'. In the paper book, there are two Schedule 'A', one which provides that, assessee's entitlement to the commission is on the sale value net of freight, insurance and other charges, whereas the other Schedule 'A'; categorically provides details of percentage of commission receivable and also provides a strict rider that:-

"Local content- Where contractor's commission order requires the procurement of local non-Varian content by Contractor to fill such order, commissions shall not be computed on local supplies".

11. If the aforesaid Schedule 'A' categorically provides that commission is not to be computed on the sale orders which requires the procurement of local content by the assessee, then on such procurement of equipments by the assessee, commission cannot be imputed, because it is the reimbursement of the cost of local equipments procured. Further, it appears that this relevant piece of document which is also a part of "Distribution and Representation Agreement", has not been examined by the Assessing Officer. Therefore, for the purpose of verification and examining of the content of this schedule, we restore the matter back to the file of AO, to adjudicate this issue afresh in light of the aforesaid document, because it changes the entire colour of the conclusion drawn by the AO. The AO will also examine the fact, whether the commission is on sale of Varian products only or not. The quantum of commission is a question of fact and cannot be imputed or presumed. In case of reimbursement of expenses from Varian Germany also, the matter is set-aside for examining, whether the commission is on gross sales or on the net of sales of the equipments directly procured by the associate enterprises. If the arrangement with this AE is also the same, then the same conclusion should be drawn in this case also. In the result, ground no.1 is treated as allowed for statistical purpose."

7.1 At this moment, we may refer to clause 5(A) of the DR agreement between the appellant and Varian Italy which is as under :

"A. Sale of Products from Supplier to Contractor shall be at prices established by Supplier from time to time in price lists or quotations, less the applicable discount(s) set forth in Schedule A. Supplier shall have the right to change the schedule of discounts (or rate of commission in schedule A) with 15 days notice to Contractor. Discounts and or commissions for products not manufactured by Varian shall be separately agreed to on a case by case basis. Prices are net to supplier contractor may be charged extra for all export packing, handling, insurance, transportation, taxes, fees duties and any other items not specifically included in Supplier's price lists and/or quotations, unless otherwise agreed to in writing on a case by case basis...."

The above clause is similar in the case of DR agreement between the appellant and Varian Netherland. In the case of DR agreement between the appellant and Varian Germany, it is clearly stated that the assessee shall be entitled to the commission on sale value, net of freight, insurance and other charges.

It is found that the transaction between the appellant and VGCs would be governed in accordance with the terms of DR agreements and accordingly as per the abovementioned clause of the DR agreements, the commission income is to be computed on the 'prices' net of discounts. Further, the said agreement also clarifies that 'prices' are net to VGCs and do not include any expenses incurred by the appellant in connection with freight, duties, travel cost and local purchase of material.

In the instant case, the appellant has credited Rs.1,58,37,595/- in its financial statements towards reimbursement of expenses and further it has offered the same to tax in the return of income filed for the year under consideration. We find that the appellant has debited its financial accounts with expenses incurred on behalf of VGCs and subsequently, on receipt of the credit note from VGCs, it credited the same under the head "Other Income" in its financial accounts. There is merit in the treatment of the appellant that as the same was in the nature of reimbursement, the same was not included for the purpose of calculation of commission.

A perusal of the order of the Tribunal dated 28.02.2014 and the facts of the case clearly indicates that the appellant has rightly computed its commission income as per the said DR agreements. Therefore, we set aside the order of the Ld. CIT(A) and delete the addition of commission income

amounting to Rs.57,27,233/- on the reimbursement of expenses received by the appellant from its AEs. Thus the 2nd ground of appeal is allowed.

The 3rd ground of appeal relating to charging of interest u/s 234B is consequential in nature.

8. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 20/03/2020.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 20/03/2020
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai