

Income Tax Appellate Tribunal - Mumbai

Asst Cit (Ltu)1, Mumbai vs Johnson & Johnson Ltd, Mumbai on 26 December, 2018

IN THE INCOME-TAX APPELLATE TRIBUNAL "K" BENCH MUMBAI

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER

AND SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 2547/Mum/2017 (Assessment Year 2005-06)

ACIT (LTU)-1,

World Trade Centre,
Centre-1, 29th Floor,
Cuffe Parade,
Mumbai-400005.

M/s Johnson & Johnson Pvt.

Ltd.(Formerly known as Johnson
& Johnson Ltd.) 501, Arena Space,
Off JVLR, Opp: Majas Bus
Depot, Jogeshwari (E),
Mumbai.

PAN: AAACJ0866E

Appellant

Respondent

Cross Objection No. 47/Mum/2018 (Assessment Year 2005-06) M/s Johnson & Johnson Pvt. ACIT (LTU)-1, Ltd.(Formerly known as Johnson World Trade Centre, & Johnson Ltd.) 501, Arena Vs. Centre-1, 29th Floor, Space, Off JVLR, Opp: Majas Cuffe Parade, Bus Depot, Jogeshwari (E), Mumbai-400005.

Mumbai.

PAN: AAACJ0866E

Appellant

Respondent

Appellant by

: Shri Jayant Kumar (DR)

Respondent by

: Shri Rajan Vora with
Shri Pranay Gandhi (AR)

Date of Hearing

: 15.10.2018

Date of Pronouncement

: 26.12.2018

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. These appeal by Revenue and Cross Objection by assessee under Section 253 of Income-tax Act is directed against the order of Id. CIT(A)-56, Mumbai dated 29.12.2016 for Assessment Year 2005-06. The Revenue has raised the following grounds of appeal:

ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd.

1. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the adjustment made on account of income tax on brand usage royalty without appreciating the fact that as per Article 13 of the agreement for payment of royalty, no condition exists for royalty being net of taxes and approval taken from RBI cannot be considered to be augmenting the terms of agreement with the principal. "

2. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the adjustment made on account of service tax paid by the assessee on brand usage royalty without appreciating the fact that approval taken from RBI cannot be taken to be augmenting the terms of agreement with the principal. "
 3. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the adjustment made on account of service tax paid by the assessee on know-how royalty without appreciating the fact that approval taken from RBI cannot be taken to be augmenting the terms of agreement the principal. "
 4. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the adjustment made on account of payment of royalty on traded finished goods made by the assessee to J & J, US."
 5. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the technical know-how royalty payment @ 2% / 4% instead of 1 % as done by the TPO."
 6. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the adjustment made on account of tax, R & D cess on know-how, royalty on traded finished goods and manufactured products."
 7. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the adjustment made on account of sales and promotion expenses, simply relying on the order of Hon'ble ITAT in the case of assessee for A.Y. 2006-07."
 8. "On the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 4,28,58,798/- on account of unaccounted production and sale."
 9. "On the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the Assessing Officer to grant credit in respect of retained MODVAT credit relating to opening stock."
- ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd.
10. "On the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing depreciation on testing equipment provided to laboratories and hospitals free of charge even though such testing instruments were not used by the Assessee."
 11. "On the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 2,79,646/-, made on account of payment to M/s Crawford Bailey & Co U/s 40A(2)(b) of the Act, though the assessee has not discharged its onus to prove the reasonableness."

Cross Objection No. 47/Mum/2018

2. The assessee has raised the following grounds of appeal:

Based on the facts and circumstances of the case and in law, Johnson & Johnson Pvt. Ltd. (hereinafter referred to as 'the Respondent' or 'Assessee' or 'J&J India') respectfully craves leave to prefer cross-objections against the appeal filed by the learned Assistant Commissioner of Income-tax ('AO') before the Hon'ble Income- tax Appellate Tribunal ('Hon'ble ITAT) against the order passed by the Hon'ble Commissioner of Income-tax (Appeals) ['Hon'ble CIT(A)'], Mumbai.

