

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

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER  
AND  
SHRI NARENDRA KUMAR CHOUDHURY, JUDICIAL MEMBER

|                            |
|----------------------------|
| IT(TP)A No. 1541/Bang/2012 |
| Assessment year : 2007-08  |

|   |     |  |
|---|-----|--|
| NMS Communications Private Limited,<br>No. 16/1, I Floor,<br>Cambridge Road, Halasuru,<br>Bangalore<br><b>PAN: AAACO6535D</b> | Vs. | Deputy Commissioner of Income Tax,<br>Circle-12(2),<br>Bangalore |
| APPELLANT   |     | RESPONDENT   |

|             |   |                          |
|-------------|---|--------------------------|
| Assessee by | : | Shri Mahavir C. Jain, CA |
| Revenue by  | : | Ms. Neera Malhotra, CIT  |

|                       |   |            |
|-----------------------|---|------------|
| Date of hearing       | : | 15-03-2016 |
| Date of Pronouncement | : | 18-03-2016 |

**ORDER**

*Per B. Ramakotiah, Accountant Member*

This appeal by assessee is against the order of the Assessing Officer (AO) u/s. 143(3) r.w.s. 144C consequent to the directions of Dispute Resolution Panel [DRP].

2. Briefly stated, assessee, NMS Communications Private Limited was in the business of software development services. The return of income for the AY. 2007-08 was selected for scrutiny assessment and the AO has referred the international transactions with AE reported by assessee for the said assessment year to the TPO to determine the Arm's Length Price

(ALP). The AO reduced the leased line charges of Rs. 25,76,545/- and travelling expense in foreign currency of Rs. 1,02,30,194/- from the 'export turnover' but not from the 'total turnover', which resulted in reduction of claim u/s. 10A of the Act to the tune of Rs. 17,41,860/-. Thereafter, the AO denied the entire deduction u/s. 10A of the Act on the ground that assessee did not furnish the Foreign Inward Remittance Certificate copies (FIRC) to substantiate the fact that export proceeds were realized within the permitted time. The AO passed a draft assessment order u/s. 144C of the Act dt. 24<sup>th</sup> December, 2010 with the following adjustments:

|  | Rs.         |
|--|-------------|
| Total income as returned by assessee   | 7,000       |
| Add: Adjustments:  |             |
| 1. Transfer Pricing adjustment   | 1,11,77,183 |
| 2. Denial of tax holiday u/s. 10A of the Act on account of non-production of FIRCs and reduction in tax holiday on account of difference of opinion of the term 'export turnover'. | 2,35,83,305 |
| Assessed Income  | 3,47,67,488 |

2.1. Assessee preferred an appeal before the DRP against the said draft order. DRP upheld the transfer pricing adjustment and reduction in tax holiday claim on account of the term 'export turnover'. However, with regard to disallowance of entire tax holiday claim on account of non-production of FIRC's directed the AO to grant sufficient opportunity to produce documents in support of tax holiday claim being a factual issue. Pursuant to the directions, opportunity was given by the AO to produce documents. Assessee produced FIRC's copies, reconciliation statements

along with the details of invoices. However, this time the AO disallowed the entire Section 10A claim on the ground of non-production of invoices. Accordingly, AO passed final order on 28<sup>th</sup> October, 2011 making the adjustments as mentioned in the table herein above. Being aggrieved by the above impugned order of DRP/AO, assessee has preferred this appeal before the ITAT.

3. *Condonation of delay:* The appeal was filed with a delay of 335 days with a petition for condonation of delay. It was submitted that assessee-company ceased its operations in the year 2009 and appointed authorized person to represent the company. The appointed AR suddenly withdrew the representation and the AO was informed accordingly. The company came to know about these facts after TRO started recovery proceedings on erstwhile directors and then company took steps to appoint a new AR, obtain copies of orders from the AO and prepared present appeal. It was submitted that the proceedings took considerable time and company has taken steps immediately on coming to know of orders. It was also submitted that in the later years orders were passed ex-parte and Ld.CIT(A) has condoned the delay and matter was adjudicated. Considering the submissions and examining the facts as placed on record, we are convinced that assessee has reasonable cause in not filing the appeal in time and so the delay in filing the appeal is condoned and appeal is admitted.

Corporate matters:

4. Ground No. 2 raised by assessee is on denial of deduction u/s. 10A on the ground of non-production of export invoices. At the draft assessment order stage, AO denied the deduction u/s. 10A on the reason that Form 56A supporting foreign inward remittances (FIRC's) were not produced. On objection from assessee and furnishing of copies, DRP directed the AO to examine the same and allow deduction. AO, however, denied the entire deduction on the reason of non-production of invoices inspite of submission of FIRC's, list of invoices along with re-conciliation statement. It was submitted that assessee is prepared to submit the invoices for verification and further submitted that on similar lines, assessee could produce the invoices in later year before AO in remand proceedings and Ld.CIT(A) has accepted the same. There was no appeal by Revenue on the issue in later year.

4.1. After considering the same, we are of the opinion that AO has wrongly disallowed the claim. Initially, the claim was disallowed on non-production of FIRC's. In the post DRP proceedings, the disallowance was made on non-production of invoices. We are not convinced with reasons stated by the AO. In fact, his order states that assessee has shown invoice value to the extent of Rs. 17,11,75,098/- as against Rs. 17,33,92,390/- and balance was reconciled. Be that as it may, now assessee undertakes to produce the copies of invoices to the AO. Therefore, without going into the

merits of action of AO, we direct the AO to examine the same and allow the claim. The issue of claim of 10A is accordingly set aside to the AO for that limited purpose. Ground is accordingly allowed for statistical purposes.

5. Ground No. 3 is also on the issue of claim of deduction u/s. 10A. AO excluded leased line charges of Rs. 25,76,545/- and travelling expenses of Rs. 1,02,30,194/- respectively from the export turnover but has not reduced from the total turnover. DRP did not however, grant relief even though the issue was already decided by that time by various orders of ITAT. This issue was already decided by the jurisdictional Hon'ble High Court in the case of Tata Elxsi Ltd., Vs. CIT,342 ITR 98 (Kar) wherein it was held that whatever expenses reduced from export turnover should also be reduced from total turnover, while computing the deduction u/s. 10A of the Act. We direct the AO accordingly. Ground is allowed.

TP adjustment:

6. Assessee has rendered software development services to an extent of Rs. 17.34 crores with a net cost plus margin of 15.65%. TPO has selected 26 comparables and proposed TP adjustment of Rs.1,11,77,183/-. DRP confirmed the same. Assessee has raised various sub-grounds in Ground No. 4 but during the course of arguments, Learned Counsel restricted the arguments to Ground No. 4(g) on comparability of certain

companies selected by TPO. Other grounds are not pressed therefore, treated as withdrawn.

6.1. The final selection of comparables are as under:

| Sl.No. | Company Name                                | Sales<br>(Rs. Cr) | OP to<br>Total Cost % |
|--------|---|-------------------|-----------------------|
| 1.     | Accel Transmatic Ltd (Seg)                  | 9.68              | 21.11                 |
| 2.     | Avani Cimcon Tech. Ltd.,                    | 3.55              | 52.59                 |
| 3.     | Celestial Labs Ltd.,                        | 14.13             | 58.35                 |
| 4.     | Datamatics Ltd.                             | 54.51             | 1.38                  |
| 5.     | E-Zest Solutions Ltd.,                      | 6.26              | 36.12                 |
| 6.     | Flextronics Software Systems Ltd (Seg)      | 848.66            | 10.71                 |
| 7.     | Geometric Ltd (Seg)                         | -158.38           | 10.71                 |
| 8.     | Helios & Matheson Information Tech Ltd      | 178.63            | 36.63                 |
| 9.     | iGate Global Solutions Ltd.,                | 747.27            | 7.49                  |
| 10.    | Infosys Technologies Ltd                    | 131.49            | 40.30                 |
| 11.    | Ishir Infotech Ltd                          | 7.42              | 30.12                 |
| 12.    | KALS Information Systems Ltd (Seg)          | 2.00              | 30.55                 |
| 13.    | LGS global Ltd (Lanco global Solutions Ltd) | 45.39             | 15.75                 |
| 14.    | Lucid Software Ltd                          | 1.70              | 19.37                 |
| 15.    | Mediasoft Solutions Ltd                     | 1.85              | 3.66                  |
| 16.    | Megasoft Ltd.,                              | 139.33            | 60.23                 |
| 17.    | Mindtree Ltd.,                              | 590.35            | 16.90                 |
| 18.    | Persistent Systems Ltd.,                    | 293.75            | 24.52                 |
| 19.    | Quntegra Solutions Ltd.,                    | 62.72             | 12.56                 |
| 20.    | RS Software (Ind.) Ltd.,                    | 101.04            | 13.47                 |
| 21.    | R Systems International Ltd (Seg)           | 112.01            | 15.07                 |
| 22.    | Sasken Communication Tech. Ltd (Seg)        | 343.57            | 22.16                 |
| 23.    | SIP Tech. & Exports Ltd.,                   | 3.80              | 1.99                  |
| 24.    | Tata Elxsi Ltd (Seg)                        | 262.58            | 26.51                 |
| 25.    | Thirdware Solutions Ltd.,                   | 36.08             | 25.12                 |
| 26.    | Wipro Ltd., (Seg)                           | 9616.09           | 3.65                  |
|        | Arithmetic mean                             |                   | 25.14                 |

6.2. Out of the above, assessee has not objected to certain comparables and also those which are not objected to before DRP/TPO, even though some other companies were also excluded by the orders of ITAT in various other similarly placed companies. Therefore, the agreed list of companies by assessee are as under:

- i. Datamatics Ltd., (Sr.No.4)

- ii. Flextronics Software Susters (Seg) S.No. 6
- iii. Geometric Ltd., (Seg) S.No. 7
- iv. Igate Global Solutions Ltd., S.No. 9
- v. LGS Global Ltd., S.No. 13
- vi. Mediasoft Solutions Ltd., S.No. 15
- vii. RS Software (India) Ltd., S.No. 20
- viii. R Systems International Ltd., S.No. 21
- ix. Sasken Communication Techn Ltd., S.No. 22
- x. SIP Technologies & Exports Ltd., S.No. 23

6.3. With reference to the balance of companies from the above list in para 6.1, it was submitted that they are functionally different and were excluded by various orders of Co-ordinate Benches in the following cases:

- i. I2 Technologies India Pvt. Ltd., Vs. DCIT  
in IT(TP)A No. 1189/Bang/11;
- ii. NXP Semiconductors India P. Ltd., Vs. DCIT  
in IT(TP)A No. 1174/Bang/2011; and
- iii. Trilogy E Business Software India P. Ltd., Vs. DCIT  
in IT(TP)A No. 1057/Bang/2011

6.4. We have considered the detailed objections placed on record by way of a chart and Co-ordinate Bench decisions. We do not intend to repeat the findings in various coordinate Benches orders. Suffice to say that the following companies are excluded for the brief reasons stated against the company:

|     |  |  |
|-----|--|--|
| 1.  | Accel Transmatics Ltd (Seg)                    | Functionally different. product/design company.                                    |
| 2.  | Avani Cimcon Technologies Ltd.,                | Functionally different.. Product based company.                                    |
| 3.  | Celestial Labs Ltd.,                           | Functional dissimilarity. product based company.                                   |
| 4.  | E-Zest Solutions Ltd.,                         | Functional dissimilarity. product development service company.                     |
| 5.  | Helios & Matheson Information Technology Ltd., | Functional dissimilarity. engaged in sale of software.                             |
| 6.  | Infosys Technologies Limited                   | Functional dissimilarity. high turnover. High end products, brand name etc.,       |
| 7.  | Ishir Infotech Pvt Ltd.,                       | Functional dissimilarity. product company.   |
| 8.  | Kals Information Systems Ltd.,                 | Functional dissimilarity. development of software products                         |
| 9.  | Lucid Software Ltd.,                           | Functional dissimilarity development of soft products & R&D activity.              |
| 10. | Persistent Systems Ltd.,                       | Functional dissimilarity. out sourced software development. No segmental data      |
| 11. | Quintegra Solutions Ltd.,                      | Functional dissimilarity. focus on software development and consultancy services.  |
| 12. | Tata Elxsi Ltd., (Seg)                         | Functional dissimilarity. products, design services, high end services.            |
| 13. | Thirdware Solutions Ltd.,                      | Functional dissimilarity. software and product development trading and licenses.   |
| 14. | Wipro Ltd., (Seg)                              | Functional dissimilarity, wide range of services, products design and consultancy. |

We direct the TPO to exclude the above comparables.

6.5. One comparable, Megasoft Ltd., is functionally comparable but Co-ordinate Benches are directing TPO to consider segmental details of software development services only. In case of non-availability of data of segment, TPO may consider excluding it from the comparability list.

6.6. TPO is directed to rework out the Arithmetic Mean of accepted companies and prepare adjustment, if any required after considering the proviso to Section 92C(2). With these directions, the Ground No. 4(g) is considered allowed.

7. In the result, appeal is treated as allowed for statistical purposes.

Pronounced in the open court on this 18<sup>th</sup> day of March, 2016

Sd/-

(NARENDRA KUMAR CHOUDHURY)  
Judicial Member

Sd/-

(B. RAMAKOTAIAH)  
Accountant Member

Bangalore,  
Dated, the 18<sup>th</sup> March, 2016.

TNMM

Copy to:

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

By order

Assistant Registrar,  
ITAT, Bangalore.