

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad**

**Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member**

ITA No.407/Hyd/2015
(Assessment Year: 2010-11)

TNS India Private Ltd Hyderabad PAN: AABCN2278F (Appellant)	Vs	Asstt. Commissioner of Income Tax, Circle 2(2) Hyderabad (Respondent)
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For Revenue :	Shri J. Siri Kumar, DR
For Assessee:	Shri Ravi Bharadwaj

Date of Hearing:	04.10.2018
Date of Pronouncement:	28.11.2018

ORDER

Per Smt. P. Madhavi Devi, J.M.

This is assessee's appeal for the A.Y 2010-11 against the final assessment order dated 25.02.2015 passed by the AO u/s 143(3) r.w.s. 92CA (4) r.w.s. 144C(13) of the Act. The assessee has raised the following grounds of appeal:

"Based on the facts and circumstances of the case and in law, the learned Assessing Officer ("AO") / Learned Transfer Pricing Officer ("TPO") and the Hon'ble Dispute Resolution Panel ('DRP') erred in:

TRANSFER PRICING MATTERS:

Rejection of TP documentation maintained and undertaking fresh economic analysis

1. Rejecting the transfer pricing documentation maintained by the Appellant in accordance with the provisions of the Income-tax Act, 1961 ('Act') read with the Income Tax Rules, 1962 ('Rules') and making an adjustment of Rs.

12,85,58,406 to the international transactions with Associated Enterprises ('AE's').

Aggregating market research business and ITES transactions

2. a) *Aggregating Market Research ('MR') business with Information Technology Enabled*

Services ('ITES') business of the Appellant which are distinct and separate, for determining the ALP of the services to the AE's.

b) *Rejecting the segmental financials of the Appellant for MR services and ITES transactions.*

Rejection of Internal Transactional Net Margin Method ('TNMM') for determining ALP

3. *Without prejudice to Ground 2, not applying TNMM to the internal uncontrolled transactions of the Appellant for determining the ALP.*

ALP for management fees and license fees

4. *Determining the ALP of management fees and license fees paid to its AEs as 'Nil'.*

Rejection of use of multiple year data

5. *Rejecting the use of multiple year data and using data for FY 2009-10 only.*

Use of additional filters

6. *Inter-alia use of the following additional filters in undertaking the comparative analysis and rejecting comparable companies having:*

a) *Diminishing revenue/Persistent loss filter; and*

b) *Different financial year-end filter.*

Selection of companies

7. *Not undertaking an objective comparative analysis and inter-alia selecting the following companies as comparable:*

a) *Accentia Technologies Ltd;*

b) *Acropetal Technologies Ltd (Seg);*

c) *Crossdomain Solutions Pvt. Ltd.*

d) *Eclerx Services Ltd;*

e) *Infosys BPO Ltd;*

f) *TCS e-Serve International Ltd;*

g) *TCS e-Serve Ltd; and*

8. *Directing the TPO/ AO to reject two companies namely M/s Infosys Technologies Ltd and L&T Infotech Ltd without appreciating the fact that the said companies were not selected by the TPO.*

Rejection of comparables

9. *Not undertaking an objective comparative analysis and inter-alia rejecting the following comparable ITES companies:*

a) *CC-YAK Software and Exports Ltd (Seg);*

b) *Caliber Point Business Solutions Limited (Seg);*

c) *R Systems International Limited (Seg); and*

d) *Microland Ltd.*

Margin computation of comparables

10. *Excluding provision for bad and doubtful debts in computing the net margin under TNMM for certain comparables.*

Negative Working capital adjustment

11. a) *Making a negative working capital adjustment by considering incorrect receivables and payables.*

b) *Without prejudice, making a negative working capital adjustment without appreciating the fact that the Appellant does not bear any working capital risks.*

Adjustment for risk differences

12. *Not adjusting the net margins of the comparable companies taking into account the functional and risk differences between the international transaction of the Appellant and the comparable transactions in accordance with the provisions of Rule 10B(l)(e) of the Rules.*

No incentive to shift profits

13. Ignoring the fact that the Appellant is availing tax holiday u/s 10A of the Act in respect of part of its operations and there is no motive or reason to shift profits out of India, which is the basic intention of introducing transfer pricing provisions.

CORPORATE TAX MATTERS

Capitalizing expenses on software licence fee

*14. (a) Disallowing the expenditure of Rs. 3,45,18,636 on software licence fees, by considering the same as capital in nature; and
(b) Without prejudice to the above, in granting depreciation on software licence fees at 25% instead of 60%.*

Disallowing advances written off

15. Disallowing the amount of Rs. 2,07,53,684 claimed as advances written off.

TDS credit

16. Allowing credit of TDS of Rs. 6,54,93,323 instead of Rs. 6,87,39,406 as claimed in the Return of Income.

Imposition of interest

17. Calculation of interest u/s 234D of the Act on the excess refund issued u/s 143(1).

Initiating penalty proceedings

18. Initiating penalty proceedings u/s 271(1)(C) of the Act”.

2. In addition to the above, the assessee has also raised the following additional grounds of appeal:

“Ground No.19. Without prejudice to ground No.14, the learned AO erred in law and on facts in not allowing deduction u/s 10A of the Act on the expenditure towards software license fees disallowed in the assessment order of Rs.2,14,19,008 relating to the STPI Unit of the Company.

3. At the time of hearing, the assessee submitted that the assessee is pressing only grounds of appeal No.7 and the grounds Nos.14 to 19. All other grounds are therefore, rejected as not pressed.

4. With regard to Ground No.7 i.e. seeking exclusion of certain companies from the final list of comparables, the assessee has filed a chart and therefore, we are proceeding to dispose of the appeal on the basis of the material before us and the contentions of the assessee made in the chart. The assessee is engaged in the business of market research and data processing. During the relevant A.Y, the assessee entered into the following international transactions:

Provision of market research services	18,55,67,790
Global/regional management overhead allocation fee	5,23,16,379
Payment for trade mark license fee	1,18,23,639
Provision of IT enabled services	58,08,59,426
Reimbursement to AEs	6,22,27,185

5. The assessee conducted its own TP study and reported margin of 9.92% of OP/OC. The TPO however, was not convinced with the assessee's TP study and rejected the same. Thereafter, he proceeded to aggregate all the transactions and adopted TNMM as the most appropriate method and proposed 11 companies as comparable to the assessee. The assessee submitted its objections to all the 11 companies. However, the TPO held that all the 11 companies are comparable to the assessee and therefore, worked out the average mean margin of these companies at 27.50% and proposed the adjustment accordingly after giving the working

capital adjustment. In consequence thereof, the AO proposed the draft assessment order against which the assessee preferred its objections to the DRP. The DRP confirmed the assessment order except for directing the exclusion of two companies M/s Infosys Technologies Ltd and L&T Infotech from the final list of comparables. However, it is seen that these two companies were not taken as comparable either by the assessee or by the TPO. Therefore, the effect of DRP directing the exclusion of these companies is Nil. Therefore, except for the 4 companies out of the 11 companies taken by the TPO, the assessee is seeking exclusion of the following 7 companies:

- i) Accentia Technologies Ltd
- ii) Acropetal Technologies Ltd (Seg.)
- iii) Eclerx Services Ltd
- iv) Infosys BPO Ltd
- v) TCS e-Serve International Ltd
- vi) TCS e-Serve Ltd
- vii) Crossdomain Solutions Pvt Ltd.

6. While the learned Counsel for the assessee reiterated the submissions made before the authorities below, the learned DR supported the orders of the authorities below. We are therefore, now proceeding to discuss the comparability of each of the companies as under:

6.1 **Accentia Technologies Ltd:** The assessee had objected to consider this company as comparable to the assessee on the ground that it is engaged in 4 stream of services (medical transcription, medical coding, medical billing and receivable management) and no segmental information was available. It was also submitted that it possesses significant intangible assets and

therefore, is functionally different. It is also submitted that there was an extra ordinary event of amalgamation with Assent Infoserve Ltd which had an impact on the financial margin of this company and hence this company should be excluded.

6.2 The learned Counsel for the assessee has placed reliance upon the decision of the Coordinate Bench of the Tribunal in the case of M/s. Hyundai Motor Engineering Ltd in ITA No.1743/Hyd/2014 and ITA No.1917/Hyd/2014 for the A.Y 2010-11 wherein vide orders dated 13.11.2015, these very contentions were considered by the Tribunal for directing that the company be excluded from the final list of comparables. Relevant paragraph is reproduced hereunder for the sake of ready reference:

18. As regards M/s. Accentia Technologies Ltd., is concerned, we find that the DRP has directed to exclude this company by placing reliance upon the order of the ITAT in the assessee's own case for the A.Y. 2009-10 by holding that this company operates in a different business strategy of acquiring companies for inorganic growth as its strategy and considering the profit margins of the company and insufficient segmental data, held that this company cannot be selected as a comparable. It was also held by the DRP that on the very same reason of acquisition of various companies, being an extraordinary event, it had an impact on the profit of the company and the said company was directed to be excluded.

18.1. For the relevant A.Y. 2010-11, the Ld. Counsel for the assessee has drawn our attention to the information available on Accentia Technologies Ltd., to demonstrate that the said company is into diversified knowledge process outsourcing activities. It is seen therefrom that the said company is involved in Healthcare documentation as well as receivables, management services including installation and maintenance of all software, hardware and band width infrastructure required for the same, deployment of man power and service delivery in all these areas. It is also seen that it is engaged in legal process outsourcing. From Schedule-IV showing the fixed assets of the assessee, it is also seen that the said company owns goodwill/brand/IPRs (Intellectual Property Rights). From the notes to the accounts, it is also seen that a subsidiary of the company Asscent Infoserve Pvt. Ltd., has been amalgamated with the company consequent to which, assets and liabilities of the erstwhile company

were transferred and vested in the company w.e.f. 1st April, 2008 and the scheme has been given effect to in the accounts of the year. Therefore, it is clear that there is an extraordinary event in the case of Accentia Technologies Ltd., during the relevant financial year particularly since the approval for amalgamation has been given by the Hon'ble High Court of Mumbai vide orders dated 21st August, 2009 and by the Hon'ble Karnataka High Court vide orders dated 6th February, 2010. This event would definitely have an effect on the profit margins of the said company and therefore, has to be excluded from the list of comparables as rightly done by the DRP. Therefore, we do not see any reason to interfere with the order of the DRP on this company also. Accordingly, ground No.3 of the Revenue is dismissed”.

6.3 Since the facts and circumstances in the case before us are the same, respectfully following the above decision, we direct the TPO to exclude this company from the final list of comparables.

7. Similarly, we find that the other comparables which are challenged by the assessee were also taken by the TPO in the case of Hyundai Engineering Motor India (P) Ltd and the table with regard to it is reproduced by the ITAT at page 8 of the order which is also reproduced hereunder for the sake of ready reference:

S.No	Name of the company	OR	OP/OC
1	Accentia Technologies Ltd	93,12,44,808	49.02
2	Acropetal Technologies Ltd (Seg.)	46,39,36,810	10.12
3	Axis-I.T&T Ltd	20,29,67,892	11.89
4	Cosmic Global Ltd	5,86,37,419	16.59
5	Eclerx Services Ltd	2,57,02,10,000	42.17
6	Infosys BPO Ltd	11,30,05,01,306	31.63
7	TCS e-Serve International Ltd	1,49,29,56,000	51.51
8	TCS e-Serve Ltd.,	14,05,10,05,000	67.58
9	Jeevan Softech Ltd (Seg.)	1,74,43,000	8.04
10	Microgenetics Systems Ltd	2,40,42,539	6.60
11	Crossdomain Solutions P Ltd	37,69,57,428	17.13
		Total	312.28
		Average	28.39

7.1 We find that similar objections were raised by the assessee therein and the ITAT had considered them to direct the AO to exclude those companies. For the sake of ready reference, the relevant paragraphs are reproduced hereunder:

“TCS e-Serve International Ltd., and TCS e-Serve Limited

11. We find that the assessee had raised its objections in detail against the adoption of these two companies as comparables both before the TPO as well as DRP, but its objections were rejected. Before us also, the Ld. Counsel for the assessee reiterated these objections and relied upon the T.P. order in the case of IGS Imaging Services (India) (P.) Ltd., for A.Y. 2010-2011, where TPO has excluded both of these companies by holding that they are engaged in BPO activity and that they have reported exceptional circumstances in their annual report for the relevant financial year.

11.1. The Ld. D.R. on the other hand, supported the orders of the authorities below.

11.2. Having regard to the rival contentions and the material on record, we find that during the relevant financial year, the TCS e-Serve International Ltd., had acquired the Citi group India based Captive business processing outsourcing (BPO) arm for an all-cash consideration and in return, had acquired the business of an aggregate amount of \$ 2.5 billion over a period of 9.5 years. This definitely is an exceptional circumstance which has been taken note of by the TPO in the case of M/s. IGS Imaging Services (India) P. Ltd., to exclude the same from the list of comparable. This exceptional circumstance was not taken note of by the TPO and the DRP failed to appreciate the objection of the assessee in proper perspective. Any circumstance which would influence or result in abnormal result in the financials of a company have to be adjusted or where no adjustment can be done to make it comparable to the tested party, such a company has to be excluded from the list of comparables. This Tribunal in a number of decisions held that exceptional circumstance is a reasonable filter to exclude a company from the list of comparables. Therefore, we direct the A.O./TPO to exclude this company from the final list of comparables.

11.2.1. As regards TCS e-Serve Limited is concerned, we find that it possesses brand value as is evident from the Schedule-N (Operation and Other expenses) to the P & L A/c of the annual report for the financial year 2009-10 of Rs.46,065 thousands and also that it possesses intangibles in the form of software licenses which have not been taken note of by the authorities below while adopting its margin. It is also the case of the assessee that this company has a turnover of Rs.1405.10 crores which is 25 times of the turnover of the assessee and hence, is not comparable to the assessee. The Ld. Counsel for the assessee had also placed reliance upon the TPO's order in the case of M/s. IGS Imaging Services India Ltd., to hold that there are

exceptional circumstances during the relevant financial year due to which this company is not comparable to the assessee. The Ld. Counsel for the assessee also submitted that the segmental details of this company are not available and hence, has to be excluded on this count also.

11.2.2. We find that the assessee's contentions about the presence of 'brand value' and owning of 'intangibles' is supported by the evidence on record. However, as regards the extraordinary event or exceptional circumstance there is no material placed before us by the Ld. Counsel for the assessee. Therefore, merely because the TPO in another case has held that there is an extraordinary event for which this company has to be excluded from the list of comparables, it cannot be excluded. Such claim has to be supported by evidence on record. As regards the functional dissimilarity and huge turnover and brand value is concerned, we find that this Tribunal in assessee's own case for A.Y. 2009-10 while considering the comparability of the assessee with Infosys BPO Ltd., has taken note of the possession of the brand value and intangibles which influenced the financial results of this company. The Hon'ble Delhi High Court in the case of CIT v. Agnity India Technologies (P.) Ltd., [\[2013\] 219 Taxman 26/36 taxmann.com 289](#), held that huge turnover companies like Infosys and Wipro cannot be considered as comparable to smaller companies like assessee therein. In the case before the Hon'ble High Court (supra), the turnover of the assessee was about Rs.15.79 crores as against the turnover of Rs.1016 crores of the Infosys. Considering these facts, the Hon'ble High Court had directed for exclusion of Infosys BPO because of its brand value and also on the grounds of functional dissimilarity and huge turnover. Though, the company before us is TCS e-Service Ltd., and not Infosys BPO, we find that the turnover of the assessee company for this assessment year is around Rs.50 crores as against the turnover of TCS e-Serve Limited of Rs.1405.10 crores. Therefore, following the turnover filter as well as taking note of the fact that it owns and possesses brand value and intangibles as compared to the assessee which does not own such assets, we direct that this company be excluded from the list of final comparables. Accordingly, assessee's grounds of appeal No.6 is partly allowed.

16. As regards M/s. Eclerx Services Ltd., is concerned, we find that this company was also directed to be excluded by following the decision of ITAT in assessee's own case for the A.Y. 2009-2010 on the ground that it is a KPO. The Ld. Counsel for the assessee has drawn our attention to the annual report of the said company to demonstrate that the facts and circumstances and the nature of the activities carried on by the said company in the A.Y. 2010-11 are also same.

17. Ld. D.R. has not been able to rebut this factual aspects of the said company with any evidence to the contrary. The only ground relied on by the Revenue is that in the case of Agilent Technologies International P. Ltd., the ITAT, Delhi Bench has upheld selection of M/s. Eclerx Services Ltd. A copy of the said order is filed before us. Assessee's contentions therein that the KPO services are distinct from BPO services and are not comparable, has been rejected by the Tribunal.

However, since a uniform and consistent stand has to be taken in the case of the same assessee on similar facts and circumstances, we, respectfully following the decision of the Coordinate Bench in assessee's own case, do not see any reason to interfere with the order of the DRP. Ground No.2 is accordingly rejected.

18. As regards M/s. Accentia Technologies Ltd., is concerned, we find that the DRP has directed to exclude this company by placing reliance upon the order of the ITAT in the assessee's own case for the A.Y. 2009-10 by holding that this company operates in a different business strategy of acquiring companies for inorganic growth as its strategy and considering the profit margins of the company and insufficient segmental data, held that this company cannot be selected as a comparable. It was also held by the DRP that on the very same reason of acquisition of various companies, being an extraordinary event, it had an impact on the profit of the company and the said company was directed to be excluded.

18.1. For the relevant A.Y. 2010-11, the Ld. Counsel for the assessee has drawn our attention to the information available on Accentia Technologies Ltd., to demonstrate that the said company is into diversified knowledge process outsourcing activities. It is seen therefrom that the said company is involved in Healthcare documentation as well as receivables, management services including installation and maintenance of all software, hardware and band width infrastructure required for the same, deployment of man power and service delivery in all these areas. It is also seen that it is engaged in legal process outsourcing. From Schedule-IV showing the fixed assets of the assessee, it is also seen that the said company owns goodwill/brand/IPRs (Intellectual Property Rights). From the notes to the accounts, it is also seen that a subsidiary of the company Asscent Infoserve Pvt. Ltd., has been amalgamated with the company consequent to which, assets and liabilities of the erstwhile company were transferred and vested in the company w.e.f. 1st April, 2008 and the scheme has been given effect to in the accounts of the year. Therefore, it is clear that there is an extraordinary event in the case of Accentia Technologies Ltd., during the relevant financial year particularly since the approval for amalgamation has been given by the Hon'ble High Court of Mumbai vide orders dated 21st August, 2009 and by the Hon'ble Karnataka High Court vide orders dated 6th February, 2010. This event would definitely have an effect on the profit margins of the said company and therefore, has to be excluded from the list of comparables as rightly done by the DRP. Therefore, we do not see any reason to interfere with the order of the DRP on this company also. Accordingly, ground No.3 of the Revenue is dismissed”.

7.2 Further, in the assessee's own case for the A.Y 2009-10, the Tribunal has considered the comparability of Acropetal Technologies Ltd and has held as under:

“(5) Acropetal Technologies Ltd. (Seg.)

20. The objection of assessee with reference to this company is that the company is involved in engineering design services and high end services and has products in its inventory. It is also involved in R&D activity and developing sophisticated delivery system. It was further submitted that this company is not functionally comparable at segment level also, as engineering design services are high end services, as considered in other cases. It is further submitted that allocation of expenses between segments is not possible and depreciation was not allocated between the segments. There are extra-ordinary events which impact profit also, as can be seen from the Annual Reports. It is further submitted that this company is not selected in the list of comparables selected in the case of Mercer Consulting (India) Pvt. Ltd. and therefore, selection of the company by the TPO in this case, which is also in similar ITES services, is not proper.

20.1 After considering the rival contentions, we agree with the objections raised by assessee. As seen from the Annual Report, this company is involved in engineering design services and has products also, which makes it functionally not comparable. Even at the segmental level, it provides engineering design services, which was considered as high end by the coordinate bench of the Tribunal in the case of Hyundai Motors India Engineering (supra) in earlier year. Therefore, we are of the opinion that this company cannot be selected as a comparable. We accordingly direct the Assessing Officer/TPO to exclude this company”.

7.3 In the case of M/s. Market Tools Research Pvt Ltd, the Tribunal considered the comparability of Cross Domain Solutions to the assessee to hold as under:

“(h) Crossdomain Solutions:

11.1 The learned Authorised Representative for the assessee, arguing against selection of the aforesaid company as a comparable, submitted that the said company is functionally different as it is engaged in the knowledge process outsourcing(KPO) services and is one of the leading KPO service provider, rendering a wide ranging value based services in the areas of pay-roll and HR, finance and accounting, administration and tax processes, insurance process for leading companies in US, Europe and Indian markets. In this context, the learned Authorised Representative for the assessee, referred to the relevant extracts from the website of the said company, and it was further submitted that besides the KPO services, the said company was also engaged in providing niche services. He further submitted that the said company has brand presence in the market unlike the assessee which does not own any intangible and does not also take any of the entrepreneurial risk taken by the said company. He therefore, submitted that the aforesaid company being functionally different, cannot be taken as a comparable for determining ALP. In support of these contentions, he placed reliance on the decision of the Income-tax Appellate Tribunal Bangalore Bench in the case of Symphony Marketing Solutions (India) (P.) Ltd. (supra).

11.2 The learned Departmental Representative, on the other hand, submitted that the company is in data processing and insurance claim processing services, which are classified under ITES/BPO services. Therefore, the company has been correctly selected as a comparable.

12. We have heard the submissions of the parties and perused the material on record with regard to the aforesaid company. As can be seen from the website extract of the aforesaid company, it is engaged in providing services which are in the nature of KPO. Further, on perusal of the annual report of the company, furnished in the paper-book, it is seen that the said company is engaged in providing Niche services, as well as developed its own brand 'Exdion' to target the insurance industry in US. The Annual Report further reveals that the company has been running marketing campaigns in the US for expanding its plant base in relation to the brand developed by it. The assessee however, is only providing IT Enabled Services to its AE and does not have the diversified activities like the aforesaid company. The Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India (P.) Ltd. (supra), while considering the issue of aforesaid company as a comparable accepted the assessee's contention that Crossdomain cannot be compared to a routine ITES provider and directed for exclusion of the same from the list of comparables. Respectfully following the aforesaid decision of Income-tax Appellate Tribunal Bangalore in the case of Symphony Marketing Solutions India (P.) Ltd. (supra), we also direct the Assessing Officer to exclude the aforesaid company from the list of comparables for the purpose of determining ALP”.

7.4 Respectfully following the same, we direct the TPO to exclude all these companies from the final list of comparables and recompute the ALP of the assessee.

8. As regards the other grounds of appeal i.e. Ground No.14 regarding the rate of depreciation to be allowed on software license fee, the learned Counsel for the assessee submitted that this issue is covered in favour of the assessee in the assessee's own case in the earlier A.Y. For the sake of ready reference, the relevant para of the Tribunal's order is reproduced hereunder:

14. Ground No. 19: Capitalisation of license fees

Disallowance the license fees of Rs. 34,23,815 by considering the same capital in nature

14.1 This ground pertains to the disallowance of license fees of Rs. 34,23,815/- by considering the same as capital in nature.

14.2 *It was submitted that this issue is covered by the directions of the ITAT in the case of TNS India (P.) Ltd., v. Dy. CIT [2015] 57 taxmann.com 165 (Hyd.-Trib.) vide paras 21 to 23. The decision of the Co-ordinate Bench is as under:*

"21. The issue raised in ground No. 17 is with regard to treating the software licence fee paid as capital expenditure and allowing depreciation @ 25%.

22. Briefly the facts are, during the assessment proceeding, AO noticed that in the profit & loss a/c, assessee has debited an amount of Rs. 2,21,29,855 towards computer maintenance charges. From the break-up submitted by assessee, it was noticed by AO that assessee has claimed an amount of Rs. 1,00,99,916 on account of licence fee. AO asked assessee to explain why the expenditure claimed should not be disallowed as it is in the nature of capital expenditure. Though assessee objected to such view of AO, but, AO rejecting the objections of assessee disallowed the expenditure claimed and added the amount of Rs. 1,00,99,916 by treating it as capital expenditure. Assessee objected to the addition made before DRP. Id. DRP, though, upheld AO's decision that the expenditure incurred is capital in nature, but, directed AO to allow depreciation at appropriate rate. The AO while completing final assessment in pursuance to the directions of Id. DRP, allowed depreciation @ 25% on the software licence fee by mentioning that it falls in the block of intangible assets.

23. We have considered the submissions of the parties and perused the materials on record. It is very much evident from record that the software licence fee has been paid towards operation as well as application software. That being the case, the rate of depreciation applicable is 60% (as applicable to computer) and not 25% as allowed by AO. Moreover, this issue is more or less covered in favour of assessee by the decision of the coordinate bench in assessee's own case for the AY 2009-10. The coordinate bench in ITA No. 604/Hyd/14 while deciding the issue held as under:

37. We have considered the submissions of the parties and perused the materials on record as well as the decisions relied upon by Id. AR. As far as assessee's claim that the expenditure claimed has to be treated as revenue expenditure, we are of the view that as per the ITAT Special Bench decisions in case of Amway India Ltd. v. DCIT (supra), whether a particular expenditure in relation to acquisition of software will be revenue or capital, cannot be decided by either the ownership test or enduring benefit test. The functional test has also to be applied. ITAT Special Bench went on to lay down certain tests for deciding whether the expenditure incurred has to be treated as revenue or capital. In the present case, assessee has not brought any material on record to establish that by applying the functional test, the expenditure can be said to be of a revenue nature. Moreover, after 01/04/2003 computer software has been specifically brought into the schedule at par with computer as far as eligibility of depreciation is concerned. Therefore, after 01/04/2003, computer software in the nature of application software and not mere licence for renewal have to be treated as capital assets eligible for depreciation at

the same rate as of computer. Therefore, expenditure incurred for acquiring such asset will be capital expenditure. However, we accept Id. AR's alternative contention that depreciation should be allowed at 60%. As per the new appendix applicable from AY 2006-07, depreciation on computer and computer software is to be allowed at 60%. As AO has not brought any material on record to show that computer software acquired by assessee is not in the nature of software as mentioned in the appendix, in our view, AO is not justified in allowing depreciation at 25%. We, therefore, direct AO to allow depreciation on the computer software at 60%. This ground is partly allowed.

In view of the above, we direct AO to allow depreciation @ 60% on the software licence fee. This ground is partly allowed".

14.3 In view of that, we uphold the direction of the DRP to treat the amount as 'capital in nature' to allow the depreciation. However, the rate of depreciation is to be determined at 60%. With the above directions, the ground is considered partly allowed".

8.1 This ground of appeal is accordingly allowed.

9. As regards ground of appeal No.15, the assessee's contention has been that the advances written off amounting to Rs.2,07,56,784 in the P&L A/c of the company represents the TDS deduction by the customers of the company in the earlier years in which the company did not receive TDS certificate and hence the company could not claim the credit for such TDS, which resulted in a loss to the company and therefore, the company received the TDS receivables of Rs.2,07,56,784 as advance written off/bad debt and the same has accordingly been claimed. The AO observed that though the assessee has claimed it as advances written off, it has not given full details and therefore, he disallowed the same and brought to tax. Even before us also, the assessee has not filed any evidence. The learned Counsel for the assessee requested that this issue may be remanded to the TPO to give another opportunity of filing all the evidence. But since the assessee has not been able to produce any evidence

before us, we do not see any reason to remand the issue at this juncture without any evidence. In view of the same, this ground of appeal is rejected.

10. As regards Ground No.16 with regard to credit for Rs. 6,54,93,323 instead of Rs. 6,87,39,406 as claimed in the return of income, we remand this issue to the file of the AO for verification and allowing the same in accordance with law.

11. As regards Ground No.17, we find that it is consequential in nature and therefore, the AO is directed to give the consequential relief, if any, to the assessee.

12. As regards Ground No.18 regarding Initiating penalty proceedings u/s 271(1)(C) of the Act, it is premature in nature. Therefore, this ground is also rejected.

13. As regards the additional grounds of appeal, we find that this is covered in favour of the assessee by various decisions, particularly, the Hon'ble Bombay High Court in the case of CIT vs. Gem Plus Jewellery India Ltd reported in (2010) 194 Taxmann.com 192 (Bombay) wherein it was held that the exemption u/s 10A should be granted even on the income which is enhanced due to the disallowance of certain expenditure. Respectfully following the same, we direct the AO to allow the deduction u/s 10A of the Act to the assessee on enhanced income as well.

14. In the result, additional ground of appeal is allowed.

15. In the result, the assessee's appeal is partly allowed.

Order pronounced in the Open Court on 28th November, 2018.

Sd/-
(S.Rifaur Rahman)
Accountant Member

Sd/-
(P. Madhavi Devi)
Judicial Member

Hyderabad, dated 28th November, 2018.

Vinodan/sps

Copy to:

- 1 M/s. TNS India (P) Ltd, 7th Floor, ORION Block, The V Ascends IT Park, Plot No.17, Software Units Layout Madhapur, Hyderabad 500081
- 2 Asstt. Commissioner of Income Tax, Circle 2(2) 5th Floor, Room No.513, Signature Towers, Kothaguda, Kondapur, Hyderabad
- 3 TPO/Addl. CIT (TP) Hyderabad 500004
- 4 CIT (International Taxation) IT Towers, 10-2-3, AC Guards, Hyderabad
- 5 CIT – 5, Hyderabad 500004
- 6 The DR, ITAT Hyderabad
- 6 Guard File

By Order