On the facts and in the circumstances of the case as well as in law, the learned AO:

General ground

1. erred by not accepting the order passed by the CIT(A) and by filing an appeal against the order of CIT(A) which is based on rulings of the Hon'ble jurisdictional Tribunal and Hon'ble Jurisdictional High Court in Assessee's own case and hence, the appeal ought to be dismissed;

Transfer Pricing Grounds Withholding tax on brand usage royalty of Rs. 1.16 crore

2. erred in objecting to the Hon'ble CIT(A) order without appreciating the fact that the Hon'ble CIT(A) has followed the order of Hon'ble Jurisdictional Tribunal in Assessee's own case, wherein transfer pricing adjustment on withholding- tax on brand usage royalty was deleted;

Service tax on brand usage royalty of Rs. 0.50 crore

3. erred in objecting Hon'ble CIT(A) order without appreciating the fact that the Hon'ble CIT(A) has followed the order of Hon'ble Jurisdictional Tribunal in Assessee's own case, wherein transfer pricing adjustment on tax paid on brand usage royalty was deleted;

Payments of royalty on sale of traded finished goods of Rs. 8.28 crore

4. erred in objecting Hon'ble CIT(A) order without appreciating the fact that the Hon'ble CIT(A) has followed the order of Hon'ble Jurisdictional Tribunal in Assessee's own case wherein the transfer pricing adjustment on account of ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd.

payment of royalty on traded goods for receipt of technical know-how was deleted;

Disallowance of Rs. 18.33 crore on account of Restriction of technical/ marketing royalty rate at 1 %

5. erred in objecting to the Hon'ble CIT(A) order without appreciating the fact that the Hon'ble CIT(A) has followed the order of Hon'ble Jurisdictional Tribunal in Assessee's own case, wherein the transfer pricing adjustment was deleted and the Hon'ble Tribunal allowed the payment of royalty for technical/ marketing know-how at 2%/4% instead of 1 % as applied by the learned AO/ TPO. Disallowing the corresponding withholding tax and R&D Cess on disallowed Technical/ marketing know-how royalty of Rs. 5.31 crore

6. erred in objecting to the Hon'ble CIT(A) order without appreciating the fact that the Hon'ble CIT(A) has followed the order of Hon'ble Jurisdictional Tribunal in Assessee's own case, wherein the transfer pricing adjustment was deleted. Service tax on the technical/marketing know-how royalty of Rs.1.35 crores

7. erred in objecting to the Hon'ble CIT(A) order without appreciating the fact that the Hon'ble CIT(A) has followed the order of Hon'ble Jurisdictional Tribunal in Assessee's own case, wherein the transfer pricing adjustment on account of service tax on technical/ marketing know-how royalty was deleted Disallowing Publicity and sales promotion expenses of Rs. 0.60 crores

8. erred in objecting to the Hon'ble CIT(A) order without appreciating the fact that the Hon'ble CIT(A) has followed the order of Hon'ble Jurisdictional Tribunal in Assessee's own case for AY 2006-07, wherein the adjustment on account of excess publicity and sales promotion expenses was deleted on the ground that the same has been made without following one of the prescribed methods as per section 92C(1) of the Act.

Corporate Tax Grounds Addition on account of unaccounted production and sale of Rs.4,28,58,798

9. erred in objecting the Hon'ble CIT(A)'s order without appreciating the fact that the Hon'ble Jurisdictional High Court and Hon'ble Jurisdictional Tribunal both in Assessee's own case has deleted the addition made by the Assessing Officer and allowed the claim of the assessee on account of production loss; Adjustment of MODVAT Excise Duty Credit to Opening Stock

10. erred in objecting to the Hon'ble CIT(A)'s order which is based on rulings of the Hon'ble jurisdictional High Court and Hon'ble jurisdictional Tribunal both in Assessee's own holding that if adjustments are made to closing stock then the corresponding adjustment should also be made in the opening stock; Disallowance of depreciation on testing equipments of Rs 53,48,110/-

11. erred in objecting to the Hon'ble CIT(A)'s order which is based on rulings of the Hon'ble Jurisdictional High Court and Hon'ble jurisdictional Tribunal both in Assessee's own case that depreciation claimed on testing equipment installed at various pathologies and hospitals under section 32 of the Act amounting to Rs.53,48,110/- is to be allowed;

ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd.

Payments made to person specified under section 40A(2)(b) of Rs. 2,79,646

12. erred in objecting to the Hon'ble CIT(A)'s order which is based on rulings of the Hon'ble jurisdictional High Court and Hon'ble jurisdictional Tribunal both in Assessee's own holding payments made to MIs Crawford Bailey & Co of Rs 2,79,646 is not excessive or unreasonable and hence, no disallowance is required under section 40A(2)(b);

On the facts and in the circumstances of the case as well as in law, the Hon'ble CIT(A):

Adjustment in accordance with section 145A in toto

13. erred in confirming the action of the learned AO of adding proportional MODVAT credit attributable to closing stock without appreciating the fact that even if adjustment under section 145 are made in case of the Assessee on inclusive basis (i.e. inventory, purchases as well as sales are taken inclusive of tax) the impact to taxable profits would be Nil.

3. Brief facts of the case are that the assessee-company is 75% subsidiary of Johnson & Johnson, USA. The assessee-company is engaged in the business of manufacturing of consumer care, health care, Diagnostic products, filed its return of income for Assessment Year 2005-06 on 31.10.2005 declaring total income at Rs. 183,93,59,200/-. Along with the return of income, the assessee furnished report in Form No. 3CEB wherein, the assessee reported International transaction with its Associated Enterprises (AE). Therefore, a reference was made to TPO for computation of Arms Length Price (ALP). The TPO vide its order dated 29.01.2018 suggested Transfer Pricing Adjustment in respect of brand usages royalty and technical know how of Rs. 35.53 Crore. The T.P. Adjustment consist of Rs. 1.66 Crore on tax and service on brand royalty, Rs. 8.28 Crore royalty on sales of traded finished goods, Rs. 18.33 Crore by restriction of royalty to 1% of manufactured goods, Rs. 6.66 Crore by disallowing tax R &D Cess and service tax and Rs. 60 Lakhs partial disallowance on publicity and ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd. sale promotion expenses. On appeal before the ld. CIT(A), entire T.P. Adjustment was deleted. Hence, aggrieved by the order of ld. CIT(A), the Revenue has filed present appeal. On service of notice of appeal, the assessee has filed its cross objection in support of order of ld. CIT(A).

4. We have heard the submission of ld. AR of the assessee and ld. DR for the Revenue and perused the material available on record. At the outset of hearing, the ld. AR of the assessee submits that all the grounds of appeal raised by revenue are covered in favour of assessee and against the revenue by various decision of Tribunal in assessee's own case for earlier Assessment Year. The ld. AR of the assessee furnished the detailed chart narrating the various ground and the reference of decision of Tribunal wherein the grounds of appeal raised by revenue are covered.

5. On going through the details on the chart with regard to grounds of appeal, the ld. DR for the Revenue submits that the grounds of appeal are covered in favour of assessee. The ld. DR further submits that he relied upon the order of Assessing Officer/TPO. In the rejoinder submission, the ld. AR of the assessee submits that the grounds of appeal in cross objection filed by assessee are in

support of the order of the ld. CIT(A).

6. We have considered the rival submission of the parties and have gone through the orders of authorities below.

7. Ground No. 1 relates to disallowance of Tax on brand usage royalty amounting to Rs. 1.16 Crores. The ld. AR of the assessee submits that this ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd. ground of appeal is covered in favour of assessee's own case for AY 2002-03 in ITA No. 4092/Mum/2007 dated 28th August 2013 and again in assessee's own case for A.Y. 2006-07, A.Y. 2008-09, A.Y. 2009-10 wherein the Tribunal deleted the adjustment based on the principle laid down by Tribunal in its order for A.Y. 2002-03. The ld. AR further submits that the facts in the year under consideration are same as of previous year and the appeal of the revenue is dismissed. The ld. DR relied on the order of Assessing Officer.

8. We have considered the submission of the parties and have gone through the order of authorities below. We have noted that similar ground of appeal was raised before Tribunal in assessee's own case for A.Y. 2002-03 in ITA No. 4092/Mum/2007 and the co-ordinate bench of Tribunal passed the following order:

34. We have heard the rival submissions, perused the orders of the lower authorities and also the copy of agreement submitted alongwith application to RBI as exhibited at pages 1143 to 1145 of the Paper book. We find that the application made by the assessee to RBI for brand usage agreement specifically mentions that the royalty to be remitted is net of taxes. Further, the approval was received from the RBI to remit the royalty on brand usage by the assessee @ 1% net of taxes. Considering the brand usage agreement vis-à-vis the approval granted by RBI, it can be safely inferred that taxes were liability of J&J India under the terms of agreement. The assessee has entered into a commercial arrangement with J&J US and it has been so arranged that the payment of taxes have to be borne by the assessee being a commercial arrangement, the same should not be questioned while calculating arm's length price. Reliance by the assessee on the decision of the Tribunal in the case of Dresser Rand India Pvt. Ltd. in ITA No. 3509/M/08 is well founded. Considering the entire facts in totality in the light of the brand usage agreement and the approval of the RBI, the findings of the Ld. CIT(A) is set aside. The AO is directed to delete the addition of Rs. 60,00,000/-. Ground No. 13 is allowed.

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9. Considering the decision of Tribunal in assessee's own case for A.Y. 2002-03 which was followed in A.Y. 2006-07 in ITA No. 83/Mum/2011, for A.Y. 2008-09 in ITA No. 7133/Mum/2012 and further in A.Y. 2009-10 in ITA No. 829/Mum/2014, on identical ground, we confirmed the order of ld. CIT(A). In the result, ground no.1 of the appeal is dismissed.

10. Ground No.2 & 3 relates to deleting the disallowance made on account of service tax paid by the assessee on brand usage royalty and disallowance of service tax paid on no how royalty. The ld. AR of the assessee submits that this ground of appeal is covered in favour of assessee's own case for AY 2002-03 in ITA No. 4092/Mum/2007 dated 28th August 2013 and again in assessee's own case for A.Y. 2006-07 and again on 2008-09 in ITA No. 133/Mum/2012 & 2009-10 in ITA No.829/Mum/2014. The ld. AR further submits that the facts in the year under consideration are same as of previous year and the appeal of the revenue is dismissed. The ld. DR relied on the order of Assessing Officer.

11. We have considered the submission of the parties and have gone through the order of authorities below. We have noted that similar ground of appeal was raised before Tribunal in assessee's own case for A.Y. 2006-07 in ITA No. 83/Mum/2011 dated 05.02.2014 and the co-ordinate bench passed the following order:

34. In respect of Ground taken by assessee for making disallowance on account of tax, service tax paid by assessee on the payment of royalty, we observe that the said issue has already been considered by Tribunal in assessee's own case for the assessment year 2002-03 (supra) and the Tribunal has held after considering ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd. the agreements entered into between the assessee and J&J US and also the decision in the case of Dresser Rand India P. Ltd. (supra) that the taxes were liability of the assessee- company under the terms of agreements and accordingly disallowance made by AO were deleted. Further, we also observe that liability of payment of service tax is of recipient of services and since assessee is the receiver of services, it is the liability of the assessee company to bear service tax. Hence we hold that TPO was not justified to state that liability of bearing service tax was of assessee-company. In view of above, we hold that disallowances made by TPO on account of taxes, services tax is not justified and we direct to delete the same. Hence, Ground Nos.12, 13 and 17 of the appeal taken by assessee are allowed.

12. Considering the decision of Tribunal in assessee's own case for A.Y. 2006- 07 in ITA No. 83/Mum/2011, which was followed in A.Y. 2008-09 in ITA No.133/Mum/2012 and in A.Y. 2009-10 in ITA No. 829/Mum/2014, on identical ground, we confirmed the order of ld. CIT(A). In the result, ground no.2 & 3 of the appeal are dismissed.

13. Ground No.4 relates to deleting the no how royalty paid on traded finished goods. The ld. AR submits that this ground of appeal is also covered by the decision of Tribunal in A.Y. 2002-03 in ITA No. 4092/Mum/2007 and ITA No. 4070/Mum/2007 dated 28.08.2013, which was followed by Tribunal in A.Y. 2006-07, 2007-08 and 2009-10. The ld. DR relied on the order of Assessing Officer.

14. We have considered the submission of the parties and find that in assessee's own case for A.Y. 2002-03 in ITA No. 4092/Mum/2007 and ITA No. 4070/Mum/2007, the Tribunal passed the following order:

49. We have considered the rival submissions, perused the orders of the lower authorities and the material evidence brought on record in the form of paper book. In assessee's appeal, we have already held that the agreements between J&J India and J&J USA for payment of royalty has to be considered in the light of the approval of the RBI. We do not find any substance in the findings of the TPO that there is no need for paying royalty for technical/marketing know-how.

ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd. We also do not find any force in the findings of the TPO that this royalty is deemed to be included in Brand royalty. The Ld. CIT(A) has rightly considered the relevant clauses of the agreement between J&J India and J&J USA. We, therefore, do not find any reason to interfere with the findings of the Ld. CIT(A).

15. Considering the decision of Tribunal in assessee's own case for A.Y. 2002- 03 in ITA No. 4092/Mum/2007 and in ITA No. 4070/Mum/2007, which was followed in A.Y. 2006-07 in ITA No.83/Mum/2011 and in A.Y. 2008- 09 and A.Y. 2009-10 in ITA No. 829/Mum/2014, on identical ground, we confirmed the order of ld. CIT(A). In the result, ground no.4 of the appeal is dismissed.

16. Ground No.5 relates to restricting technical no how and market services royalty @ 1% for manufactured goods. The ld. AR of the assessee submits that similar ground of appeal was adjudicated by Tribunal in assessee's own case for A.Y. 2006-07 in ITA No. 83/Mum/2011 and in A.Y. 2002-03 in ITA No. 4092/Mum/2007 and ITA No. 4070/Mum/2007. The ld. DR relied on the order of Assessing Officer.

17. We have considered the submission of the parties and find that in assessee's own case for A.Y. 2002-03 in ITA No. 4092/Mum/2007 and ITA No. 4070/Mum/2007, the Tribunal passed the following order: "55. We have considered the submissions and perused the orders. As we have already held hereinabove that the payment of royalty has to be considered in the light of the agreement between the assessee and J & J USA, for the same reasons, we do not find any reason to interfere with the findings of the ld. CIT(A)."

18. Further, on similar issue for A.Y. 2006-07 in ITA No. 83/Mum/2011 dated 05.02.2014 the tribunal passed the following order:

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55. We have considered the submissions and perused the orders. As we have already held hereinabove that the payment of royalty has to be considered in the light of the agreement between the assessee and J&J USA, for the same reasons, we do not find any reason to interfere with the findings of the Ld. CIT(A). Ground No. 2 is accordingly dismissed.

19. Considering the decision of Tribunal in assessee's own case for A.Y. 2002- 03 in ITA No. 4092/Mum/2007 and in ITA No. 4070/Mum/2007, which was followed in A.Y. 2006-07 in ITA No.83/Mum/2011 and in A.Y. 2008- 09 and A.Y. 2009-10 in ITA No. 829/Mum/2014, on identical ground, we confirmed the order of ld. CIT(A). In the result, ground no.5 of the appeal is dismissed.

20. Ground No.6 relates to disallowance of withholding of tax and research and development cess. The ld. AR of the assessee submits that similar ground of appeal was adjudicated by Tribunal in assessee's own case for A.Y. 2006-07 in ITA No. 83/Mum/2011 and in A.Y. 2002-03 in ITA No. 4092/Mum/2007 and ITA No. 4070/Mum/2007, which was further followed the A.Y. 2006-07, A.Y. 2008-09 & A.Y. 2009-10. The ld. DR relied on the order of Assessing Officer.

21. We have considered the submission of the parties and find that in assessee's own case for A.Y. 2002-03 in ITA No. 4092/Mum/2007 and ITA No. 4070/Mum/2007, the Tribunal passed the following order:

42. As we have already held elsewhere that royalty payments has been approved by RBI and therefore deserves to be allowed. Accordingly as the payments have been made in the light of the agreement with J&J US and as per the approval/guidelines of the RBI, we do not find any reason to disallow the tax and R&D Cess paid on technical royalty. We accordingly direct the AO to delete the addition made on this account.

