

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER AND
SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER

IT(TP)A No. 1337/Bang/2014
Assessment Year :2009-10

M/s. NI Systems (India) Pvt. Ltd., 81/1 & 82/1, SalarpuriaSoftzone, Wing B, 5 th Floor, Block A, Bellandur, VarthurHobli, Bangalore – 560 103. PAN: AABCN 1159K	Vs.	The Deputy Commissioner of Income Tax, Circle – 12(2), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri P.K. Prasad, Advocate & Shri Umashankar Gautam, Advocate
Revenue by	:	Smt. Padmameenakshi, JCIT (DR)

Date of hearing	:	07.11.2017
Date of Pronouncement	:	10.11.2017

ORDER

Per Shri A.K. Garodia, Accountant Member

This is an assessee's appeal which is directed against the order of Id. CIT(A)-IV, Bangalore dated 03.09.2014 for Assessment Year 2009-10.

2. The grounds raised by assessee as per the revised grounds filed by the assessee are as under.

"1) The order passed by the Learned Deputy Commissioner of Income-tax, Circle 12(2), Bangalore ("Ld. AO") and Learned Commissioner of Income-tax (Appeals) - IV, Bangalore ["Ld. CIT(A)"]; to the extent prejudicial to the Appellant, is bad in law and liable to be quashed. [corresponding to original grounds of appeal ("GoA") No. 1]

2) The Ld. AO and Ld. CIT(A) erred in law and on facts in confirming the adjustment in the arm's length price of the international transaction with the associated enterprise by upholding the rejection of transfer pricing documentation of the Appellant and by accepting the comparability analysis performed by the learned transfer pricing officer ("Ld. TPO") : [corresponding to original GoA No. 2 and 3(a)]

3) *The Ld. CIT(A) erred in law and on facts by using the single year data pertaining to financial year 2008-09 available at the time of assessment proceedings instead of multiple year data used by the Appellant. [corresponding to original GoA No. 3(b) and 3 (c)]*

4) *The Ld. CIT(A) erred in law and on facts by not allowing adjustments on account of differences in the risk profile of the Appellant vis-a-vis of the comparable [corresponding to original GoA No. 3 (d)]*

5) *The Ld. CIT(A) erred in law and on facts by **including Bodhtree Consulting Ltd.** on the grounds of functional similarity, **whereas this comparable should be excluded** on the ground of functional dissimilarity and also highly fluctuating and abnormal profit margins [corresponding to original GoA No. 3 (e) and additional GoA No. 6 filed on February 21, 2017]*

6) *The Ld. CIT(A) erred in law and on facts by **including Kals Information Systems Ltd.** on the grounds of functional similarity, **whereas this comparable should be excluded** on the ground of being functionally dissimilar [corresponding to original GoA No. 3 (e)]*

7) *The Ld. CIT(A) erred in law and on facts by not including otherwise functionally similar comparables, namely, **Thinksoft Global Services Limited** and **FCS Software Solutions Limited**, which were excluded by the Ld. AO/ Ld. TPO on the basis of high working capital position of both these companies, alleging that it causes distortion in their mark-up [corresponding to original GoA No. 3(f)]*

8) *The Ld. CIT(A) erred in law and on facts by upholding the decision of the Ld. TPO to limit the working capital adjustment computation and thus not granting appropriate working capital adjustment for the Appellant [corresponding to original GoA No. 3 (g)]*

9) *The Ld. CIT(A) failed to follow the principle of natural justice in the course of appellate proceedings by not appreciating the additional time granted for filing the written submission till September 15, 2014 and erred in passing the order on September 03, 2014 (prior to filing the written submission by the Appellate) [corresponding to original GoA No. 4 (a)],*

10) *The Ld. CIT(A) failed to follow the principle of natural justice in the course of appellate proceedings by not addressing the Appellant grievance in full by not taking cognizance of written submission filed by the Appellant on September 04, 2014, i.e., well within the additional time granted by the Ld. CIT(A) [corresponding to original GoA No. 4 (b)]*

11) The Ld. CIT(A) erred in law and facts by upholding the order of the Ld. AO in charging interest under section 234B and 234C of the Income-tax Act, 1961. [corresponding to original GoA No. 5]"

3. It was submitted by Id. AR of assessee that as per revised grounds of appeal, ground nos. 1 to 4 and 9 to 10 are general and no adjudication is called for in respect of these grounds. He further submitted that as per ground no. 5, the assessee is requesting for exclusion of one comparable i.e. Bodhtree Consulting Ltd. and as per ground no. 6, the assessee is requesting for exclusion of one more comparable i.e. Kals Information Systems Ltd. and as per ground no. 7, the assessee is requesting for inclusion of two comparables i.e. Thinksoft Global Services Ltd. and FCS Software Solutions Ltd. Regarding ground no. 8, he submitted that in this ground, the grievance of the assessee is regarding upholding by CIT(A) of the decision of TPO to limit the working capital adjustment computation.
4. He submitted that the issue regarding exclusion of two comparables i.e. Kals Information Systems Ltd. and Bodhtree Consulting Ltd. is covered in favour of the assessee by the Tribunal's order rendered in the case of M/s. Infinera India Pvt. Ltd. Vs. ITO in IT(TP)A Nos. 1008& 977/Bang/2014, copy available on pages 1003 to 1023 of paper book. He also submitted a copy the tribunal order rendered in the case of M/s. AT & T Global Business Services India Pvt. Ltd. Vs. ITO in ITA No. 154/Bang/2014 dated 11.10.2017 for the same assessment year and submitted that in this order, the tribunal has followed the earlier tribunal order rendered in the case of M/s. Infinera India Pvt. Ltd. Vs. ITO (Supra) and decided the issue in favour of the assessee.
5. Regarding the assessee's claim for inclusion of two comparables, he submitted that this issue is covered in favour of the assessee by the tribunal order rendered in the case of VMware Software India Pvt. Ltd. Vs. DCIT in IT(TP)A No. 1311/Bang/2014 dated 06.01.2017, copy available on pages 957 to 1002 of paper book.

6. Regarding third issue i.e. of working capital adjustment, he submitted that this issue is covered in favour of the assessee by the tribunal order rendered in the case of VMware Software India Pvt. Ltd. vs. DCIT (Supra).
7. The Id. DR of revenue supported the order of CIT (A).
8. We have considered the rival submissions. First we decide the issue regarding the assessee's claim for exclusion of two comparables i.e. Bodhtree Consulting Ltd. and Kals Information Systems Ltd. As per the tribunal order rendered in the case of M/s. AT & T Global Services Pvt. Ltd. Vs. ITO (Supra), for the same assessment year, it was noted by tribunal that in that case also, the assessee was engaged in providing software development services. The tribunal in that case followed the tribunal order rendered in the case of M/s. Infinera India Pvt. Ltd. Vs. ITO (supra) and held that both these comparables i.e. Bodhtree Consulting Ltd. and Kals Information Systems Ltd. are not good comparables because these are functionally dissimilar. Respectfully following these tribunal orders, we hold that in the present case also, these two comparables are to be excluded from the final list of comparables.
9. Regarding the issue in respect of inclusion of two comparables i.e. Thinksoft Global Services Ltd. and FCS Software Solutions Ltd., we find that this issue is also covered in favour of the assessee by the tribunal order rendered in the case of VMware Software India Pvt. Ltd. Vs. DCIT (supra) and since no difference in facts could be pointed out by Id. DR of revenue, we hold that these two comparables should be included in the final list of comparables by respectfully following the judgment cited by Id. AR of assessee.
10. Regarding the third issue, the working capital adjustment, we find that this issue is also covered in favour of the assessee by the tribunal order rendered in the case of VMware Software India Pvt. Ltd. Vs. DCIT (Supra). Respectfully following the same, we direct the AO/TPO to decide the issue afresh regarding quantification of working capital adjustment in the light of this judgment. Accordingly ground nos. 5,6,7 and 8 are allowed in the terms indicated above.

11. In the result, the appeal filed by the assessee is partly allowed.

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

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member
Bangalore,
Dated, the 10th November, 2017.
/MS/

Sd/-
(ARUN KUMAR GARODIA)
Accountant Member

Copy to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Senior Private Secretary,
Income Tax Appellate Tribunal,
Bangalore.