

IN THE INCOME TAX APPELLATE TRIBUNAL

“B” BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER AND

SHRI LALIET KUMAR, JUDICIAL MEMBER

IT(TP)A No. 221/Bang/2015
Assessment Year : 2010-11

M/s. FNF India Private Limited (formerly known as FNF Business Process Outsourcing Services Private Limited), Survey No. 46 (P) & 47 (P), Electronic City, Phase – II, Hosur Road, Bangalore – 560 100. PAN: AAACP1100B	vs.	The Deputy Commissioner of Income-Tax, Circle – 3 (1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Vasudevan, Advocate
Respondent by	:	Ms. Neera Malhotra, CIT (DR)

Date of hearing	:	30.01.2019
Date of Pronouncement	:	31.01.2019

ORDER

Per Shri Chandra Poojari, Accountant Member

This appeal by assessee is directed against the assessment order passed u/s. 143(3) r.w.s. 144C of IT Act dated 30.12.2014 in consequence to DRP order passed u/s. 144C(5) of the Act dated 17.11.2014.

2. The assessee raised the following grounds.

“I. Transfer Pricing

1. The learned Deputy Commissioner of Income Tax (Transfer Pricing-IV), Bangalore ("Transfer Pricing Officer" or "learned TPO") grossly erred in determining an adjustment u/s 92CA of the Income-tax Act, 1961 to the Arm's Length Price ('ALP') of the international transaction entered into by the Appellant with its Associated Enterprises ("AEs") with respect to the Information Technology Enabled services ("ITeS").

2. *The Appellant aggrieved by the TPO Order further appealed before the Dispute Resolution Panel ("DRP") against the TPO order and subsequently, the learned Assessing Officer ("learned AO") issued the final assessment order with a transfer pricing ("TP") adjustment of INR 30,281,283/-*

3. *The learned AO / learned TPO erred in rejecting the TP documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act contending that the information or data used in the computation of the ALP is not reliable or correct. The learned AO/ learned TPO has grossly erred therefore in :*

3.a rejecting comparability analysis carried in the TP documentation and in conducting a fresh comparability analysis by introducing various filters in determining the ALP.

3.b rejecting companies that are functionally comparable to the Appellant while performing the comparability analysis. Specifically, the following companies ought to have been included as comparable:

- *Nittany Outsourcing Services Private Limited*
- *Datamatics Financial Services Limited*
- *R Systems International Limited*
- *Caliber Point Business Solutions Limited*
- *Ultramarine & Pigments Limited*
- *Jindal Intellicom Private Limited*

3.c including companies that do not satisfy the test of comparability. Specifically, the following companies selected as functionally comparable by the learned AO / learned TPO ought to have been rejected:

- *Accentia Technologies Limited*
- *Fortune Infotech Limited*
- *Jeevan Scientific Technology Limited*

4. *The learned AO / learned TPO has erred in application of employee cost filter of 25% by selecting Jeevan Scientific Technology Limited, which has an employee cost to sales ratio of 20.67%.*

5. *The learned AO / learned DRP erred in applying export earning filter of 75% instead of 25%.*

6. *The learned AO / learned DRP erred in rejecting ICRA Online Limited, a company functionally not comparable, by applying export earning filter.*

7. *The learned AO / learned TPO erred in not considering the multiple year / prior year financial data of comparable companies while determining the ALP.*

8. *The learned AO / learned TPO erred in application of different financial year ending filter.*

9. *The learned AO / learned TPO erred in using data as at the time of assessment proceedings, instead of that available as on the date of preparing the TP documentation for comparable companies while determining ALP.*

10. *The learned AO / learned TPO erred in not considering the provision for bad and doubtful debts as operating in nature.*

11. *The learned AO / learned TPO erred in computation of working capital adjustment.*

12. *The learned AO / learned TPO erred in ignoring the limited risk nature of the contractual services provided by the Appellant and in not providing an appropriate adjustment towards the risk differential, even when the full- fledged entrepreneurial companies are selected as comparable companies.*

II. Corporate Tax

1. Interest under Section 234B of the Act

The learned AO erred in levying interest under section 234B of the Act amounting to INR 4,726,839/- The levy of interest under section 234B of the Act is consequential in nature.

2. Interest under Section 234D of the Act

The learned AO erred in levying an additional interest under section 234D of the Act amounting to INR 165,275/-. The levy of interest under section 234D of the Act is consequential in nature.

The appellant craves leave to add, alter, rescind and modify the grounds provided herein above or produce further documents, facts and evidence before or during the course of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”

3. At the time of hearing, assessee not pressed ground nos. 1, 2, 3, 3(a), 4, 5, 6, 7, 8, 9, 10, 11 & 12. The Id. AR pressed only ground related to the comparables in 3(b) with reference to R Systems International Limited. Other five comparables viz., Nittany Outsourcing Services Pvt. Ltd., Datamatics Financial Services Ltd., Caliber Point Business Solutions Ltd., Ultramarine & Pigments Ltd. and Jindal Intellicom Pvt. Ltd. are not pressed.

4. The first ground for consideration in this appeal is with regard to considering R Systems International Ltd. as comparable.

5. The assessee has selected in the transfer pricing documentation R Systems International Ltd. as a comparable company since it is functionally comparable and passing all the filters applied by the assessee in the TP documentation. However the lower authorities rejected that company on the basis that it has different year ending. Against this assessee is in appeal before us. The Id. AR submitted that R Systems International Ltd. accounting period is January to December and assessee's accounting period is April to March, therefore that the assessee and R Systems International Ltd. were operating for a period of 12 months accounting cycle. Since they were facing similar business cycles, market and economic conditions, it is not possible to say that because of different accounting period it had any impact on its financials and resulted into distortion of comparability. Since use of different accounting period have no effect on the comparability parameters as mentioned in Rule 10B(2) of the IT Rules 1962, therefore it would be inappropriate to reject R Systems International Ltd. which is functionally comparable company only on the reason that it has different accounting period. He relied on the judgement of Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Mercer Consulting (India) Pvt. Ltd. in ITA No. 101 of 2015(O&M) dated 24.08.2016 wherein Hon'ble High Court held that

“the Rule 10(B)(4) does not exclude from consideration the data of an entity merely because its financial year is different from the financial year of the assessee. What the Rule requires is that the data to be used in analyzing the financial results of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the international transaction has been entered into. Thus, so long as the data relating to the financial year is available, it matters not, if the financial year followed is different. In the case before us the data relating to the relevant financial year of R.Systems International Limited is available. We are, therefore, entirely in agreement with the decision of the Tribunal that if the data relating to the financial year in which the international transaction has been entered into is directly available from

the annual accounts of that comparable, then it cannot be held as not passing the test of sub-rule(4) of rule 10B.”

6. On the other hand the Id. DR submitted that the accounting period of assessee and R Systems International Ltd. are different and hence the lower authorities have not considered R Systems International Ltd. as comparable. The same to be upheld. For this purpose she relied on the decision of Pune Bench of the Tribunal in the case of Schlumberger India Technology Centre (P.) Ltd. Vs. DDIT in ITA No. 640 (PUN.) of 2014 dated 10.01.2018 wherein held in para 21 as follows.

“21. Now, coming to the concern Jindal Intellicom Pvt. Ltd. The case of assessee before us is that the said concern has different financial year than the one of assessee. The Assessing Officer had applied the current year data as contemporaneous data to be used for benchmarking the arm's length price of international transactions of assessee. The assessee had prepared its financial statements for the financial year starting from 1st April, 2009 to 31st March, 2010. The case of assessee before us is that Jindal Intellicom Pvt. Ltd. has prepared its financial statements for period of 15 months and the same is not to be selected in the final set of comparables.

22. We find that the Pune Bench of Tribunal in the case of BMC Software India Pvt. Ltd. Vs. DCIT in ITA No.1425/PN/2010, relating to assessment year 2006-07, order dated 16.03.2016 had rejected the concern having 15 months financials.

23. The Hon'ble Bombay High Court in the case of CIT Vs. PTC Software (I) Pvt. Ltd. in Income Tax Appeal No.732 of 2014 had also held that the comparable data should pertain to the same financial year. Accordingly, we hold that the margins of concern having different accounting period cannot be selected for benchmarking international transactions and the same is to be excluded from the final set of comparables. Accordingly, we direct the Assessing Officer to exclude Jindal Intellicom Pvt. Ltd.”

7. We have heard both the parties and perused the material on record. As rightly pointed out by the Id. AR, Rule 10(B)(4) does not exclude from consideration the data of an entity merely because its financial year is different from the financial year of the assessee. What the Rule requires is that the data to be used in analyzing the financial results of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the

international transaction has been entered into. Thus so long as the data relating to the financial year is available, it matters not, if the financial year followed is different. In the case before us the data relating to the relevant financial year of R.Systems International Limited is available. We are, therefore, entirely in agreement with the decision relied by Id. AR that if the data relating to the financial year in which the international transaction has been entered into is directly available from the annual accounts of that comparable, then it cannot be held as not passing the test of sub-rule(4) of rule 10B and the same is the view taken by Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Mercer Consulting (India) Pvt. Ltd. (supra). Being so, in our opinion data relating to the assessee financial year to be interpolated and thereafter if required, it should be considered as a comparable to the assessee's case. With this observation we remit this issue to the file of TPO for his fresh consideration.

8. The next ground of appeal is with regard to exclusion of Accentia Technologies Limited as comparable. The Id. AR submitted that

- Accentia is engaged in rendering IT enabled services in the fields of medical transcription, billing and coding. Further it is evident from the website of the company, that the company develops its own software products for Business Process Outsourcing. Furthermore, Accentia is the first company to offer Software as Service model in the Healthcare Receivables Management area. However, the company has not provided any segmental data. Hence, the Company cannot be considered comparable to the assessee.
- Accentia possesses brand value/ IPRs as reflected in the Financial Statements, which will tend to influence the pricing policy and thereby directly impacting the margins earned.
- Accentia has acquired the IQ Group of companies of United Kingdom consisting of three companies, Tactiq Ltd., Centric Ltd. and Neologiq Ltd and also amalgamated Ascent Infoserve. Owing to these extra ordinary events, Accentia should not be considered comparable to the assessee.

Further, the IQ Group of companies are engaged in Full Product

Development Lifecycle involving Electronic Design and development, Software Design and Development and separate validation service, and User Interface Design and Implementation and Product Development Consultancy and Troubleshooting involving Systematic Technology Consultation software product design and development services.

- The assessee also provided the workings highlighting the abnormal fluctuations in revenues and profits of Accentia for a 5 year period.

9. He submitted that the assessee does not agree to the acceptance of Accentia as a comparable company since it not only provides ITES but it is also into software products development and provides software as service. Also, the learned TPO in order to suit his own requirements and needs has accepted Accentia as a comparable.

9.1 The Id. DR submitted that as per its Annual Report the assessee's operation includes medical transcription, medical coding, billing and receivable management (collection) all are integral part of the health care BPO services termed as HRCM Services. In regard to revenue recognition, the objection cannot be upheld in view of the financial reporting narrated in annual report wherein it was mentioned that company shall prepare and maintain its accounts fairly and accurately in accordance with the accounting and the financial reporting Question of segmental information does not arise as per the annual report, the company has only one segment.

10. We have heard both the parties and perused the material on record. The main contention of Id. AR is this Accentia Technologies Ltd. is functionally not comparable to assessee, which is a BPO. The segmental data relevant to software services and product ITES are not available in the annual report. That company own intangibles. These facts were considered in the case of the coordinate bench in the case of Outsource Partners International Pvt. Ltd. Vs. DCIT in IT(TP)A No. 337/Bang/2015 dated 06.02.2017 and held that it cannot be a comparable case as in the case of assessee. Being so, we uphold the argument of Id. AR and direct the TPO to exclude the above comparable.

11. The next ground of the appeal of the assessee is with regard to exclude Fortune Infotech Limited as comparable. The Id. AR submitted that that company uses web based software, unique technology and technical knowhow imported from its business partners for providing BPO services. He relied on the decision of coordinate bench of the Tribunal in the case of Outsource Partners International Pvt. Ltd. Vs. DCIT (supra).

11.1 On the other hand, Id. DR submitted that on examination of the annual report of Fortune Infotech Ltd., it was noticed that there is no mention in the annual report about the import of the unique technology and technical knowhow from the business partners. Even otherwise, every company is required to use the software and technology for providing ITES services and therefore, above company is to be considered as comparable to the assessee's case. The Id. DR relied on the directions of DRP.

12. We have heard both the parties and perused the material on record. As discussed in earlier year this comparable Fortune Infotech Ltd. was rejected as a comparable in the case of Outsource Partners International Pvt. Ltd. Vs. DCIT (supra) and it was held that it cannot be a comparable. Accordingly, we direct the AO/TPO to exclude the same.

13. The next ground is with regard to exclusion of Jeevan Scientific Technology Limited in ground no. 3(c). This ground does not require any adjudication in view of our findings with regard to issue raised in additional ground.

14. The assessee has raised additional ground and submitted the reason for raising an additional ground as follows.

“Ground No. 4A: Jeevan Scientific Technology Ltd. (hereinafter referred to as "Jeevan Scientific") should be rejected as it fails service income filter of 75% as applied by the Ld. TPO.

The Appellant submits that income from ITES activities for Jeevan Scientific is less than 75% of the total operating income and therefore Jeevan Scientific does not qualify the service income filter as applied by the TPO and therefore is not comparable to the Appellant.

Reason for filing Additional Ground of Appeal

The Appellant in the Form 36B has taken a generic ground for rejection of Jeevan Scientific on comparability and employee cost filter. However, in order to bring out a more specific argument for exclusion of Jeevan Scientific we would like to bring to your kind attention that Jeevan Scientific fails the service income filter applied by the TPO himself and therefore cannot be comparable to the Appellant. On the above basis, we humbly request the Hon'ble Bench members to reject the above-mentioned company from the final set of comparable.

Ground No. 5A: DRP has on its own modified the filter i.e., export earning filter

The Appellant submits that the Appellant and the Ld. TPO has unilaterally applied 25% export earning filter but the DRP has on its own applied export earning filter of 75% and rejected the company which were not disputed either by the Appellant or by the Department before the DRP.”

15. The Id. AR submitted that admittedly the assessee raised that in ground no. 3 for exclusion of Jeevan Scientific Technology Limited and also in ground no. 5 with regard to applying export earning filter of 75% instead of 25%. However assessee has raised additional ground for exclusion of Jeevan Scientific Technology Limited on the basis that income from ITES activities of Jeevan Scientific Technology Ltd. is less than 75% of the total income and therefore Jeevan Scientific Technology Ltd. does not qualify the service income treated as applied by the TPO. Hence it is to be excluded as comparable to the assessee's case. In our opinion this is not additional ground but only modified ground so as to facilitate proper adjudication of the issue. Hence, we are inclined to admit this ground in the interest of justice.

16. The Id. AR submitted that Jeevan Scientific Technology Ltd. cannot be considered as comparable to the assessee's case as it fails service income filter of 75% as applied by the TPO. It is also submitted that DRP has itself excluded ICRA Online Ltd. as comparable but the fact that 75% of export earning filter needs to be applied as against 25% of export earning filter applied by the TPO. Therefore in our opinion these facts required to be examined by the TPO and if it is so ICRA Online Ltd. was excluded as comparable, this comparable is also to be excluded on the same basis. Accordingly, this issue is remitted to TPO for fresh consideration with this observation.

17. With regard to levy of interest u/s. 234B and 234D of IT Act which are consequential and mandatory in nature to be computed accordingly.
18. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Pronounced in the open court on this 31st day of January, 2019.

Sd/-
(LALIET KUMAR)
Judicial Member

Sd/-
(CHANDRA POOJARI)
Accountant Member

Bangalore,
Dated, the 31st January, 2019.
/MS/

Copy to:

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

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.