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22. Considering the decision of Tribunal in assessee's own case for A.Y. 2002- 03 in ITA No. 4092/Mum/2007 and in ITA No. 4070/Mum/2007, which was followed in A.Y. 2006-07 in ITA No.83/Mum/2011 and in A.Y. 2008- 09 and A.Y. 2009-10 in ITA No. 829/Mum/2014, on identical ground, we confirmed the order of ld. CIT(A). In the result, ground no.6 of the appeal is dismissed.

23. Ground No.7 relates to disallowance of part of publicity and sale promotion expenses. The ld. AR of the assessee submits that this ground of appeal is covered by the decision of Tribunal in assessee's own case for A.Y. 2006- 07 in ITA No. 83/Mum/2011. The ld. AR further submits that ld. CIT(A) deleted the addition by following the decision of Tribunal in assessee's own case for A.Y. 2006-07. The ld. DR relied on the order of Assessing Officer.

24. We have considered the submission of the parties and find that in assessee's own case for A.Y. 2006-07 on similar ground in ITA No. 83/Mum/2011, the Tribunal passed the following order:

40. We have considered the order of the TPO/AO and the submissions of ld. Representatives of the parties. We observe that the TPO has suggested disallowance on the ground that the AE of the assessee viz J&J US is reaping the benefit of higher royalty amount as a result of higher sales realized by assessee by incurring higher expenses by way of publicity and sales promotion undertaken by assessee and therefore the parent company of the assessee- company should share some of the expenses. It is a fact that TPO while suggesting any disallowance/adjustment has to state that the transactions between the assessee-company and its AE is not at Arm's Length. The TPO is to determine the Arm's length by following one of the method and /or most appropriate method as prescribed in section 92C(1) of the Act. The TPO cannot suggest adjustment/disallowance on the basis of his assumptions that the payment is excessive though it is at arm's length. Similar issue was also considered by ITAT Mumbai Bench in the case of Kodak India Pvt. Ltd.(supra). Further, Rule 10B specifically provides the procedure to be followed for ITA No. 2547 Mum 2017 &

C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd. determining Arm's Length Price. We observe that the TPO while suggesting the disallowance of 200.82 Lakhs out of the expenses incurred by assessee on publicity and sales promotion has not followed any of the method and therefore the said adjustment/disallowance suggested by TPO is outside its jurisdiction. During the course of hearing, ld. DR submitted that the matter could be restored to TPO to decide afresh after considering the guidelines laid down by Special Bench (Delhi) in the case of L.G. Electronics India (P.) Ltd. (supra). Since no specific submissions were made and considering the fact that the assessee justified the payment of technical know-how royalty at the rate of 4% of net sales which is lower than Arm's length rate of 4.84% and the said fact, we have also discussed herein above in para 33 of this order, that the payment of royalty by assessee to its parent company is at Arm's Length, we do not find any justification to make the said disallowance of Rs.200.82 lakhs as suggested by TPO towards the shares to be contributed by AE of the assessee-company. Therefore, we delete the said disallowance made by AO by allowing ground No.18 of the appeal taken by assessee.

25. Considering the decision of Tribunal in assessee's own case for A.Y. 2006- 07 in ITA No.83/Mum/2011, on identical ground, we confirmed the order of ld. CIT(A). In the result, ground no.7 of the appeal is dismissed.

26. Ground No.8 relates to deleting the addition on account of unrecorded production. The ld. AR of the assessee submits that the Assessing Officer made addition of Rs. 4.28 Crore by rejecting actual wastage percentage and adopting ad-hoc wastage percentage as acceptable work and made addition on account of unaccounted sale. The ld. CIT(A) deleted the addition by following the order of earlier years as Assessing Officer has not brought anything on record to show that loss incurred by assessee is excessive. The ld. AR submits that a similar issue came up in assessee's own case for A.Y. 1993-94, wherein the then Assessing Officer directed for special audit. The special auditor after extensive study of production process did not find any issue against the assessee. Based on the Audit Report, no addition was made in A.Y. 1993-94. Copy of Assessment Order and Audit Report is ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd. placed on record. Further, based on the said Audit Report, no addition was made in A.Y. 1993-94. The ld. AR further submits that similar addition was made for A.Y. 2002-03 and the Tribunal on the basis of decision of A.Y. 1991-92 deleted the addition. By following the order of Tribunal, similar issue was decided in favour of assessee by Tribunal in A.Y. 2003-04 & A.Y. 2004-05. Copy of which placed on record. The ld. DR for the Revenue after going through the various as referred by ld. AR not disputed the factual position canvassed by ld. AR of the assessee.

27. We have considered the submission of the parties and find that in assessee's own case for A.Y. 2002-03 in ITA No. 4092/Mum/2007, the Tribunal passed the following order:

62. We have considered the rival submissions and perused the orders of the lower authorities. We have also perused the order of the Tribunal in assessee's own case for A.Y. 1991-92 in ITA No. 1146/M/97 wherein the Tribunal has held that the production loss depends on number of factors and in absence of any comparable to show that the loss shown by the assessee is excess and decided the appeal in favour of the assessee. We find that no evidence of purchase/sales outside the books of account have been brought on record. We, therefore, do not find any reason to interfere with the

findings of the Ld. CIT(A). Ground No. 3 is accordingly dismissed.

28. Considering the decision of Tribunal in assessee's own case for A.Y. 2002- 03 in ITA No.4092/Mum/2007, identical ground, we confirmed the order of ld. CIT(A). In the result, ground no.8 of the appeal is dismissed.

29. Ground No.9 relates to MODVAT credit relating to opening stock. The ld. AR of the assessee submits that it is settled legal position that to give impact to the provision of section 145A, in case tax, duty, cess or fees are ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd. added to the value of closing stock than opening stock also would have to be grossed up with excise duty. Otherwise, it would result into following a hybrid system of accounting i.e. neither the exclusive method nor inclusive method. The ld. AR submits that in assessee's own case for A.Y. 1999- 2000 in ITA No. 2680/Mum/2003, the similar issue was restored back to the file of Assessing Officer vide order dated 18.01.2013. Against the order of Tribunal, the revenue filed appeal before the jurisdictional High Court and the same has been rejected vide order dated 28.03.2016 in ITA No. 2197 of 2013 by following the ratio laid down by High Court in Mahalaxmi Glass Works Pvt. Ltd. [318 ITR 116]. The ld. AR further submits that by following the decision of Tribunal and High Court in assessee's own case, similar relief was granted to the assessee for A.Y. 2000-01, A.Y. 2001-02 in ITA No. 3289/Mum/2004 and ITA No. 9437/Mum/2004 and further in A.Y. 2002-03 in ITA No. 4092/Mum/2008, in A.Y. 2006-07 in ITA No. 83/Mum/2011, for A.Y. 2008-09 & A.Y. 2009-10. The ld. CIT(A) while granting relief to the assessee following the earlier years order.

30. On the other hand, the ld. DR for the Revenue relied upon the order of Assessing Officer.

31. We have considered the submission of the parties and have gone through the order of lower authorities. The ld. CIT(A) allowed relief to the assessee by following the decision of Hon'ble High Court in Mahalaxmi Glass Works (supra), which was also followed by his predecessors in A.Y. 2003-

ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd. 04 & A.Y. 2004-05. Considering the consistent view on the issue which was followed by ld. CIT(A), therefore, we do not find any justification to interfere in his order.

32. Ground No. 10 relates to disallowance of depreciation on testing equipment. The ld. AR submits that this ground of appeal is also covered by the decision of Tribunal in assessee's own case for A.Y. 2001-02 in ITA No. 9437/Mum/2004 vide order dated 05.02.2013. The revenue filed appeal before Hon'ble Bombay High Court and the same was dismissed vide order dated 04.07.2016 in ITA No. 2441 of 2013. By following the decision of Tribunal and Hon'ble High Court, the assessee was allowed similar relief in A.Y.2002-03, A.Y.2006-07, A.Y. 2008-09 & A.Y.2009-10. The ld. DR relied on the order of Assessing Officer.

33. We have considered the submission of parties and find that in A.Y. 2000- 01 in ITA No. 3287/Mum/2004, the co-ordinate bench of Tribunal passed the following order:

"21. The learned Counsel for the assessee contended that similar issue was raised in the case of assessee's sister concern, namely, NR Jet Enterprises Limited and the Tribunal vide its order dated 28th May, 2008 in ITA No. 4474/Mum/2004 has held that depreciation should be allowed on the testing equipment provided to laboratories and hospitals free of charge as the said equipments have been provided to the laboratories and hospitals for making profit from the sale of slides. The learned Departmental Representative did not contravene this position. Respectfully following the Tribunal order passed in another group concern of the assessee, whose facts have not been distinguished by the ld. DR, we uphold the impugned order on this issue."

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34. By following the decision of AY 2000-01, similar relief was allowed to the assessee in AYs 2001-02, 2002-03, 2006-07, 2008-09 and 2009-10. Therefore, keeping in view that consistent view was taken by the tribunal, therefore, we confirm the order of ld. CIT(A).

35. Ground No.11 relates to disallowance of 10% of payment made to Crawford Bailey & Co., the ld. AR of the assessee submits that Assessing Officer disallowed 10% of the payment made to Crawford Bailey & Co. under section 40A(2)(b) on the ground being excessive and unreasonable. The ld. AR submits that the payments were made to the independent counsel are not covered by the provision of 40A(2)(b). The ld. AR of the assessee also submits that this ground of appeal is also covered by the decision of Tribunal in assessee's own case for A.Y. 2002-03 in ITA No. 4070/Mum/2007 dated 28.08.2013. The revenue filed the appeal against the order of Tribunal for A.Y. 2002-03 and the same has been dismissed by Hon'ble High Court in ITA No. 1030/2014 dated 07.03.2017. And following the decision of A.Y. 2002-03, the similar relief was given to assessee in A.Y. 2006-07, A.Y. 2003-04 & A.Y. 2004-05. The ld. DR relied on the order of Assessing Officer.

36. We have considered the submission of the parties and have gone through the order of lower authorities below. We have noted that on similar ground for A.Y. 2002-03, the Tribunal passed the following order:

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72. Similar issue came up for hearing in assessee's appeal before the Tribunal in A.Y. 2001-02 in ITA No. 9437/M/04 wherein the Tribunal has deleted the addition mentioning that in order to make any disallowance u/s. 40A(2)(b), it is for the AO to bring on record some material to indicate that the payment was in fact excessive having regard to the fair market value of goods or services for the legitimate needs of the business. We find that during the year under consideration, The AO has disallowed invoking provisions of Sec. 40A(2)(b) on fees paid for legal counseling. We find that the Ld. CIT(A) has deleted the addition holding that for the payments for legal counseling, it is futile to think of comparables because counsels may not charge standard fee but may charge according to the issue involved. The Ld. CIT(A) further observed that if the AO wanted to disallow on the ground of excessive payment, he ought to have established excessiveness of the payment. This has not been done. Considering the decision of the Tribunal in assessee's own case, in the light of the

observations made by the Ld. CIT(A), we do not find any reason to interfere with the findings of the Ld. CIT(A). Ground No. 7 is accordingly dismissed.

37. Considering the decision of Tribunal in assessee's own case for A.Y. 2002- 03 in ITA No.4092/Mum/2007, which was followed in A.Y. 2006-07, A.Y. 2003-04 & A.Y. 2004-05, we confirm the order of ld. CIT(A). In the result, ground no.11 of the appeal is dismissed.

C.O. No. 47/Mum/2018 by assessee

38. Considering the fact that we have dismissed all grounds of appeal raised by revenue, the grounds of cross objection raised by assessee have become infructuous. Hence, dismissed.

39. In the result, appeal of the Revenue and Cross Objection of assessee are dismissed.

Order pronounced in the open court on 26/12/2018.

Sd/-
R.S. SHARMA
ACCOUNTANT MEMBER
Mumbai, Date: 26.12.2018
SK

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

ITA No. 2547 Mum 2017 & C.O. 47 Mum 2018-M/s Johnson & Johnson Pvt. Ltd. Copy of the Order forwarded to :

1. Assessee
3. The concerned CIT(A)
5. DR "K" Bench, ITAT, Mumbai
6. Guard File

2. Respondent
4. The concerned CIT

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai