

आयकर अपीलीय अधिकरण “K” न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL “K” BENCH, MUMBAI
BEFORE SHRI N.K. BILLAIYA, AM AND SHRI AMIT SHUKLA, JM**

श्री एन. के. बिलैय्या, लेखा सदस्य एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।

आयकर अपील सं./I.T.A. No.160/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2008-09)

Varian India Private Limited – India Branch, G 01, Prime Corporate Park, 230-231 Opposite Blue dart Centre, Sahar Road, Andheri (East), Mumbai – 400 099.	बनाम/ Vs.	Addl. Director of Income Tax (International Taxation), Range 2, Mumbai.
स्थायी लेखा सं./PAN : AAACV3294Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Appellant by	Shri Kanchun Kaushal, Shri Dhanesh Bafna & Shri Arpit Agrawal
Department by	Shri Akhilendra P. Yadev

सुनवाई की तारीख / **Date of Hearing** : 22-09-2014

घोषणा की तारीख / **Date of Pronouncement** : 26-09-2014

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आदेश / ORDER

PER N.K. BILLAIYA, A.M. :

एन. के. बिलैय्या, लेखा सदस्य

This appeal by the assessee is preferred against the order of TPO dated 31-03-2011 in pursuance to the directions of the Dispute Resolution Panel – I (DRP), Mumbai dated 21-09-2012.

2. The assessee has raised four substantive grounds of appeal. Ground No. 1 relates to the addition of Rs. 44,22,168/- on account of inclusion of reimbursement of expenses for the purpose of computing commission income.

3. At the very outset, the Id. Counsel for the assessee stated that this issue has been decided by the Tribunal in assessee's case for A.Y. 2007-08 in ITA No. 8950/Mum/2010 dtd. 28-02-2014. The Id. D.R. fairly conceded to this.

4. We have carefully perused the orders of the authorities below and the decision of the Tribunal in assessee's own case in ITA No. 8950/Mum/2010. The Tribunal has considered this issue at para 11 on page 7 of its order which read as under:-

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

5. Facts and issues being identical, respectfully following the findings of the co-ordinate Bench of this Tribunal, we restore the matter back to the file of the A.O. to adjudicate this issue afresh in the light of the direction given by

the Tribunal in A.Y. 2007-08. Ground No. 1 is treated as allowed for statistical purpose.

6. Ground No. 2 relates to the addition of Rs. 24,46,542/- on account of attribution of profits to Permanent Establishment.

7. Once again the ld. Counsel for the assessee stated that the issue has been decided by the Tribunal in assessee's own case in A.Y. 2007-08 vide ITA No. 8950/Mum/2010. The ld. D.R. fairly conceded to this.

8. We have carefully perused the orders of the authorities below and the decision of the Tribunal in assessee's own case in ITA No. 8950/Mum/2010. We find that an identical issue has been decided by the Tribunal vide para 13 on page No. 8 of its order which read as under:-

“13. On perusal of the assessment order, it is seen that the Assessing Officer while adjudicating the issue whether, the Varian Group of Companies have PE in India in the form of the Branch of the assessee company, has followed the reasoning given in the assessment order for the A.Y.2002-03. The detail reasoning of the Assessing Officer which in turn is based on the finding given in assessment year 2002-03 has been dealt by the Assessing Officer from paras 6.1 to para 13. This issue, whether the assessee is a PE of various Varian group of companies or not, has been discussed in detail by the Tribunal in assessee's own case in ITA No.4672 to 4676/Mum/2011 for the assessment years 2002-03 to 2006-07 vide order dated 27/02/2013. After detail analysis, the Tribunal has finally held that, the Indian branch of the VIPL is not dependent agent of VGCs and therefore, it does not constitute PE for various Varian companies in India, as per Article 5(4) 5(5), respective DTAAAs. The relevant finding of the Tribunal has given from para 25 to para 43 of the order. Thus, in view of the findings given therein and as a matter of judicial precedence, we hold that the assessee branch, does not constitute PE of Varian-Italy and, therefore, the addition of Rs.10,80,117/-, being 10% of gross made by Varian Italy to its customer in India, cannot be taxed in the hands of the assessee. Thus ground no.2 as raised by the assessee is treated as allowed.”

9. As no distinguishing facts have been brought on record before us, respectfully following the findings of the co-ordinate Bench, we hold that the assessee branch does not constitute PE of Varian-Italy and therefore the addition of Rs. 24,46,542/- cannot be taxed in the hands of the assessee. Ground No. 2 is accordingly allowed.

10. Ground No. 3 relates to the Transfer Pricing adjustment of Rs. 87,34,979/-.

11. Following heads of expenditure were considered for allocation:-

Sr. No.	Particulars	Amt (In Rs.)
1	Rent	94,79,508
2	Depreciation	33,52,935
3	Staff welfare	19,91,869
4	Travelling and Conveyance expenses	3,45,14,589
5	Communication expenses	35,77,100
6	Electricity	7,54,401
7	Office maintenance	5,20,524
8	Insurance charges	19,61,101
9	Other Misc. expenses	10,08,491

12. The TPO observed that for the allocation of expenses, the assessee has adopted the ratio of employee for the expenses mentioned hereinabove. It was the claim of the assessee that since these expenses are “directly attributable costs” which can be clearly ascribed to and are caused by a particular activity i.e. employees activities, therefore, it is an appropriate mechanism to use employee headcount ratio to allocate such expenses. The TPO was of the firm belief that gross profit ratio will be appropriate to allocate various expenses. It was explained by the assessee that gross profit ratio has been applied to allocate cost which are not attributable in nature and which requires an approach that somehow spread the costs across the various business activities. Therefore, gross profit ratio cannot be applied to those costs which are directly attributable to the activities and therefore manpower ratio has been identified as a more appropriate allocation key to allocate the costs. The

explanations/submissions made by the assessee did not find favour with the TPO. The TPO was of the opinion that the expenses have no direct relation to the number of employees employed. The TPO further observed that it is a prerequisite under the agreement that the Indian branch maintained a sales and service organization for rendering the marketing services to be provided under the agreement. Hence, it is appropriate that these expenses are apportioned in proportion to the gross profit turnover. The TPO proceeded by making an adjustment of Rs. 87,34,979/-. Aggrieved by this, the assessee is before us.

13. The ld. Counsel for the assessee reiterated what has been stated before the lower authorities. Per contra, the ld. D.R. strongly supported the findings of the TPO.

14. We have carefully perused the orders of authorities below. The assessee has used allocation key of employee head account. The expenses like rent, depreciation, electricity, insurance charges, office maintenance and other miscellaneous expenses have no co-relation with the number of employees. On the contrary, these expenses have a direct bearing to the revenue generation. As per Rule 10-B(1) of the Act, determination of ALP u/s 92CA(2) of the Act, the ALP in relation to an international transaction has to be determined by the most appropriate method. In our considered opinion, the method adopted by the TPO is slightly better than the method adopted by the assessee. More so when the allocation by the assessee is not supported by any certificate from the management. Considering the nature of expenses in totality, we do not find any merit in the case of the assessee. Adjustment of Rs. 87,34,979/- is accordingly confirmed. Ground No. 3 of the assessee's appeal is accordingly dismissed.

15. Ground No. 4 relates to short credit of TDS to the extent of Rs. 2,95,335/-. We restore this matter to the file of the A.O. The A.O. is directed

to verify the detail and allow proper credit of TDS to the assessee. Ground No. 4 is allowed for statistical purpose.

16. Ground No. 5 relates to levy of interest under section 234B of the Act. Levy of interest is mandatory though consequential. The A.O. is directed to levy interest as per the provisions of the law.

17. In the result, appeal filed by the assessee is allowed in part for statistical purpose.

Order pronounced in the open court on 26th September, 2014.

आदेश की घोषणा खुले न्यायालय में दिनांक: 26-9-2014 को की गई ।

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 26-09-2014.

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व.नि.स./ R.K., Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The DRP -I, Mumbai
4. आयकर आयुक्त / Addl. Director of Income Tax (IT)- 2(2), Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai K Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai