

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'C' PUNE – VIRTUAL COURT**

**BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER**

आयकर अपील सं. / ITA No.190/PUN/2021

निर्धारण वर्ष / Assessment Year : 2016-17

Emerson Climate Technologies (India) Private Limited, Plot No.23, Rajiv Gandhi Infotech Park, Phase II, Hinjewadi, Pune – 411 057 PAN : AAACK7291C	Vs.	Additional/Joint/Deputy /Assistant Commissioner of Income Tax/Income Tax Officer, National e- Assessment Centre, Delhi
Appellant		Respondent

Assessee by

Shri Dhanesh Bafna

Revenue by

Shri Shivraj B. Morey

Date of hearing

14-07-2021

Date of pronouncement

15-07-2021

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final assessment order dated 18.03.2021 passed by the Assessing Officer (AO) u/s.143(3) r.w.s.144C(13) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2016-17.

2. This appeal was filed belatedly by 3 days. The ld. AR explained the lockdown due to covid-19 as the reason for the late filing of the appeal. The ld. DR did not object to the condonation of the delay. We are satisfied with such a reason. The delay is

condoned and the appeal is admitted for hearing and disposal on merits.

3. The ld. AR did not press ground nos. 5 and 6 due to smallness of the amount. Such grounds are, therefore, dismissed as 'not pressed'.

4. The only other surviving issue in this appeal through various grounds is against the confirmation of transfer pricing addition of Rs.14,56,09,180/-.

5. Briefly stated, the facts of the case are that the assessee is a company incorporated under the Companies Act, 1956. It was a 51:49 joint venture between Kirloskar Brothers Limited (KBL) and Copeland Corporation, USA for carrying on the activities of Planning, Development, Manufacturing, Assembling, Marketing and Selling compressors and parts of various types, models and varieties. Subsequently, Copeland Corporation, USA purchased the stake of Kirloskar Brothers Limited. The assessee company filed its return declaring total income at Rs.1,63,47,34,240/-. Certain international transactions were reported in Form No. 3CEB. The AO made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of the international transactions. One of the reported international transactions was "Payment of fees for

Advisory and other services” with transacted value of Rs.14,48,84,020/-. The assessee applied the Transactional Net Margin Method (TNMM) as the most appropriate method for demonstrating this transaction to be at ALP. The TPO did not accept the assessee’s point of view primarily on the ground that the assessee did not lead any evidence to demonstrate that the services were actually received. The evidence and communication etc., filed by the assessee in this regard were held to be general not justifying receipt of services. The assessee submitted that the Tribunal in its own case for the assessment years 2009-10 to 2013-14 has deleted the transfer pricing adjustment proposed by the TPO under similar circumstances. The TPO rejected the assessee’s contention on the ground that the order passed by the Tribunal for the earlier years was not accepted by the Department and the appeal was recommended. He, therefore, rejected the TNMM and applied the Comparable Uncontrolled Price (CUP) method for this international transaction. Accordingly, he determined Nil ALP of the international transaction of ‘Receipt of Advisory and other services’ and proposed transfer pricing adjustment of Rs.14.48 crore. The AO incorporated the transfer pricing adjustment in the draft order notified by him. The assessee carried the matter before the Dispute Resolution Panel

(DRP) but without any success. The AO in the final assessment order made the transfer pricing addition of Rs.14.56 crore against which the assessee has come up in appeal before the Tribunal.

6. We have heard both the sides and gone through the relevant material on record. It is found as an admitted position that the facts and circumstances of the instant appeal are similar to those of the earlier years. The Tribunal has passed orders starting from assessment year 2009-10 to 2015-16, whose copies have been placed on record. In the lead order, which has been followed in later years, the application of the TNMM as the most appropriate method has been accepted in preference to the CUP method as applied by the TPO. After giving certain directions, matter has been sent back to the AO/TPO for deciding the issue accordingly. The Id. DR fairly conceded that the facts and circumstances of the instant appeal are *mutatis mutandis* similar to those of earlier years. Respectfully following the precedent, we set-aside the impugned order and remit the matter to the file of AO/TPO for deciding this issue afresh in accordance with the directions given by the Tribunal in assessee's own case for the earlier assessment years. Needless to say, the assessee will be provided adequate opportunity of hearing in such fresh proceedings.

7. The assessee has raised the following additional ground:

“8. On the facts and in the circumstances of the case and in law, the learned Assessing Officer (‘learned AO’) ought to grant a deduction for Education Cess and Secondary and Higher Education Cess paid on income-tax while computing the Income from Business and Profession for the year under appeal.

It is prayed that the deduction of Education Cess and Secondary and Higher Education Cess should be allowed to the Appellant as a business expenditure under the provisions of the Act.”

8. The Hon’ble Supreme Court in *National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC)* has observed that “the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item”. Answering the question posed before it in affirmative, their Lordships held that on the facts found by the authorities below, if a question of law arises (though not raised before the authorities) which has bearing on the tax liability of the assessee, the Tribunal

has jurisdiction to examine the same. Having gone through the subject matter of the additional ground taken by the assessee, it is apparent that the same raises a pure question of law. We, therefore, admit the same.

9. On merits, it is found that the issue raised through the additional ground is no more *res integra* in view of the judgment of Hon'ble jurisdictional High Court in *Sesa Goa Lt. Vs. JCIT (2020) 423 ITR 426 (Bom.)* in which it has been held that Education Cess is not disallowable expenditure u/s.40(a)(ii) of the Act. Similar view was earlier taken by the Hon'ble Rajasthan High Court in *Chambal Fertilisers and Chemicals Ltd. and Another Vs. JCIT (2018) 102 CCH 0202 (Raj-HC)*. We, therefore, direct the AO to ascertain the correct amount of education cess and then allow a deduction for it, after allowing opportunity of hearing to the assessee.

10. In the result, the appeal is partly allowed for statistical purposes.

Order pronounced in the Open Court on 15th July, 2021.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 15th July, 2021
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT (DRP-3), Mumbai-1/ CIT (DRP-3), Mumbai-2/
CIT (DRP-3), Mumbai-3
4. DR, ITAT, 'C' Bench, Pune
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	14-07-2021	Sr.PS
2.	Draft placed before author	15-07-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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