

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'B', BANGALORE**

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER
AND**

SMT ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER

ITA No.1316 (Bang) 2011

(Assessment years : 2007 - 08)

M/s Nvidia Graphics Pvt. Ltd.,
(Assessment in the name of Portal Player (India) Pvt. Ltd.,
(Now merged with Nvidia Graphics Pvt. Ltd.),
C1 - "JACARANDA", Wing - A,
Manyata Embassy Business Park,
Outer Ring Road,
Bangalore - 560045
PAN : AABCP7418F

Appellant

Vs

The DCIT, Circle 12 (2),
Bangalore

Respondent

Assessee by : Shri Chavali Narayan, C. A.

Revenue by : Miss Neera Malhotra, CIT DR

Date of hearing : 17-10-2016

Date of pronouncement: : -11-2016

ORDER

PER SHRI A.K.GARODIA, AM

This appeal is filed by the assessee. This is directed against the assessment order dated 11.10.2011 passed by the A. O. u/s 143 (3) r.w.s. 144 C of The I T Act, 1961 for A. Y. 2007 - 08.

2. The Grounds raised by the assessee are as under:-

"Based on the facts and circumstances of the case and in law, NVIDIA Graphics Private Limited (hereinafter referred to as 'Appellant') respectfully craves leave to prefer an appeal against the order passed by Deputy Commissioner of Income-tax - Circle 12(2) ('AO') dated 11 October 2011 in pursuance of the directions issued by

Dispute Resolution Panel ('DRP'), Bangalore (dated 23 September 2011) under section 253 of the Income-tax Act, 1961 (,Act') in respect of the assessment made on Portal Player (India) Private Limited (now merged with NVIDIA Graphics Private Limited) on the following grounds:

That on the facts and circumstances of the case and in law,

I. the learned AO, based on directions of the Hon'ble DRP, has erred in assessing the total income at Rs. 1,89,02,851/- as against returned income of Rs. 15,74,004/- computed by the Appellant;

Grounds of appeal relating to corporate tax matters

2. the learned AO has erred in law by holding that the telecommunication expenses (i.e. leased line charges) attributable to the delivery of computer software outside India should be reduced from export turnover while computing the deduction under section 10A of the Act;

3. the learned AO has erred in law by holding that the travelling and conveyance expenses incurred in foreign currency are towards technical services rendered outside India and should be reduced from "export turnover" while computing the profits eligible for deduction under Section 10A of the Act;

4. the learned AO has erred in law by not considering that, if any expenditure is reduced from export turnover, on the principle of parity an equal amount should also be reduced from total turnover for computing the deduction under section 10A of the Act;

Grounds of appeal relating to transfer pricing matters

On the facts and in the circumstances of the case and in law:

5. the learned AO/Transfer Pricing Officer ('TPO') erred in making an addition of Rs. 1,57,38,352 to the total income of the Appellant on account of adjustment in the arm's length price of the software development services transaction entered by the Appellant with its associated enterprise;

6. the learned AO/TPO erred in disregarding the economic analysis undertaken by the Appellant and conducting a

fresh economic analysis for the determination of the arm's length price in connection with the impugned international transaction and holding that the Appellant's international transaction is not at arm's length;

7.the learned AO/TPO erred in determining the arm's length margin! price using only financial year 2006-07 data, which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements;

8.the learned TPO erred in obtaining information which was not available in public domain by exercising powers u/s 133(6) of the Act and relying on the information for comparability analysis;

9.the learned AO/TPO erred in rejecting certain comparables considered by the Appellant in the comparability analysis by applying different quantitative and qualitative filters;

a)the learned AO/TPO erred in rejecting certain comparables considered by the Appellant in the comparability analysis using 'onsite revenues greater than 75% of the export revenues' as a comparability criterion;

b)the learned AO/TPO erred in rejecting certain comparables considered by the Appellant in the comparability analysis using 'employee cost greater than 25% of the total revenues' as a comparability criterion;

c)the learned AO/TPO erred by rejecting certain comparable companies identified by the Appellant using turnover < Rs. 1 crore as a comparability criterion;

d)the learned AO/TPO erred in rejecting certain comparables considered by the Appellant in the comparability analysis on the ground that the comparables were having different accounting year (other than March 31 or companies whose financial statements were for a period other than 12 months);

e)the learned AO/TPO erred by rejecting certain comparable companies identified by the Appellant as having economic performance contrary to the industry behavior (e.g. companies which showed a diminishing revenue trend);

10.the learned AO/TPO erred in accepting/rejecting companies based on unreasonable comparability criteria;

11.the learned AO/TPO erred in not considering the

foreign exchange fluctuation gain (loss) in computing the operating margin of the Appellant as well as the comparable companies;

12.The learned AOITPO has erred, in law and in facts, by wrongly computing the operating /' margins of some of the comparable companies identified in the TP order;

13.the learned AOITPO erred in computing the working capital adjustment of the Appellant by not considering advances received from holding company of the Appellant;

14.the learned AOITPO erred in not making suitable adjustments on account of differences in the risk profile of the Appellant vis-a-vis the com parables, while conducting comparability analysis;

15.the learned AOITPO have erred in ignoring the fact that since that Appellant is availing tax holiday U/S 10A of the Act, there is no intention to shift the profit base out of India, which is one of the basic intention of the introduction of transfer pricing provisions;

16.the learned AOITPO erred in computing the arms length price without giving benefit of +1- 5 percent under the proviso to section 92C of the Act;

17.the learned AO erred in levying interest of Rs. 33,59,235 and Rs. 13,503 u/s 234B and 234C of the Act respectively;

18.the learned AO erred, in law, and in facts, in initiating penalty proceedings u/s 27 1 (1)(c) of the Act.

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law.

3. It is submitted by the learned AR of the assessee that Ground No. 1 is general and Grounds 2 & 3 are not pressed. Accordingly, Grounds 2 & 3 are rejected as not pressed and it is held that no separate adjudication is called for in respect of Ground No. 1.

4. Regarding Ground No. 4, he submitted that the issue involved in this ground is covered in favour of the assessee by the judgment of Hon'ble Karnataka High Court rendered in the case of Tata Elxsi Ltd as reported in 349 ITR 98. Respectfully following this judgment, we direct the A.O. to reduce the amount of expenditure reduced by him from Export turnover from Total Turnover also because this was held by Hon'ble Karnataka High Court that total turnover is sum total of domestic and export turnover and therefore, if an amount is reduced from export turnover, total turnover also gets reduced automatically by the same amount. This ground is allowed.

5.Regarding remaining grounds involving TP issues, he submitted that Grounds Nos. 5 to 8 and 9(a), 9 (b), 9 (d) & 9 (e) are not pressed and accordingly, these Grounds are rejected as not pressed. In respect of remaining grounds involving TP issues, he submitted that these issues may be restored back to the AO/TPO for a fresh decision because neither the assessee raised proper objections before DRP and nor DRP has properly adjudicated the matter. Learned DR of the revenue supported the orders of the authorities below.

6. We have considered the rival submissions. We find that in fact, neither the assessee raised proper objections before DRP and nor DRP has properly adjudicated the matter. We therefore, in the interest of justice, set aside the assessment order on these issues raised in

Ground 9 (c) and 10 to 16 and restore the matter back to AO/TPO for fresh decision after affording adequate opportunity of being heard to the assessee. These grounds are allowed for statistical purposes. Ground No 17 is consequential and Ground No. 18 is premature.

7. In the result, the appeal of the assessee is partly allowed in the terms indicated above.

8. Order pronounced in the open court on the date mentioned on the caption page.

**(SMT ASHA VIJAYARAGHAVAN
JUDICAL MEMBER**

Place: Bangalore:

D a t e d : .11.2016

am*

Copy to :

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

**(A.K. GARODIA)
ACCOUNTANT MEMBER**

By order

AR, ITAT, Bangalore

1.	Date of Dictation
2.	Date on which the typed draft is placed before the dictating Member
3.	Date on which the approved draft comes to the Sr. P. S.
4	Date on which the order is placed before the dictating Member for pronouncement
5.	Date on which the order comes back to the Sr. P.S.
6.	Date of uploading the order on website
7.	If not uploaded, furnish the reason for doing so.....
8.	Date on which the file goes to the Bench Clerk
9.	Date on which order does for Xerox & endorsement
10.	Date on which the file goes to the Head Clerk.....
11	The date on which the file goes to the Assistant Registrar for signature on the order.....
12	The date on which the file goes to the dispatch section for dispatch of the Tribunal order.....
13	Date of dispatch of order.....