

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

IT(TP)A No.144/Coch/2015 : Asst.Year 2010-2011

The Asst.Commissioner of Income-tax, Circle 1(1) Trivandrum.	Vs.	M/s.Navigant BPM (India) Private Limited (Formerly known as M/s.RevenueMed India (P) Ltd., Pamba Module No.A3, Technopark Campus, Kazhakoottam Trivandrum - 695 581 PAN : AACCR7900F
(Appellant)		(Respondent)

IT(TP)A No.146/Coch/2015 : Asst.Year 2010-2011
SA No.25/Coch/2018

M/s.Navigant BPM (India) Private Limited (Formerly known as M/s.RevenueMed India (P) Ltd., Pamba Module No.A3, Technopark Campus, Kazhakoottam Trivandrum - 695 581	Vs.	The Asst.Commissioner of Income-tax, Circle 1(1) Trivandrum.
(Appellant)		(Respondent)

Revenue by : Sri.Santham Bose
Assessee by : Sri.Raghunathan S, Advocate

Date of Hearing : 29.08.2018	Date of Pronouncement : 07.09.2018
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ORDER

Per George George K, JM

These cross appeals are directed against the final assessment order dated 29.12.2014 passed u/s. 143(3) r.w.s. 144C of the I.T. Act. The relevant assessment year is 2010-

2011. The assessee has also filed Stay Application seeking stay of outstanding tax arrears.

2. The Department has filed a letter seeking to withdraw the appeal filed by them. The learned AR representing the assessee did not have any objection. Hence the department's appeal (ITA No. 144/Coch/2015) is dismissed as withdrawn.

3. In assessee's appeal, 15 grounds and various sub-grounds are raised. However in the course of hearing, the learned AR had pressed for adjudication only Ground No. 7.1 and Ground No.14.

3.1 The assessee has also raised additional ground vide its petition dated 16.11.2015 and 13.11.2017. However additional ground raised vide petition dated 13.11.2017 was not pressed by the learned AR. The surviving grounds and the additional grounds read as under:-

Grounds:

"7.1 On the facts and circumstances of the case and in law, the learned AO/learned TPO and the Hon'ble DRP erred in accepting/selecting Informed Technologies Limited as a comparable company.

14. Without prejudice to the above, the appellant is an STP unit and is eligible for claiming deduction under section 10A of the Act. If the claim for deduction under section 10B of the Act is not allowed, the appellant be permitted to claim the deduction allowable under section 10A of the Act."

Additional Ground:

2.1 On the facts and circumstances of the case and in law, the learned A.O./TPO erred in computation of operating profit margins of the tested party.

4. We shall adjudicate the above grounds as follows:-

Ground No. 7.1 (Transfer Pricing)

4.1 In ground No.7.1, the assessee objects to TPO's selection of Informed Tech India Ltd. as a comparable company. According to the assessee, this company fails the TPO's filter adopted for selection of comparable companies. The TPO had adopted a filter that the revenue from IT related services should be more than 70% of the total revenue for selecting a company as comparable. According to the assessee the revenue generated by Informed Tech India Ltd. from IT related services is only 50% of its total revenue and therefore, fails the TPO's filter adopted for selection of comparables.

4.2 The Ld. DR present relied on the orders of the TPO and the DRP.

4.3 We have heard the rival submissions and perused the material on record. The assessee-company in its Transfer Pricing study had selected three companies as comparable. The TPO rejected the comparable selected by the assessee in its TP study. The TPO adopted fresh analysis and arrived at six companies wherein operating profit to operating cost was arrived at 25.78%. One of the six companies selected by the TPO was Informed Tech India Ltd. The TPO in his order dated 23.01.2014 had adopted certain filter in selecting the comparable companies. One of the filters adopted by the TPO is that the operating income should be more than 70% of total revenues. The copy of the order of the TPO is enclosed in the

paper book filed by the assessee. It is clear from reading of the TPO's order that he had adopted such a filter. This fact is endorsed by the DRP at para 5.1 of the impugned direction. We have gone through the financial statements of comparable company, namely, Informed Tech India Ltd., which is placed in the paper book filed by the assessee. It is clear from the financial statement of comparable company, namely Informed Tech India Ltd. that rental receipts was at 50% of the data outsourcing charges. Therefore, prima facie, we are of the view that Informed Tech India Ltd. does not qualify the filter adopted by the TPO himself. This plea of assessee now raised before us was not raised before the TPO. Functional dissimilarity between assessee-company and Informed Tech India Ltd. alone was the ground taken before the TPO, when he sought to include Informed Tech India Ltd. as a comparable company. We also notice from the objections raised before the DRP that there was only a broad contention raised against the inclusion of Informed Tech India Ltd. as a comparable company. Since Informed Tech India Ltd. prima facie does not satisfy the filter adopted by the TPO himself, in the interest of justice and equity, we are of the view that the matter is to be re-examined by the TPO. The assessee shall raise all the contentions before the TPO and shall place necessary evidence to prove its case that Informed Tech India Ltd. should not be adopted as a comparable company. Hence Ground No. 7.1 of the assessee is allowed for statistical purposes.

Ground No.14 (Corporate Tax)

5. The assessee-company had claimed deduction u/s 10B of the I.T.Act, an amount of Rs.1,53,15,376. The Assessing Officer denied deduction u/s 10B of the I.T.Act by placing reliance on the judgment of the Hon'ble Delhi High Court in the case of CIT v. Regency Creations Ltd. [27 Taxmann.com 32]. According to the A.O., the assessee's unit was not approved by an appropriate authority constituted u/s 14 of the Industrial (Development & Regulation) Act, 1951 and hence was not entitled to deduction u/s 10B of the I.T.Act. The assessee in course of assessment had made an alternative claim that it was entitled to deduction u/s 10A of the I.T.Act. However, the assessment order in regard to the claim of section 10A of the I.T.Act is silent. Before the DRP, objections were raised stating that the assessee's unit was approved by the Internal Ministry Standing Committee, which is a valid approval for the purpose of deduction u/s 10B of the I.T.Act. Further it was stated that the assessee was granted the benefit of deduction u/s 10B in the previous assessment years and it was contended that for the purpose of consistency, deduction u/s 10B of the I.T.Act, ought to be granted. Alternatively, it was submitted that the assessee was entitled to deduction u/s 10A of the I.T.Act, which is para material with section 10B of the I.T.Act. The DRP, however, rejected the objections of assessee on this issue. The DRP's direction is silent regarding the alternative claim made u/s

10A of the I.T.Act. Before us the assessee had reiterated the submissions made before the Assessing Officer and the DRP. The learned Departmental Representative, on the other hand, relied on the assessment order and the directions of the DRP.

5.1 We have heard the rival submissions and perused the material on record. In the following judicial pronouncements, it was held that section 10A of the I.T.Act is para material with section 10B of the I.T.Act.

- (i) M/s.US Technology International Pvt. Ltd. (ITA No.133/C/2016)
- (ii) M/s.QBurst Technologies P Ltd. (ITA Nos.172 & 173/Coch/2015)
- (iii) Cronos Consulting India (P) Ltd. (ITA No.105/Coch/2014)
- (iv) Device Driven (India) [TS-613-ITAT-2013 (Coch)]
- (v) Fast Booking (I) Private Limited (Delhi High Court) [TS-516-HC-2015 (Del.)]
- (vi) J.C.Infosoft Technologies (ITA No.1135/Del/2011)
- (vii) Valiant Communications Ltd. (ITA 438-441/2012) (Delhi HC).

5.2 In the above mentioned cases it was held that if section 10B is denied for the reason that units are not having necessary approval from the appropriate authority, the authorities are duty bound to consider the alternative claim of deduction u/s 10A of the I.T.Act and grant the same, if the conditions are satisfied as prescribed u/s 10A of the I.T.Act. The alternative claim of the assessee that it should be granted deduction u/s 10A of the I.T.Act was not considered by the Assessing Officer nor the DRP in its directions. Therefore, we deem it appropriate to remit the issue to the Assessing Officer

for fresh consideration. The Assessing Officer shall follow the dictum laid down by the above mentioned judicial pronouncements and shall grant deduction u/s 10A of the I.T.Act provided the conditions are satisfied by the assessee's unit as prescribed u/s 10A of the I.T.Act. It is ordered accordingly.

5.3 In the result, the ground No.14 filed by the assessee is allowed for statistical purposes.

Additional Ground (Transfer Pricing)

6. The issue raised in this ground is that operating profit margin of the assessee should also include the premium on forward exchange contract. The above said additional ground is a pure legal issue and facts for adjudicating the same are on record. The Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd. v. CIT [(1998) 229 ITR 383 (SC)]* had held that when additional ground is raised before an appellate authority, which is a purely legal and the facts on record, the appellate authority ought to have decided the legal issue raised in the additional ground. Therefore, going by the judgment of the Hon'ble Apex Court *National Thermal Power Co. Ltd.*, we admit the additional ground and proceed to adjudicate the same on merits.

6.1 The Transfer Pricing Officer in its order dated 23.01.2014 had excluded the foreign exchange gains while arriving at the Profit Level Indicator (PLI). Before the DRP, the

assessee had taken the ground that foreign exchange gains is part of the operating profit margin of the assessee. Further, the assessee in the additional ground before the DRP, had also raised a contention that premium on forward exchange contract is also to be considered as part of the operating margin of the assessee to arrive at the PLI. The DRP directed the TPO to include the foreign exchange gains while arriving at the assessee's PLI. However, the DRP did not give direction with regard to the objections of the assessee that premium on forward exchange contract has to be considered as part of the operating profit margin of the assessee. The Tribunal in the case of *Ambattur Clothing Ltd. v. JCIT (ITA Nos.1436 & 1643/Mads/14 & ITA No.910/Mds/2015)* had held that when premium on forward exchange contract is on account of proximity with the export turnover, the same should be taken as part of the operating profit margin. Since the DRP has not considered the specific plea of the assessee, in the interest of justice and equity, the matter needs to be considered by the TPO. The assessee is directed to place necessary evidence before the TPO to claim that premium on forward exchange contract is earned in the normal course of the business to hedge against fluctuations in foreign currency exchange rate and gains from such contract has to be considered while computing the PLI in the international transaction with the AE. It is ordered accordingly.

6.2 In the result, the additional ground raised is allowed for statistical purposes.

SA No.25/Coch/2018

7. Since the appeal is disposed off, the Stay Application filed by the assessee is dismissed as infructuous.

8. In the result (i) the appeal filed by the Revenue is dismissed as infructuous, (ii) the appeal filed by the assessee is allowed for statistical purposes and (iii) the Stay Application filed by the assessee is dismissed as infructuous.

Order pronounced on this 07th day of September, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 07th September, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The The Dispute Resolution Panel-II,
Bangalore.
4. The CIT Thiruvananthapuram.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin