FIN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI

Before Ms. Suchitra Kamble, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 2025/Del/2017 : Asstt. Year : 2011-12
ITA No. 279/Del/2018 : Asstt. Year : 2012-13
ITA No. 889/Del/2018 : Asstt. Year : 2013-14

Addl. CIT, Special Range-5, New Delhi	Vs	M/s Johnson Matthey India Pvt. Ltd., 103, Ashok Estate, Barakhamba Road New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACJ2919A		

ITA No. 2209/Del/2017 : Asstt. Year : 2011-12
ITA No. 252/Del/2018 : Asstt. Year : 2012-13
ITA No. 253/Del/2018 : Asstt. Year : 2013-14

M/s Johnson Matthey India Pvt. Ltd., 103, Ashok Estate, Barakhamba Road New Delhi-110001	Vs	DCIT, Circle-13(2), New Delhi-110002
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACJ2919A		

Assessee by : Sh. Sumit Mangal, Adv. &
Sh. Mayank Agarwal, Adv.
Revenue by : Sh. Surenderpal, CIT DR &
Sh. Arun Kr. Yadav, Sr. DR

Date of Hearing: 12.08.2021		Date of Pronouncement: 3 .11.2021

ORDER

Per Bench:

The cross appeals have been filed by the Revenue and the assessee against the orders of the ld. CIT(A)-19, New Delhi dated 31.01.2017 and the orders of ld. CIT(A)-44, New Delhi dated 31.10.2017 and 21.11.2017.

2. JMIPL is engaged in manufacture of auto-exhaust catalysts in India. As a part of this function, JMIPL has been undertaking international transactions with its Associated Enterprises ("AEs") since its commencement of commercial production in AY 03-04 JMIPL benchmarked the international transactions using Transactional Net Margin Method ("TNMM"), with Profit Level Indicator ("PLI") of Operating Profit / (Total Cost-cost of raw material).OP/TC

3. For the A.Ys. 2008-09, 2009-10, 2010-11, the TPO made adjustments on account of international transactions namely, payment of royalty, sales commission and cost sharing charges. During the year, before us, the TPO repeated the similar additions in addition to adjustment on account of testing charges.

4. The ld. CIT(A) deleted the adjustment made on account of payment of royalty and testing charges whereas the ld. CIT(A) confirmed the

addition on account of sales commission and cost sharing charges. Hence the Cross Appeals.

5. At the outset, the ld. AR submitted that the issue of payment of royalty, sales commission and cost sharing charges have been adjudicated by various orders of the ITAT for the A.Ys. 2008-09, 2009-10 and 2010-11. This fact has not been in dispute.

6. We have perused orders of the Co-ordinate Bench of ITAT for the A.Ys. 2007-08, 2008-09 and 2009-10 in ITA Nos. 1817/2014, 2493/2014, and 3755/2015 order dated 16.03.2018. The relevant portion of the order is as under:

"6. The Ld. TPO thereafter proceeded to analyse the payment of 'royalty' and other intra group payments separately for the purpose of ascertaining the ALP of these transactions. He noted that assessee company has paid royalty of Rs. 2,45,57,629/- to its AE, JM-UK for use of technology, trade mark and patents at the rate of 8% of the net sales value. The TPO issued a detailed show-cause notice to the assessee to substantiate the payment of 'royalty' made to its AE and what tangible and direct benefit had accrued to the assessee by way of such payment. Assessee's detailed reply in response to the point wise query raised and also the observation of the TPO with regard to reply submitted by the assessee has been incorporated in the transfer pricing order from pages 6 to 9. The TPO observed that, *firstly*, royalty has not been benchmarked

separately; *secondly,* assessee has been unable to show that transaction of royalty payment is at arm's length; and *lastly*, no cost benefit analysis has been done by the assessee company. As regards assessee's contention that royalty transaction has been aggregated under TNMM and since under these transactions are at arm's length, therefore, no separate adjustment for royalty should be made as it is closely linked with other transactions and same has been aggregated under TNMM, the same was rejected by the TPO. Later on in the course of TP proceedings the assessee submitted that CUP method can be applied and for comparing the rate of royalty, the rates prescribed and approved by RBI and FIPB for the payments of 'royalty' should be taken as benchmark. The TPO first of all held that under the facts and circumstances of the case, royalty has to be reckoned as separate transaction which needs to be separately benchmarked and in support, he referred to various decisions of the Tribunal as illustrated at pages 11 and 12 of his order. The TPO instead of examining the payment of 'royalty' under CUP which though he held as a most appropriate method for the payment of royalty, but held that 'benefit test' has to be seen. After discussing in detail whether any kind of benefit has arisen to the assessee or not, he came to the conclusion that ALP of the royalty payment should be determined as 'NIL' for the following reasons:-

"1. The taxpayer did not produce any evidence/documentation on how the royalty rate fixed. At an arm's length, party receiving technology would like to see the profitability from future revenue streams before fixing a royalty rate.

2. The taxpayer did not produce any cost benefit analysis at the time of entering into the agreement with its AE showing that the royalty rate is not fixed based on expected benefit.

3. There is no proof that the other group concerns or third parties are also charged identical royalty.

4. The taxpayer has also not been able to show that it derived any economic benefit from the alleged know how received the AE.

5. The profitability is below the arithmetical mean margin of the comparable companies considered by the TPO.

6. The profit that accrues to the licensee may not arise solely through the engine of the technology. There are returns from the mix of assets it employs such as fixed and working capital and the returns from intangible assets such as distribution system, trained workforce, etc. Allowances need to be made for them. In the absence of any data provided by the taxpayer, it is impossible to know what percentage of profits the licensee would like to share at an arm's length after removing the returns from assets employed and other economic factors which may not arise solely through the engine of the technology.

7. The taxpayer did not give the details of royalty in the industry. Thus the arm's length price of royalty is determined at Rs. Nil.

a. Payment of Royalty Rs. 2,45,57,629/-

b. Arm's length price under CUP Rs. Nil

c. Adjustment u/s 92CA Rs. 2,45,57,629/-

The above amount of Rs. 2,45,57,629/- is treated as adjustments u/s 92CA as the value of royalty transactions in uncontrolled conditions is treated as Rs. Nil under CUP and in the absence of any substantiation to show that substantial benefit is accrued to the taxpayer."

7. So far as the various payments made to different AEs for 'intra group services', he issued a detailed show cause notice to submit various details so as to analyse the nature of transaction and to see whether any

tangible or direct benefit has been derived by the assessee in paying the said amount to the AE. In response, assessee filed elaborate explanation, details and evidences which have been highlighted by the TPO from pages 16 to 20 of his order, wherein he has also summarised his observations with regard to the point wise reply and details filed by the assessee. After referring to OECD guidelines with regard to the 'intra group services' and on perusal of the details furnished by the assessee, he came to the conclusion that assessee is not able to prove that he has actually received services of some value that called for such a huge payment. The assessee has not been able to give a separate benchmarking for each of the services which it has received. After referring to the decision of the ITAT Mumbai Bench in the case of Star India Pvt. Ltd. vs. ACIT and also referring to various international rulings, he held that assessee is not able to show that any tangible benefit has actually passed on to it and no independent party would have made a payment in an uncontrolled circumstances. After applying CUP method, he held that transaction of payment of service fee has to be determined at 'NIL' and thereby he made transfer pricing adjustment on the entire payment of Rs. 2,08,97,308/-.

8. Before the Ld. CIT (A), the assessee submitted that 'royalty agreement' entered with JM UK was duly approved by RBI and Foreign Investment Promotion Board (FIPB) and as per the terms of the agreement, royalty was required to be paid for the period of 10 years from

the date of commencement of the commercial production or for a period of 13 years from the date of grant of approval from the RBI. Accordingly, the royalty was payable for the period between financial year 1999-2000 to financial year 2008-09. So far as the benefit derived to the assessee under the royalty agreement following facts was stated:-

i) Access to latest technology in relation to manufacture of auto-catalysts in accordance with the latest emission norms prescribed in the relevant country;

ii) Automatic right to receive updates relating to the technology of manufacture and related processes for auto-catalysts business;

iii) Training of employees of the appellant in relation to the use of equipment and technology provided by JMUK;

iv) Right to use the world renowned and established brand name "Johnson Matthey" in order to sell its products;

It was submitted that entire business of the assessee was dependent upon its collaboration with JM UK due to supply of technology, knowhow, brand name, etc. The payment by way of royalty was at the following rates:-

a) 5% of net sales value;

b) 3% of net sales value subject to a maximum of Rs. 633 lacs.

Accordingly, royalty was paid @ 8% of its net sales. It was further submitted that the rate of 5% to 8% on net sales is a reasonable payment of royalty for use of technology, know how, brand name etc. and in support decision of Tribunal in the case of Lumax Industries Ltd. was cited.

Apart from that it was also submitted that RBI/FIPB approval is an important factor for determining the arm's length price and since there is a RBI approval of 8%, same should be treated as arm's length. Lastly, regarding treating the ALP of royalty at NIL, reliance was placed on the judgment of Hon'ble Delhi High Court in the case of **CIT vs. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi)** to contend that AO/TPO cannot decide what payments are required to be made for the purpose of business and ALP cannot be taken at NIL. On the issue of significant benefits which has been approved in lieu of payment of royalty, detailed submissions have been made which have been incorporated from pages 13 to 15 of the appellate order.

9. Ld. CIT (A) after analysing the Technical Collaboration Agreement (TCA) and the benefits derived by the assessee from such an agreement held that the royalty cannot be determined at 'NIL' and royalty of 5% to 8% is as per industry standards for auto/auto ancillary industry. While coming to this conclusion, Ld. CIT (A) too referred to the decision of ITAT Delhi bench in the case of Lumax Industries Ltd. He accepted that RBI/FIPB approval has substantive persuasive value upon the determination of the ALP. He further referred to various other decisions, which has been referred by him at page 17 of his order. Accordingly, he held that ALP of the royalty payment cannot be taken at 'NIL' and directed

the AO /TPO to delete the entire addition. Against this finding of the Ld. CIT (A), revenue is in appeal before us.

10. So far as issue relating to 'intra group services', the assessee submitted that the 'benefit test' applied by the Ld. TPO to conclude that no direct benefit has been received by the assessee through such services cannot be upheld as these services were received wholly and exclusively for the business purpose and if such services were to be received from independent third parties, assessee had to make the payments. It was reiterated that arms ALP analysis has been carried out by the assessee by selecting TNMM as a most appropriate method and in respect of all the international transactions; and accordingly, TP report demonstrating the entire transaction under TP analysis and why aggregation has been done should be accepted. Regarding nature and performance of the intra group services, following submissions have been made, which for the sake of understanding of facts and the nature of such services the same are reproduced hereunder :-

> *The details regarding the various Intra Group Services received by the appellant from its associated enterprises is provided hereunder:-*
>
> ***Payment of Sales Commission Rs. 1,08,48,310/-:***
>
> *The appellant had entered into an agreement dated March 16, 2004, with its associated enterprise (viz. JMJ)) a copy of which is enclosed herewith as Annexure 10. In accordance with the terms of the said*

agreement, JMJ is required to provide following services to the appellant:

- *Marketing and liaison services with Japanese customers in respect of sales by the appellant to all Japanese customers;*
- *Feedback on organizational and personnel changes In Japanese customers, in relation to business of the appellant;*
- *Inputs on design and model changes based on Japanese customers requirements and plans for all Japanese customers;*
- *Feedback on other aspects of the activities of Japanese customers that have impact on the business of appellant in India*

In respect of the agreement between the appellant and JMJ, it is pertinent to note that major customer of the appellant is Maruti Suzuki India Limited, the holding company of which is Suzuki Motor Corporation. Therefore, the appellant requires presence in Japan to liaise with Suzuki Motor Corporation and also to market the products manufactured by the appellant and procure the orders.

The services performed by JMJ include, inter alia, liaison, communication and sales support functions with the objective of improving the level of service and commitment to Japanese automotive manufacturers. JMJ performs marketing services in Japan of operation (as per the agreement), in respect of sales by the appellant to its customers. It also provides, from time to time, feedback on organization and personnel changes in relation to the business of the appellant and also provides inputs on design and model changes based on automotive manufacturers' requirements and plans for all automotive manufacturers.

For the services to be rendered, the appellant has to pay JMJ a fee at the rate of 40 cents per unit sold by the appellant to all Japanese customers including their India subsidiaries, if any.

During the relevant period the appellant paid Rs. 1,08,48,310 (USD 239,174.80 i.e. 5,97,937 units x 0.40) at the rate of 40 cent per unit sold to Japanese customers including its Indian subsidiaries to JMJ for the services rendered pursuant to the agreement entered into with the appellant.

In support of the same, copies of the invoices raised by JMJ in respect of the sales commission paid during the relevant period (already submitted before Ld. TPO) are enclosed herewith as Annexure 11.

Payment made under cost sharing arrangements Rs. 73,36,991/-:

During the year under consideration, the appellant reported an amount of Rs.73,36,991 (USD 168,665) to its associated enterprise (viz. JMIM) under cost sharing arrangement of the Johnson Matthey Group.

The Asian region head quarter of Johnson Matthey Group was located at Malaysia. The said headquarter was managed by the personnel appointed by Johnson Matthey group and deputed at headquarter. During the year under consideration, the following were deputed at headquarter to manage the Asia region:

- *Managing Director – Asian Region*
- *Finance Director – Asian Region*
- *Sales Director – Asian Region*
- *Common Secretary to Managing Director/Finance Director & Sales Director of Asia Region.*

The salary of these employees and other expenditure incurred on these employees was allocated to the group companies located in Asia region i.e. India, Japan, China and Malaysia.

The basis for allocation of the expenses incurred to manage Asia region is the net revenue of respective countries located in Asia region i.e. the allocation of expense is based on the ratio of figures arrived at after reducing from the turnover of each country the cost of the raw material imported.

With respect to the above mentioned cost allocation arrangement, it is submitted that such arrangements are required in order to have the benefit of expert guidance for the appellant with minimum costs. In the absence of such an arrangement, either the appellant would have to employ such experts or will have to engage outside consultants. However, that arrangement may not be cost efficient as compared to the present arrangement where expert guidance is available to the appellant with only some proportion of the total expenses being borne by the appellant.

Payment of SAP Maintenance Charges Rs. 27,12,007/-:

During the year under consideration, the appellant reported an amount of Rs. 27,12,007 (USD 61,292.67) to its associated enterprise (viz. JMM) for SAP Maintenance.

The Asian region head quarter of the Johnson Matthey Group located in Malaysia implements the SAP Program for the Asian Region. For this purpose, a server owned by an independent vendor has been set up in Chennai. The cost of operating and maintaining the server is being incurred by JMM which is subsequently recovered from the group entities located in the region i.e. India, Japan, China and Malaysia equally.

In support of the same, copies of invoices and debit notes raised on JMM by independent vendors in respect of SAP maintenance charges (already submitted before Ld. TPO) are enclosed herewith as Annexure 13.

On the basis of the above, it is evident that the arrangement between the appellant and the associated enterprises relating to the provision of various "Intra Group Services" provides the appellant with the following benefits:-

- *Streamlining the processes of the appellant in accordance with the standards of the Johnson Matthey Group;*
- *Enabling uniform use of systems for accounting, administration etc., facilitating ease of communication and co-ordination amongst the members of the Group;*
- *Providing cost-efficient expertise and management personnel for the companies of the Johnson Matthey Group in the Asia region;*
- *Engaging reliable Group companies to provide for services like marketing and sales, customer relationship management, server support etc.;*

On the basis of the above, it is clearly evident that substantial-benefits are derived by the appellant, both in terms of cost and efficiency, through centralisation of certain back-end operation at group level and allocating the same amongst group companies based on reasonable allocation keys.

Thus, the argument of the Ld. TPO that the appellant has not derived any benefit from the Intra Group Services received from its associated enterprises is wholly incorrect and unsustainable.

In this regard, it is further important to note that the Ld. TPO has completely lost sight of the business model and the nature of Intra Group Services availed by the appellant. The services provided by the associated enterprises (such as marketing, testing, server support, personnel support etc.) by their very nature are intangible. Thus, it is not possible to provide for proof regarding the receipt of such services. Further, the appellant has duly submitted before the Ld. TPO, copies of the agreements between the appellant and its associated enterprises along with copies of Invoices / debit notes raised by the associated enterprises in respect of such services. Therefore, considering the nature of services provided by the associated enterprises, the supporting documents submitted before the Ld. TPO should constitute sufficient evidence of receipt of such services by the appellant.

Thus, considering the facts and circumstances of the case, the argument of the Ld. TPO that the appellant has not submitted proof of receipt of such Intra Group Services is unreasonable and untenable.

11. Ld. CIT (A), rejected the assessee's contention and held that the TPO's action in treating the said payment at NIL is correct on facts his relevant observation and the finding are as under:-

"As regards the Payment of Sales Commission, the appellant had entered into an agreement dated March 16, 2004, with its associated enterprise (viz. JMJ), In accordance with the terms of the said agreement, JMJ is required to provide various services to the appellant. During the relevant period the appellant paid Rs. 1,08,48,310 (USD 239,174.80 i.e. 5,97,937 units x 0.40) at the rate

of 40 cent per unit sold to Japanese customers including its Indian subsidiaries to JMJ for the services rendered pursuant to the agreement entered into with the appellant. All the customers of the appellant are located in India. The appellant h+-as failed to prove with evidence that JMJ has actually rendered any services to the appellant during the year. Thus the appellant has failed to justify the Payment of Sales Commission to JMS.

As regards the Payment made under cost sharing arrangements, the appellant has submitted that it has paid an amount of Rs. 73,36,991 (USD 168,665) to its associated enterprise (viz. JMIM) under cost sharing arrangement of the Johnson Matthey Group. The Asian region head quarter of Johnson Matthey Group was located at Malaysia. The said head quarter was managed by the personnel appointed by Johnson Matthey group and deputed at headquarter. The salary of these employees and other expenditure incurred on these employees was allocated to the group companies located in Asia region i.e. India, Japan, China and Malaysia. As regards the Payment made under cost sharing arrangements, the appellant has failed to prove with evidence that it has actually received any services from JMIM during the year. Thus the appellant has failed to justify the Payment made under cost sharing arrangements to JMIM.

As regards the Payment of SAP Maintenance Charges, the appellant has submitted that it has paid an amount of Rs. 27,12,007 (USD 61,292.67) to its associated enterprise (viz. JMM) for SAP Maintenance. The Asian region head quarter of the Johnson Matthey Group located in Malaysia implements the SAP Program for the Asian Region. For this purpose, a server owned by an independent vendor has been set up in Chennai. The cost of operating and maintaining the server is being incurred by JMM which is subsequently recovered

from the group entities located in the region i.e. India, Japan, China and Malaysia equally. However, the appellant has failed to demonstrate as to how the setting up a server in Chennai by an independent vendor has benefitted the appellant."

12. Ld. CIT (A) also referred to the following judgments of the Tribunal: - i) Gemplus India Pvt. Ltd. vs. ACIT in ITA No. 352/Bang/2009 A.Y. 2003-04; ii) Knorr-Bremse India Pvt. Ltd. vs. CIT (2012) 27 Taxmann. com 16 (Delhi).

13. Thus, so far as the transfer pricing adjustment is concerned, the Ld. CIT (A) deleted the adjustment made on account of royalty but confirmed the adjustment on account of intra group services.

14……………..

20. On the issue of transfer pricing adjustment on account of 'royalty' and 'intra group services', Ld. Counsel at the outset submitted that appellant has been undertaking international transactions with its AEs since the commencement of commercial production in the A.Y. 2002-03 and has been benchmarking all the transaction under TNMM. This method has been accepted in the earlier years and such a benchmarking of all the transactions under TNMM has not been disputed uptill A.Y. 2006-07. Therefore, as a matter of consistency the same approach should be followed without there being any change in facts or in law. Thus, there

was no basis for the TPO to separately benchmark the transactions in this year relating to 'royalty' or the 'intra group services' under CUP and rejecting the TNMM as MAM. He submitted that being a manufacturer of auto exhaust catalysts, the assessee utilizes support in the form of technology, knowhow and various support services from its AEs which overall helps and strengthens its manufacturing functions. The transactions of 'royalty' and' intra group services' are inextricably linked with the core business of manufacturing of the catalysts, as the supply of technology and services gives competitively advantageous position in its sector and therefore, such transactions cannot be analysed in isolation. In support of such aggregation of the transactions under TNMM he relied upon the following judgments:-

- *Delhi HC - Magneti Marelli Powertrain India (P.) Ltd. v. DCIT [2016] 75 taxmann.com 213 (Delhi);*
- *Delhi ITAT - Coming SAS India Branch Office v. DDIT [2017] 82 taxmann.com 444;*
- *Delhi HC - Sony Ericson Mobile Communications India (P.) Ltd. v. CIT [2015] 374 ITR 118;*
- *Delhi ITAT - Lumax Industries Ltd. v. ACIT, ITA No. 4456 / Del /2012, dated May 31,2013.*

21. He further submitted that TPO has sought to apply CUP method to benchmark 'royalty' and 'intra group services' but no comparable data was identified and has merely applied benefit test and thereby determining the ALP at 'Nil' which is against the settled legal position under the transfer

pricing law, which envisages that identification of comparable data is mandatory to benchmark the ALP. In support of, he relied upon the following judgments to canvass that 'intra group services' and 'royalty' cannot be determined at nil:-

i) *CIT v. EKL Appliances Ltd, [2012] 345 ITR 241 (Delhi)*

ii) SC Enviro Agro India Ltd. v. DC1T, [2013] 143 ITD 195 (Mumbai - Trib)

iii) McCann Erickson India P. Ltd. v. ACIT, 20 I 2-TlI-59-ITAT-DEL-TP, 24 Taxman 21.

22. Lastly, he submitted that benefit test is not a prescribed method for which he referred to the judgment of Hon'ble Delhi High Court in the case of Sony Ericson Mobile Communications India (P) Ltd. vs. CIT(2015) 374 ITR 118; and CIT vs. Cushman and Wakefield (India) (P.) Ltd. (2014) 46 taxmann.com 317 and other decisions.

23. On the issue of various components of intra group payments, assessee has given following submissions and reference to corresponding documents to substantiate the payment:

S. No.	Payment	Nature of payments	Benefits derived by the appellant	Relevant documents
a.	Sales commission	JAPAN Paid to Johnson Matthey Japan ("JM Japan") for liaison and marketing activities undertaken by it in Japan with Suzuki due to which the appellant secured orders from Maruti Suzuki in India. UK Paid to JM UK (only in AY 2009-10) for liaison and marketing activities undertaken by it for potential customers in Iran. Iran business was newly added. The sales commission paid to JM UK in respect of sales to customers in Iran was similar to the commission paid to an independent third party agent which was appointed by the appellant in subsequent year.	JAPAN The appellant derived significant benefits in the form of business from Maruti Suzuki in India. Further, the sales commission paid to AE as % of sales to Japanese customer (2.98%, 2.49% and 0.45% respectively for AYs 2007-08, 2008-09 and 2009-10) was much lesser than the marketing costs incurred locally and internally by the appellant as % of sales to non-Japanese customers 8.15%, 5.39% and 2.20% respectively for AYs 2007-08, 2008-09 and 2009-10) UK In lieu of payment made to JMUK (only in AY 2009-10), appellant derived significant benefits in the form of new customers in Iran. In 2011, such activity was outsourced to an independent third party which clearly substantiates the business exigency to have a local agent in Iran to develop customers and to provide liaison activities in relation to the existing customers in Iran.	JAPAN Service agreement between appellant and JM Japan is on page 456 of paper book for AY 2007-08 (Vol. II). Copies of invoices raised by JM Japan are on page 463 of paper book for AY 2007-08 (Vol. III) Comparison of marketing cost for Japanese and non-Japanese customers; AY 2007-08 in Vol. II Pg.552 AY 2008—09 in Vol. II Pg. 596 AY 2009-10 in Vol. II- Pg. 363 UK Service agreement between appellant and JMUK is on pg. 658 of paper book for AY 2009-10 (Vol. II) Copies of invoices raised by JUMK are on Pg. 664 of paper book for AY 20-09-10 (Vol. II).

b.	Server charges (only in AY 2008-09 and 2009-10)	Paid to Johnson Matthey Hong Kong for maintaining a centralized server for the Asia region, which serves as a common email and communications platform. Cost was allocated among JM Asia entities, and such arrangement was more cost effective.	Principle of consistency – This payment was not separately benchmarked in AY 2007-08 and allowed but ALP was determined at nil for subsequent years without any change in facts and circumstances of the case. In the absence of such payment, appellant would not be able to access the centralised system set up for the Asia region, which serves as a common e-mail and communication platform for Group entities. Considering the co-dependence between Group entities, lack of access to such system would be prejudicial. Additionally, if the appellant were to appoint an independent entity, it would have incurred significant costs.	Affidavit by Johnson Matthey Hong Kong in respect of server charges – pg. 567 of the paper book for AY 2008-09 (Vol. II)
c.	SAP Maintenance charges (only for AY 2007-08)	Paid to JM Malaysia ("JMM") for costs on SAP Program for the Asia region. An independent third party was appointed for this purpose and copies of invoices raised by such independent party were submitted before lower authorities. Cost was allocated among JM Asia entities, and such arrangement was more cost effective.	The Asian region head quarter of the Johnson Matthey Group located in Malaysia implemented the SAP Program for the Asian Region. For this purpose, a server owned by an independent vendor was set up in Chennai. The cost of operating and maintaining the server was incurred by JMM which was subsequently recovered from group entities located in the region i.e. India, Japan, China and Malaysia equally.	Copy of debit notes raised by JMM on the appellant for allocated costs along with third party vendor invoices for the full cost – Pg. 477 to 510 of the paper book for AY 2007-08 (Vol. II)
d.	Cost sharing charges	*Divisional Cost:* Paid to JMM for salary costs of group head that were involved in	Divisional costs and SAP ERP system cost : These costs provided	Divisional costs: Debit notes raised by JMM- pg. 475

		strategic and operational roles, and were deputed to manage the Asia region through the regional headquarters in Malaysia. *SAP ERP system cost* : AY 2009-10, Cost was capitalized as capital work-in-progress (schedule 4 of financial statements) and not claimed as expense in P & L but the same was still disallowed	access to significant exposure and expertise to appellant. Such payment represented cost allocated to appellant by JMM, for common ERP system implemented for Asia region in 2007 to standardize finance and IT systems. Such standardized system resulted in greater efficiency, risk mitigation, and significant financial savings to appellant. The arrangement between appellant and its associated enterprises relating to provision of various "intra group services " provided the appellant with the following benefits : Streamlining the process of the appellant in accordance with the standards of the Johnson Matthey Group; Enabling uniform use of systems for accounting, administration etc. facilitating case of communication and co-ordination amongst the members of the Group; Providing cost-efficient expertise and management personnel for the companies of the Johnson Matthey Group in the Asia region; Engaging reliable Group companies to provide for services like marketing and sales, customer relationship management, server support etc. The appellant derived substantial benefits both	& 476 of the paper book for AY 2007-08 (Vol. II). Affidavit by JMM regarding allocation of such costs – Pg. 570 of the paper book for AY 2008-09 (Vol. II)

			in terms of cost and efficiency, through centralization of certain back-end operations at group level and allocating the same amongst group companies based on reasonable allocation keys.	
e.	Testing charges	Payment of testing charges to JM Brussels for testing of sample catalysts for their conformity with the evolving environmental standards. CIT (A) deleted transfer pricing additions in respect of testing charges and Revenue has not filed an appeal on this issue before the Hon'ble Tribunal.		

24. On the other hand Ld. CIT (DR) on the both the issue of 'royalty' and 'intra group services', submitted that the arguments of the Ld. Counsel that both cannot be analysed in isolation but same have to be aggregated, cannot be accepted in view of the decision of the Tribunal in the case of Gruner India (P.) Ltd. vs. DIT (2017) 77 taxmann.com 311 (Delhi), wherein the Tribunal after detailed discussion of the various provision of the law and also the judgment of Hon'ble jurisdictional High Court in the case of Sony Ericsson Mobile Communication India (P) Ltd. and other judgments have laid down that segregation of international transaction of payment of royalty and fees for technical services is justified as these are not linked with import of raw material etc. Thus, he submitted that royalty cannot be aggregated with other transactions because it is a separate and distinct transaction having a separate agreement for which assessee is required to pay on the net sales. He also

pointed out that the judgment of Gruner India (P.) Ltd. has been upheld by the Hon'ble Delhi High Court.

25. On the issue of intra group services, he made following submissions:-

"**Sales Commission**: Sales commission paid to the AE Johnson Mathey Japan as per service agreement on Paper book II page no. 456 for AY 2007- 08.

The assessee has paid to JM Japan sales commission for liaison and marketing activities undertaken by JM Japan with Suzuki due to which the appellant secured orders from Maruti Suzuki in India. This contention of the assessee is not tenable in view of the fact that both Suzuki Japan and Maruti Suzuki are independent company. Further Maruti Suzuki is located in India and any liaison activities with the Maruti can be carried directly with it in India especially Maruti being an independently run company. Also the agreement is not clear in language about the kind of activities being undertaken by JM Japan vis a vis Suzuki Japan. Also the agreement talks about the auto catalyst provide to Japanese customers. The assessee has not provided the list of customers and has not given any figures of exports to these Japanese customers. The assessee is contradicting itself by making statements such as "securing orders from Maruti Suzuki in India" while the terms of the agreement talks about the supply of the auto catalyst to Japanese Customers who have not been disclosed by the assessee. Referring to clause 4 of the said agreement which talk about the Service Fee for services rendered by the JM Japan as service provider under this agreement JMIPL shall pay a fee at rate of 40 cents per unit sold by JMIPL TO ALL Japanese Customers is in contradiction to the claim as per submission dated November so" wherein the assessee

claimed that the sales commission was paid for "securing orders from Maruti Suzuki in India". Both claims being contradictory the payment of sales commission is not corroborated by documents. Just raising of the receipt /invoices does not proof the payments were made for business purposes. Hence sales commission is liable to be disallowed for all the years AY2007-08, 2008-09 and 2009-10.

Further the assessee has paid to JM UK commission of Rs 52,78522/- as per agreement dated March 16 2008. In this case the assessee has not disclosed the customers in Iran to whom the auto catalysts were exported. The claim of the assessee of the said export thus not verified. Just raising of the invoice to its AE Le ECT Royston (as per invoice raised) does not prove the service being passed on to the assessee. In absence of any evidence of such export to unknown Iranian customers to whom the auto catalyst were exported the same is liable to be disallowed.

b. **Server Charges**: Paid to JM Hong Kong for maintaining a centralized server for the Asia region which serves as a common email and communication platform. Cost was allocated among JM Asia entities and such arrange are more cost effective. This too is liable to be disallowed as the assessee has failed to show that any service has actually been passed to it.

c. **SAP Maintenance**: Paid to JM Malaysia for cost on SAP Program for Asia region. An independent third party was appointed for this purpose. For this purpose a server owned by an independent vendor was set up in Chennai. The cost of operating and maintaining the server was incurred by JM Malaysia which was subsequently recovered from group entities located in the region. The assessee has not explained the business rational behind setting up another server in

Chennai for the Asia Region for SAP implementation when it already has a server in Hong Kong doing pretty much the same function. It seems to be a duplication of function performed when there is already a server in Hong Kong carrying on the same function for the assessee for whom the assessee is already paying the server charges which is less then what has been paid under the guise of SAP maintenance charge to JM Malaysia. Hence the same is liable to be disallowed. In this regard reference is made to OECD TP Guidelines in Chapter VII on Special Consideration on Intra -Group Services para 7.11 7.11 In general/ no intra-group service should be found for activities undertaken by one group member that merely duplicate a service that another group member is performing for itself, or that is being performed for such other group member by a third party. An exception may be where the duplication of services is only temporary/ for example/ where an MNE group is reorganising to centralise its management functions. Another exception would be where the duplication is undertaken to reduce the risk of a wrong business decision (e.g. by getting a second legal opinion on a subject).

d. **Cost Sharing Charges**: As per the TP Study of the assessee Cost Sharing Arrangement as a part of the cost of four employees responsible for Asia region.

*Managing Director -Asian Region

* Finance Director- Asia Region

* Sales Director -Asian Region

* Common Secretary to Managing Director I Finance Director and Sales Director of Asian Region.

As per assessee the salaries of these employees and expenditure incurred by these employees while travelling on business including

boarding and lodging are allocated to group companies in India Japan China and Malaysia.

The contention of the assessee is not tenable as the assessee has not cited any agreement for such cost sharing arrangement. Also the assessee has not brought out the kind of the work performed by these employees and the value addition to the company that these employees may have performed. Also number of days spent by the employees in India performing these activities has not been furnished. This intra group charge is in nature of the shareholding activity or duplication of activities as these activities are already performed by someone from JM India or in its capacity as shareholder in absence of any tangible benefit accruing to the assessee. The assessee has failed to corroborate with facts the benefit that has accrued to the assessee. Also the same set of functions performed by these same four people for other group entities in India Japan China and Malaysia indicates these activities being performed in capacity as shareholder. In this regard reference is made to the OECD Guidelines 2010 Chapter VII para 7.9

7.9 A more complex analysis is necessary where an associated enterprise undertakes activities that relate to more than one member of the group or to the group as a whole. In a narrow range of such cases, an intragroup activity may be performed relating to group members even though those group members do not need the activity (and would not be willing to pay for it were they independent enterprises). Such an activity would be one that a group member (usually the parent company or a regional holding company) performs solely because of its ownership interest in one or more other group members, i.e. in its capacity as shareholder. This type of activity would not justify a charge to the recipient companies. It may be referred to

as a "shareholder activity", distinguishable from the broader term "stewardship activity" used in the 1979 Report. Stewardship activities covered a range of activities by a shareholder that may include the provision of services to other group members/ for example services that would be provided by a coordinating centre. These latter types of non-shareholder activities could include detailed planning services for particular operations/ emergency management or technical advice (trouble shooting), or in some cases assistance in day-to-day management.

7.10 The following examples (which were described in the 1984 Report) will constitute shareholder activities/ under the standard set forth in paragraph 7.6:

a) Costs of activities relating to the juridical structure of the parent company itself, such as meetings of shareholders of the parent/ issuing of shares in the parent company and costs of the supervisory board;

b) Costs relating to reporting requirements of the parent company including the consolidation of reports;

c) Costs of raising funds for the acquisition of its participations.

In contrast/ if for example a parent company raises funds on behalf of another group member which uses them to acquire a new company/ the parent company would generally be regarded as providing a service to the group member. The 1984 Report also mentioned "costs of managerial and control (monitoring) activities related to the management and protection of the investment as such in participations". Whether these activities fall within the definition of shareholder activities as defined in these Guidelines would be determined according to whether under comparable facts and

circumstances the activity is one that an independent enterprise would have been willing to pay for or to perform for itself.”

26. By way of rejoinder, ld. Counsel pointed out that the decision of ITAT Delhi Bench as heavily relied upon by the Ld. DR has not been upheld, albeit the Delhi High Court [since reported in (2017) 77 taxmann.com 311 (Delhi)] has set aside the Tribunal order and matter has been remanded back to the file of the TPO to examine the aggregation under TNMM.

27………………….

29. Now coming to the issue whether the payment of ‘royalty’ should be benchmarked separately or the said transaction should be aggregated at entity level under TNMM and get subsumed in the PLI / overall profit margin. As discussed above, the assessee company is engaged in manufacturing of auto catalysts using technology provided by JM-UK. Various international transactions undertaken by the assessee with its AE have been highlighted in the earlier part of the order and one such transaction is an account of payment of ‘royalty’ to the AE of Rs. 2,45,57,629/-. Assessee Company and JM-UK have entered into a technical collaboration agreement (TCA) on 23rd September, 1998 and such an agreement was amended from time to time. Under the TCA, assessee was allowed to use “Johnson Matthey” trade name and the

technical information like patented product specifications and designs, formulae, processes and secret methods etc., which were owned by JM-UK. As per the TCA, the assessee required to pay JM-UK, 5% of net sales value and additional 3% of the net sales value subject to maximum of Rs. 633 lacs. The arrangement was valid for 10 years and the net sale value was meant as ex-factory sales price of the products exclusive of excise duty, sales tax and cost of standard brought out components and material, landed cost of imported components and material irrespective of source of procurement including insurance, freight and custom duties etc. The amounts due are credited to the account of JM-UK at the end of each month. Under the terms of TCA following technical knowhow, information, etc., are provided to assessee by JM-UK:-

- *The Trademark and Patents;*
- *License to produce patented products;*
- *The Technical Information for running the manufacturing unit including;*
- *List of Master Parts;*
  - *Drawings;*
  - *Design and Quality Standards;*
  - *Inspection Standard for completed products;*
  - *Process Standards, which specify and give technical explanation of the process of manufacturing*
- *Training to the employees';*

- *Provisions for continuous technical support, improvements in the production technology resulting from research being carried on in the United Kingdom.*

30. From the nature of payment as well as terms of TCA it is quite evident that it is a payment made to the AE for use of trademark and patent, licence to produce patented products and host of technical information for which assessee at the outset was required to pay certain percentage of the net sales value. The TCA under which royalty has been paid to the AE is a separate transaction all together and it is neither linked or intertwined or interconnected with any other transactions. The assessee has carried out separate transactions for the import of raw material and for the provision of services with its AEs under various head of 'intra group services'. The 'royalty' paid is neither linked with the payment of import of raw material, nor with the intra group services or export of goods to AE or any other transactions highlighted above. The transaction of 'royalty' is exclusive of any other transactions. The question of aggregation of all the transactions are only desirable if the nature of transactions taken as a whole are so interrelated and interconnected that each transaction loses his character of being separately benchmarked so as to give proper arm's length price for the controlled transactions. When separate transactions are so intertwined and linked that it is impossible to evaluate on separate basis, then aggregation will get the desired result of ALP consideration. On the other hand, if the transactions are clubbed which by themselves are

separate and distinct, then determining the arm's length price for the transactions will defeat the entire purpose of transfer pricing. Hon'ble Delhi High Court in the case of Sony Ericson Mobile Communication India (P.) Ltd. (2015) 374 ITR 118, has discussed this issue of aggregation of various transactions in a very detailed manner and opined that though the number of closely linked transactions can be aggregated but the transactions which are not closely related to each other would definitely require determination in segregated manner. Hon'ble Punjab & Haryana High Court in the case of Knorr-Bremse India (P) Ltd. vs. ACIT, (2016) 380 ITR 307 held that:-

> *"In the case of a package deal where each item is not separately valued, but, all are given a composite price, this should be considered as one international transaction and processed accordingly for the transfer pricing purpose. It further held that where a number of transactions are priced differently, but, on the understanding that the pricing was dependent upon the assessee accepting all of them together (i.e., either take all or leave all), then also, the separate transactions be considered as one international transaction. In such circumstance, burden has been placed on the assessee to prove that although each transaction is priced separately, but, they were provided under one common understanding. It further laid down emphatically that, the contention that as the services and goods are utilized by the assessee for the manufacture of the final product they must be aggregated and considered to be a single transaction and the value thereof ought to be computed by the TNMM is not acceptable. Merely because the purchase of each item and the acceptance of each service is a component leading to the manufacture/production of the final product sold or service provided by the assessee, it does not follow that they are not independent transactions for the sale of goods or*

provision of services. The end product requires several inputs. The inputs may be acquired as part of a single composite transaction or by way of several independent transactions. In the latter case, the sale of certain goods and/or the provision of certain services from out of the total goods purchased or services availed of by an assessee together can form part of a separate independent international transaction. In such an event, the AO/TPO must value this group of sale or purchase of goods and/or provision of services as separate transactions."

31. Again the issue of aggregation had come up for consideration before the Hon'ble Jurisdictional High Court in the case of Magneti Marelli Powertrain India (P) Ltd. vs. DCIT, judgment dated 25.1.2016 reported in (2016) 75 taxmann.com). In this case the precise question of law which was required to be answered by their Lordships was as under:-

"1. Whether the Income Tax Appellate Tribunal was right in holding that royalty and technical assistance fee did not form part of a composite transaction and have to be treated as two separate transactions for the purpose of benchmarking and computing arm's length price?"

The Hon'ble Court after referring to the judgment of Sony Ericsson Mobile Communications India (P) Ltd. and judgment of Denso India Ltd. vs. CIT (2016) 240 taxman 713, answered the question against the assessee. Though while answering the second question which was that, whether Tribunal was justified in holding that TNMM should be applied for benchmarking the transaction relating to technical assistance fee, the Hon'ble Court held that if the TPO had accepted TNMM as a most

appropriate method then for one element payment of technical assistance fee should not be benchmarked by applying different ((CUP) method. However, one of the ratio as culled out from the said judgment is that the aggregation or segregation of a transaction depends upon the fact of the each case and if the transaction itself like technical assistance fee is inter linked with other transaction which has been benchmarked under TNMM, then proposed different method should not be applied by segregating one part of the transaction.

32. From the *ratio decidendi* of the above referred judgments, one fundamental principle which permeates through is that, although closely related transactions can be aggregated, but, unconnected transactions cannot be clubbed for determining ALP on a combined basis. The relevant criteria to determine whether certain transactions is to be considered as one international transaction or not has to be judged from the angle, whether such transactions were entered by the parties entering into the controlled transactions as a package deal or are so closely linked that one transaction cannot stand without the other. If the said criterion is satisfied, then, two or more related transactions can be considered as one international transaction for the purpose of aggregation and thereby determining their ALP. On the contrary, if the such a criteria is not satisfied, then, ostensibly these transactions are to be viewed separate from each other and, accordingly, their ALP should also be determined in a

distinct and separate manner as if these are two separate independent transactions. The mere fact that the transaction of 'royalty' and other 'intra-group services' and goods are utilized by the assessee for the manufacture of the final product, it cannot be reckoned as decisive factor to consider such separate transactions as a single transaction.

33. Here in this case, the transaction of payment of 'royalty' is flowing from a separate agreement and has to be paid to JM-UK irrespective of any services or goods received and is entirely a separate transaction having no remote connection with the other transactions; and therefore, bundled approach for aggregation to transfer all the transaction under TNMM would not be desirable on the facts of the present case. Accordingly, we reject the contention of the Ld. Counsel before us that payment of 'royalty' should be aggregated with the other transactions and needs to be benchmarked under TNMM.

34. Now coming to the issue as to whether the payment of royalty should be taken as 'Nil' as done by the TPO on the ground that no benefit has arisen to the assessee on payment of such royalty. The case of the revenue is that no cost benefit analysis has been done by the assessee and how the benefit has derived from such a payment of royalty to its AE. The assessee company is into manufacturing of specialised catalysts using technology provided by its AE which are used in automotive industry. One

of the key drivers in such specialised automotive components industry is quality and technology brand name etc. Assessee has shown total turnover of Rs. 189.2 crores from sale of said components. The entire component has been manufactured by the assessee after using the trade name and patent of its AE and license to produce the patented products and host of other technical information. If assessee has used a trade name, licences and technical information for carrying out its manufacturing unit, at the outset it cannot be held that no benefit has derived to the assessee by entering into TCA with AE. In fact the entire existence of assessee's business is dependent upon its collaboration with AE and the supply of technology, know how, brand name etc. The TPO cannot brush aside the royalty payment of use of such technology know how brand name etc. on the ground that assessee has to give cost benefit analysis and whether any profit has been derived by it. Though he has applied CUP, however he determined the ALP at 'nil' on the ground that it fails the benefit test. We are unable to appreciate such a contention of the department that, even if there is a direct technical collaboration and use of technology from which assessee is manufacturing a high end technical product from which it has generated huge revenue, it is of no consequence and therefore, it should determine at 'nil'. If the TPO has determined the arms length price at 'nil', then he should have atleast analysed some comparable cases to demonstrate that such kind of high end technological

aid received by an independent third party, no 'royalty' would have been paid under a comparable uncontrolled transaction scenario. Without bringing any such data or material on record, the ALP of the payment of royalty cannot be determined at nil. Hon'ble Delhi High Court in the case of CIT vs. EKL Appliance Ltd. (2012) 345 ITR 241 held that Rule 10B (1(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in view of the Revenue, the expenditure was not necessary because of the continued losses suffered by the assessee in its business or he could have fared better had he not incurred such expenditure. These are completely irrelevant consideration. The relevant observation and the finding of the High Court in this regard read as under:-

> *"20. In the case of Sassoon J. David & Co. Pvt. Ltd. v. CIT, (1979) 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure, should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.*
> *21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the*

subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B (1) (a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that In the view of the Revenue the expenditure was un-remunerative or that In view of the continued losses suffered by the assessee In his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale

disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised.

35. Similarly in the case of Knorr-Bremse India Pvt. Ltd. Hon'ble P & H High Court admits similar observation which reads as under:-

> *"20. A reading of the orders of the TPO, the DRP and of the Tribunal makes it clear that one of the main reasons for not accepting the assessee's case was that the assessee had not been able to substantiate that the payment for the services had actually increased its profits. As we noted earlier, the TPO, in fact, further held that the assessee should have been able to show the level of increase in profit post the said transactions.*
>
> *21. We are unable to agree with this finding. The answer to the issue whether a transaction is at an arm's length price or not is not dependent on whether the transaction results in an increase in the assessee's profit. This would be contrary to the established manner in which business is conducted by people and by enterprises. Business decisions are at times good and profitable and at times bad and unprofitable. Business decisions may and, in fact, often do result in a loss. The question whether the decision was commercially sound or not is not relevant. The only question is whether the transaction was entered into bona fide or not or whether it was sham and only for the purpose of diverting the profits."*

36. Thus, following the proposition laid down in the aforesaid judgments, we hold that the payment of royalty cannot be determined at 'NIL'.

37. Now coming to the issue whether any adjustment can be made on the facts of the present case or not. Ld. CIT (A) has deleted the adjustment made on account of royalty on the ground that, *firstly*, ITAT Delhi Bench in the case of Lumax Industries Ltd. has accepted the royalty rate of 5% to 8% of net sales; and *secondly*, RBI/FIPB approval on the rate fixed by the RBI in the case of 'royalty' should be taken for the purpose of arm's length analysis, because, it has huge pervasive value and for coming to this conclusion, he again referred to certain decisions, cited in his order.

38. Under the Transfer Pricing regulations as appearing in Chapter X under the Income Tax Act as well as in Rule 10B, it is imperative that an international transaction has to be benchmarked by using appropriate method as prescribed under the rules. A judgment or the decision of a Tribunal rendered on particular facts of the case, whereby a certain broad range of ALP has been given, then same cannot be followed in a blanket manner in all the cases, as benchmarking has to be done for the relevant financial year using a data for identifying comparable entities available in public domain. Further the quote given by RBI or rates approved by RBI under automatic route is meant for the purpose of regulating the flow of foreign exchange under the FEMA and does not lay down any arm's length price for a particular international transaction. The RBI at the time of giving permission for quoting a rate neither take into consideration the

transfer pricing provision under the Income Tax Act nor its quote override the ALP determination mechanism and it cannot be reckoned as sacrosanct, because TPO/ AO can always examine and analyse the transaction to ascertain its ALP or the arm's length conditions between the related party transactions. The RBI only provides the maximum permissible rate of royalty which can be paid but such rate cannot be made applicable across all the industry, because, technical knowhow required for manufacturing electronic goods, automobile components or heavy industrial equipments varies largely depending upon the industry norms. The parties negotiate the rates depending upon the complexity existing in particular industry, nature of technical knowhow and keeping other relevant economic factors. The rates given by the RBI, which are quite often fluctuating, cannot constitute a comparable data for external CUP, as it merely gives the range of the royalty rate for the money which can be remitted to a Foreign Entity. Thus, we are of the opinion that rate prescribed by RBI under FEMA regulation cannot be reckoned as an external CUP for the purpose of benchmarking.

39. Now the issue is, under which method the 'royalty' should be benchmarked. Since, we have already rejected the assessee's contention that the transaction of 'royalty' cannot be aggregated under TNMM, therefore, in our opinion the CUP method would be the most appropriate

method for determining the ALP of payment of 'royalty'. The CUP method under rule 10B (1) (a) has been prescribed in the following manner:-

> *"(a) comparable uncontrolled price method, by which,-*
>
> *(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;*
>
> *(ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;*
>
> *(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction;"*

40. The mandate of CUP method is the price charged or paid for the services provided in comparable uncontrolled transaction and its adjusted price paid for availing services which constitutes the benchmark for comparison with price paid for availing of any services in an international transaction. If the price paid for availing the service in a comparable uncontrolled transaction is compared with price paid in an international transaction, then it is reckoned to be at ALP. Since, there is no internal CUP, i.e., there is no similar payment of 'royalty' to an independent third party, therefore, it would be desirable that external CUP is to be applied. Here in this case neither the assessee nor the AO has searched for any external CUP; and therefore, we deem fit that the issue of benchmarking of 'royalty' payment should be remanded back to the file of the AO/TPO to benchmark 'royalty' payment separately by using external CUP. The data

from "**Royalty Stat"** available for automotive industry can be used for search of external comparables and the payment of 'royalty' paid for use of technical knowhow for manufacturing of automotive components can be used for the purpose of benchmarking. The onus would be on the assessee to carry out the fresh search process and after selecting external comparables and carrying out comparability analysis may present the same to the TPO, who shall analyse the external comparables and benchmark the royalty payment of the assessee. With this direction the issue of royalty payment is set aside to the file of the AO/TPO and the TPO who shall give appropriate opportunity of hearing to the assessee to substantiate the ALP of the said transaction.

41. As regards the intra group services, the assessee in its Form 3CEB has shown following payments to various AEs:-

A) Testing charges:	Rs.	3,07,869/-
B) Sales Commission:	Rs.	1,08,48,310/-
C) Server charges:	Rs.	9,88,483/-
D) SAP maintenance charges:	Rs.	27,12,007/-
E) Cost sharing charges:	Rs.	73,36,991/-

42. So far as 'testing charges' and 'server charges' are concerned, TPO has not made any addition or adjustment and has accepted to be an ALP though these issues have been taken up by the TPO in assessment year 2008-09, wherein the entire payment has been adjusted and addition

has been made. For "intra group services" the assessee has submitted that, since these charges are part of the operating cost and interconnected with the overall transactions, therefore, all these transactions need to be aggregated under TNMM. During the course of the transfer pricing proceedings the TPO had required the assessee to submit copies of invoices raised by each of the AEs alongwith the documentary evidences to show that the said service has actually been rendered by the AE and also to show the what tangible benefit has been derived by the assessee in paying the said amount to the AEs. In response the assessee did filed copies of invoices for certain services as per the details incorporated in the TPO's orders from pages 16 to 20. The TPO, as discussed above has held that there is no benefit arrived to the assessee for making such payment and therefore, the entire payments to AE under the head "intra group services" have been adjusted and addition has been made. Ld. CIT (A) too has confirmed the finding of the TPO. The nature of "intra group services", benefit derived by the assessee, the relevant documents for these services, has already been summarised and incorporated above.

43. To examine the "intra group services" under the arm's length principle, it has to be seen vis-à-vis the activity provided by the respective group member with economic and commercial value to enhance its commercial position; and whether an independent enterprise in a

comparable uncontrolled circumstances would have been willing to pay for the activities to perform by any independent enterprise or would have perform the activity by itself. If such an independent enterprise is not willing to perform for by itself or for the others, then such an activity ordinarily should not be considered as "intra group services" under the arm's length principle. One needs to identify the arrangements between the related parties and whether any tangible services have been provided which can be easily identified. Often cost allocation and apportionment methods which has some degree of remote approximation can be taken as a basis for calculating arm's length charge which can be benchmarked under indirect charge method, for example, under the TNMM the relevant consideration should be the value of the services to the recipient and how much a comparable independent enterprise would be prepare to pay for that service in comparable circumstances as well as the cost to the service provider under the given fact. Even the use of CUP or CPM can be applied for pricing of "intra group service", but that can only be seen when each services can be identified separately and not separately which are not inextricably linked with overall activities of the tested party. Here in this case the "intra group services" like server charges, SAP maintenance charges and cost sharing charges is an operating cost for overall manufacturing activities carried out by the assessee, because these expenses are quite essential for any independent enterprise and also for

efficiency for the business activities. Regarding cost sharing charges, we will endeavour to examine the nature of various "intra group services", as to whether actually such services at all has been rendered which can said to be part of the operating cost and whether assessee has derived some benefit while carrying out its manufacturing / business activities or not.

44. First of all, in the case of 'sales commission', we find that assessee had entered into an agreement dated 16th March, 2004 with its AE, JM Japan for providing following services to the assessee :-

- Marketing and liaison services with Japanese customers in respect of sales by the appellant to all Japanese customers;
- Feedback on organizational and personnel changes In Japanese customers, in relation to business of the appellant;
- Inputs on design and model changes based on Japanese customers requirements and plans for all Japanese customers;
- Feedback on other aspects of the activities of Japanese customers that have impact on the business of appellant in India.

One important fact which is to be noted here is that, the assessee's major customer is Maruti Suzuki India Limited (MSIL), in India and for its marketing and liaisioning services and for all such other activities, assessee has incurred expenditure in India. The assessee's contention has been that, since Suzuki Motor Corporation Japan is the holding company of MISL and therefore, it requires presence in Japan to liaise with Suzuki

Motor Corporation and also to market the products manufactured by the assessee in Japan and for procuring the orders for rendering of services, assessee has to pay JM Japan, fee @ 40% per month by the assessee to its Japanese customers. During the course of hearing, we specifically require the Ld. Counsel to show as to whether any service has been rendered by the AE JM Japan to any Japanese customer or there is any kind of evidence to show that these services have been rendered for any customer in Japan. However, neither before us nor before the authorities below any such evidence has been filed. Except for the agreement nothing is borne out from the records that AE Japan has carried out any such services to assessee or has assisted or benefited assessee in getting the orders for any customer in Japan and the basis for which the fee has been calculated. The Ld. Counsel also could not brought on record as to when the product manufactured by the assessee in India have been sold to any independent customers in Japan for which it has to carry out any marketing and liaisioning services and other inputs required from Japanese customers. In absence of any such details it can be presumed that no products have been sold to any Japanese customers. The sales commission for sale of products in India to MISL has been separately debited in the books of accounts as all its products have been sold here in India. What kind of liaisioning work JM Japan has done for Suzuki Motors Corporation has not been brought on record? For making a payment to AE

the onus is heavily upon the assessee to show that some kind of benefit has arrived to the assessee for making such a payment and there is actual rendering of services. Even if there is no benefit derived atleast it has to be demonstrated that there is actually rendering of services by the AE Japan in terms of unit sold to any Japanese customers. Not only that, it has not been brought on record that JM Japan has carried out any marketing activities in India to promote sales or carry out any similar services with MISL. Under these facts and circumstances it is very difficult to hold that the payment of 'sales commission' to AE Japan is either for the purpose of business or for any commercial expediency. Under the arms length scenario no independent enterprise will pay to a third party in a foreign country where it has not been able to show that any sale has been made to the customers or any such services has rendered for the customers in that foreign country. For benchmarking such a payment one has to see, whether any independent Indian party would pay to a foreign entity when neither it has it any customers nor has it been established that any such services have been rendered by the foreign entity which can have some commercial expediency benefitting the Indian company. Thus, under arms length conditions also such a payment does not stand the test of ALP; and accordingly, we confirm the order of the TPO that the payment of 'sales commission' to AE is not meant either for business purpose or

under the arms length conditions such a payment is justified. Accordingly, the amount of Rs. 1,08,48,310/- is confirmed.

45. So far as 'SAP maintenance charges' are concerned, the facts which emerges from the material placed on record is that, the Asian region headquarter of Johnson Matthey group located in Malaysia, implements the SAP programme for the entire Asian Region. For this purpose, a server owned by an independent vendor has been set up in Chennai and the cost of operating and maintaining the server is incurred by JM Malaysia which is subsequently recovered from the group entities located in India, Japan, China and Malaysia in equal proportion. In support the assessee has placed copies of invoices and debit notes raised by the JMM by independent vendor in respect of SAP maintenance charges. A detailed explanation has been given by the assessee in this regard which we have already incorporated in the earlier part of the order. There is no rebuttal by the Revenue or anything contrary has been brought on record that payment of SAP maintenance charges have not been equally allocated to various group entities and the assessee has been allocated/ loaded with extra expenses or the invoices and debit notes are non-genuine. Such SAP maintenance charges is linked with carrying out the business activities in a smooth and efficient manner and also to maintain quality standard uniformly all across the JM Group for uniform use of system of accounting, administration, marketing, sales, etc. Thus, this payment being a part of

the operating cost has to be aggregated under the TNMM. Here in this case it is not in dispute that, assessee's profit margin vis-à-vis the comparables under TNMM is higher and therefore, no separate adjustment is required on this expense.

46. Similarly for the 'cost sharing charge', the assessee has stated that Asian region headquarter of Johnson Matthey group was located in Malaysia which was managed by personnel appointed by JMM group and deputed at headquarters, who are managing the Asia region, like Managing Director, Finance Director, Sales Director, Common Secretary etc. The salary of these employees and other expenditure incurred on these employees have been allocated to the group companies located in Asia region, i.e., India, Japan, China and Malaysia; and the basis for allocation of the expenses incurred to manage Asia region is the net revenue of respective countries located in Asia region. The allocation of expense is based on ratio of figures arrived at after reducing from the turnover of each country and such payment made to such high level senior personnel, definitely has to be reckoned to be part of business requirement and overall management in the administration of various group entities in the Asian region countries, not only to supervise but also carry out various other functions. Such cost sharing arrangements has to be treated as part of the operating cost of the assessee company and therefore, under TNMM no separate benchmark should be done for this

service as it can be factored in arriving at net profit margin. Accordingly, we hold that no separate addition should be made on 'cost sharing charges'. Thus, in view of our finding given above, TPO is directed to give effect and determine the arm's length price accordingly. In the result appeal of the assessee as well as of the department for assessment year 2007-08 is partly allowed for statistical purposes.

47. For the assessment years 2008-09 and 2009-10, the issues involved in revenue's appeal is same, that is, deletion of adjustment on account of 'royalty' payment by the CIT(A); and in assessee's appeal, the issue raised are on account of adjustment of intra group services. Following chart will give the glimpse of the issues raised; amount disallowed by the TPO and Ld. CIT (A)'s finding:-

S. No.	Addition by TPO	Amount disallowed by TPO AY 07-08	AY 08-09	AY 09-10	CIT(A)'s finding	Current appeals
1	Payment of royalty	2,45,57,629	3,18,10,000	2,76,88,088	Addition deleted in all years – JMIPL found to have derived significant benefits	Revenue has challenged this before ITAT for all three years
2.	**Payment for intra group services**					
a.	Testing charges	TPO accepted payment to be at ALP – no addition	15,58,390	6,56,878	Addition deleted in both the years – JMIPL found to have derived significant benefits	Revenue has NOT challenged this before ITAT
b.	Sales commission	1,08,48,310 (To JM	1,34,90,396 (To JM	1,46,66,704 (To JM Japan)	Addition sustained	JMIPL has challenged this

		Japan) No payment to JMUK	Japan) No payment to JMUK	52,78,522 (To JM UK)	Addition sustained	before ITAT
c.	Server charges	TPO accepted payment to be at ALP – no addition	8,28,530	8,44,175	Addition sustained	JMIPL has challenged this before ITAT
d.	SAP Maintenance charges	27,12,007	Cost not incurred	Cost not incurred	Addition sustained	JMIPL has challenged this before ITAT
e.	Cost sharing charges	73,36,991	51,34,032	1,14,99,776 1,78,96,168 (Capitalised SAP ERP System cost) 3,60,845 (Double disallow-ance)	Addition sustained Addition sustained Deleted	JMIPL has challenged this before ITAT

48. So far as the issue of payment of royalty is concerned, we have already set aside the matter to the file of TPO for carrying out afresh analysis under external CUP; and therefore, our finding and direction given above will apply *mutatis mutandis* in the appeal for assessment years 2008-09 and 2009-10. Accordingly, the revenue's appeals are treated as partly allowed for statistical purposes. So far as payment of sales commission, SAP maintenance and cost sharing charges are concerned, our finding given above in A.Y. 2007-08 will also apply for the assessment years 2008-09 and 2009-10. However, in respect of sale commission in assessment year 2009-10, there is a payment made of Rs. 52,78,522/- to JM-UK for carrying out sales. On such payment also no credible evidence

or document have been filed to substantiate business purpose or any kind of commercial expediency; or whether any kind of actual services have been rendered by the AE or not. Hence in view of our finding given in respect of similar payment to JM-Japan, such a payment of Rs.52,78,522/- is also confirmed."

We have gone through the contracts for the year, perused the material on record.In the absence of any change in the material facts, we decline to deviate from the earlier order of the Tribunal.

Testing Charges:

7.The assessee selected TNMM as the most appropriate method for benchmarking its international transactions, based on a detailed FAR analysis which is documented in its TP study. Being a manufacturer of auto-exhaust catalysts, appellant utilizes support in the form of technology and various services from its AEs, which help strengthen its manufacturing function. Transactions of testing charges is inextricably linked with the core business of manufacturing the catalysts, as the testing of products is compulsory before selling the same and appellant did not have the facility to test the products. Further, transaction of refining charges is also an integral part of the operations of the Appellant as it does not have the technology and infrastructure to extract precious metal from the scrap. Such transactions cannot be analyzed in isolation, but in conjunction with the core transactions under TNMM which have already been held to be at

ALP by the TPO. Since the facts relevant to the payment of testing charges in the AY 2008-09, 2009-10, 2010-11 and 2011-12 are identical to the facts for AY 2013-14, it was argued to follow the orders passed in AY 2008-09, 2009-10, 2010-11 and 2011-12.

8. Further, it was argued that the TPO has held the payments made by the appellant for testing services to be at arm's length during the transfer pricing assessment proceedings for the AY 2007-08 after duly examining all the intra group services in detail and no addition has been made.

9. During the transfer pricing assessment proceedings for the AY 2013-14, the TPO has changed the opinion and determined ALP of payment made by the appellant for testing services at Nil contending that no benefit accrued to the appellant in respect of the same.

10. We find that the need for receipt of testing services emerges as the appellant does not have equipment and technology to undertake these tests in India. The test performed by JMJ and JMK is classified as 'Simulated Catalyst Activity Test' ("SCAT"). The test is undertaken to find out whether different types of catalysts produced by the appellant conform to the emission standards set by the customer. The frequency of test is as desired by the customer. The appellant sends the samples of finished catalysts to JMJ and JMK, where they are fitted in the vehicle for which

they are being manufactured. The engine of vehicle is then run and emission from exhaust measured and matched with the set standard.

11. Thus, such testing services provided by JMJ and JMK are necessary to the business of the appellant since the same enables the appellant to comply with the emission controls legislation as prescribed. In support of the same, copies of invoices raised by JMJ and JMK in respect of the testing services performed by it during the relevant period are enclosed before the revenue authorities. We find that the ld. CIT(A) has not decided this issue purely on the issue of consistency but on going through the factum of the issue for the year before us. It was held that the amounts have been paid for testing charges which enable the assessee to get to tests the samples of automobile catalysts at the centers of the group in Japan and Korea for which it lack infrastructure capacity. Since, it is commercially viable to get the samples tested at a centralized station instead of developing its own in India. Hence, we decline to interfere with the order of the ld. CIT(A) on this issue.

Refining Charges:

12. During the year, the assessee paid Rs.37,24,643/- to JMUK for refining of scrap generated during the process of manufacture of catalysts. The process of refining of scrap mainly involves extraction of precious

metals from the rejected catalysts. The process includes evaluation, smelting, chemical leaching and chemical separation.

13. JMUK charges (refining charges), the assessee for various processes that it undertakes for extraction of precious metals and refining of the same as explained above. The process of refining includes determination of the content/quality of precious metals inside the rejected catalysts, melting and extraction of the metals etc. The standard charges are levied for various procedures involved at different stages. The assessee does not have any facility to undertake this process of refining. In order to extract the maximum value out of the scrap generated during manufacturing process, the assessee sends the scrap to JMUK for extraction. It is only due to this refining process which is undertaken by JMUK for the assessee, the assessee is able to realize the full value of precious metals that were absorbed in the catalysts. Since precious metals (Platinum, Palladium and Rhodium) used in the manufacturing process of the assessee have significant market value, by incurring a small cost for refining, the assessee is able to recover substantial value of its scrap. Hence, it was argued that the TPO has grossly erred in stating that the assessee does not derive any benefit out of such payments, when in fact the assessee would not be able to realize substantial value from the scrap without such services. On the contrary, the assessee would not be able to realize substantial value from the scrap without utilizing such services.

14. The ld. CIT(A) held that in support of the above, the invoices reflecting the refining charges are enclosed as Annexure 1 and came to a conclusion that the AO has grossly erred in making transfer pricing addition in respect of the payment for refining charges in blatant disregard of the facts of the present case. We find that this charges have been paid for the first time by the assessee and the ld. CIT(A) has not given any finding as to the receipt of the amounts out of the sale of such extracted metals. Hence, we refer the matter to the file of the AO for the purpose of verification of the receipts of the recovered metals.

Foreign Travel Expenses:

15. During the financial years before us, the assessee had incurred Rs. "MMM" for foreign travel costs of family members of employees. The AO held that the expenses incurred on foreign travel of family members of employees are personal in nature and there is no business exigency of same. The ld. CIT(A) held that the disallowance of expenses does not depend on policy but provisions of Act. In case law relied, specific resolution has been passed by Board on case to case basis since presence of spouses were required when managing director attended conference and social gatherings. In facts of the case, every employee is entitled to reimbursement of family travel expenses irrespective of fact whether their services outside India required presence of family or not. The ld. CIT(A)

agreed with the reasoning of the AO and held that in absence of specific instances of necessity of family for performance of duties, such expenses cannot be considered having incurred for business.

16. It was argued by the ld. AR that the appellant's policy of paying the travel costs of family members of employees who accompany the employee sent on deputation to a foreign country. Such expenses are incurred for the purpose of business u/s 37 since the employees were sent on deputation to a foreign country for the purpose of furthering the business and the travel cost of family members accompanying the employee should also be regarded as related to business of assessee. He relied on the judgments in the case of J.K. Industries Ltd vs. CIT 11 taxmann.com 72 (Cal.) and Glaxo Laboratories (India) Ltd v. ITO 18 ITD 226 (Bom.).

17. We have considered the facts of the case and also the judgments cited by the ld. Counsel which have been duly considered by the ld. CIT(A). We have also considered the judgments in the case of DCIT v. Gems Paradise, ITA No. 700/JP/2009 wherein the Co-ordinate Bench of ITAT held that such expenses can be allowed in a case where the taxpayer establishes nexus with such person. In the instant case, we find that visit of the family members of the Directors has no nexus with the business

contingencies. Hence, we decline to interfere with the order of the ld. CIT(A) on this issue.

Reconciliation of AS 26:

18. Interest income on fixed deposits was consistently recognized by the assessee in its audited financial statements on the basis of mercantile system of accounting. At the time of maturity of fixed deposit, the total interest less interest already recognized in financial statements is recognized as income and offered to tax.

19. The entire interest income on fixed deposits maintained by the assessee with banks has already been offered to taxation and any addition due to difference in reconciliation of interest income with form 26AS is merely on account of timing difference. The addition made by Ld. AO shall result in double taxation of the same interest income in the hands of the assessee.

20. Having gone through the facts of the case, we direct the AO to reconcile the difference on re-examination.

21. To conclude,

On the issue of,

i. Royalty – To be benchmarked by the TPO using the method of Comparable Uncontrolled Price (CUP).

ii. Sales Commission – Order of the Revenue confirm in line with the earlier years.

iii. Cost Sharing Charges – No separate addition is required as it forms an integral part of TNMM.

iv. Testing Charges – No addition is warranted.

v. Refining Charges – To the AO for verification of accounting of receipts.

vi. Foreign Travel Expenses – Action of the AO upheld.

vii. AS 26 – Re-verification on the part of the AO.

22. In the result, all the appeals of the assessee are partly allowed and all the appeals of the Revenue are dismissed.

Order Pronounced in the Open Court on 3/11/2021.

Sd/-	Sd/-
(Suchitra Kamble)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 3/11/2021

Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR