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.186/Hyd/2014
(Assessment Year: 2009-10)

DCIT, Circle (3) Hyderabad	Vs	M/s. Parled Technologies Ltd (formerly Four Soft Ltd) Hyderabad PAN: AAACF 4464 A
(Appellant)		*(Respondent)*

ITA Nos.207/Hyd/2014 & 268/Hyd/2015
(Assessment Years: 2009-10 & 2010-11)

M/s. Parled Technologies Ltd (formerly Four Soft Ltd), Hyderabad PAN: AAACF 4464 A	Vs	DCIT, Circle (3) Hyderabad
(Appellant)		*(Respondent)*

For Revenue: Shri J. Siri Kumar, DR
For Assessee : Shri Mithilesh Sai

Date of Hearing: 14.11.2017
Date of Pronouncement: 30.11.2017

O R D E R

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

Appeals in ITA Nos. 186/Hyd/2014 and 207/Hyd/2014 are cross appeals for the A.Y 2009-10 and ITA No.268/Hyd/2015 is assessee's appeal for the A.Y 2010-11. For the A.Y 2009-10, appeals are filed by both the assessee as well as

Revenue against the assessment order u/s 143(3) r.w.s 144C of the Act, dated 16.12.2013.

ITA No.186/Hyd/2014- Revenue's appeal

2. In this appeal, the Revenue has raised only one ground against the direction of the DRP to delete the addition made by the AO reducing the implementation expenditure and internet connectivity charges from the export turnover only for the purpose of deduction u/s 10A of the Act. At the time of hearing, both the parties agreed that this issue is covered in favour of the assessee by the decision of the Hon'ble Karnataka High Court in the case of Commissioner Of Income Tax And Another vs. Tata Elxsi Ltd, reported in (2012) 349 ITR 98 (Kar.) and also the jurisdictional High Court in the case of BA Continuum (ITTA No.214 of 2017) wherein it has been held that if any expenditure is excluded from the export turnover, then the same should also be excluded from the total turnover while computing the deduction u/s 10A of the Act and the DRP has followed similar decisions to direct the AO to reduce the same from the total turnover as well. Respectfully following the same, we do not see any reason to interfere with the order of the DRP and the Revenue's appeal is accordingly dismissed.

ITA Nos.207/Hyd/2014 A.Y 2009-10

3. As regards the assessee's appeal, brief facts are that the assessee, formerly known as M/s Four Soft Ltd, was engaged in software development and I.T. Consulting Services. It filed its return of income for the relevant A.Y on 30.09.2009 admitting total income of Rs.50,37,530. Thereafter, the assessee filed a

revised return of income on 14.10.2010 admitting total income of Rs.25,26,675. The assessment was taken up for scrutiny by issuance of notices u/s 143(2) and 142(1) of the Act. On perusal of the Form 3CEB filed along with the return of income, the AO observed that the assessee has entered into international transactions with its AEs and therefore, a reference was made to the TPO u/s 92CA of the Act for determination of the ALP of the international transactions. The TPO, vide order dated 22.1.2013, proposed the adjustment of Rs.5,70,75,888 being the total of shortfall in respect of (i) software development services, (ii) reimbursement received and (iii) commission on guarantees. The AO, accordingly proposed the draft assessment order, against which, the assessee preferred its objections before the DRP. The DRP, vide orders dated 22.11.2013 confirmed the addition proposed by the AO and the final assessment order was accordingly passed by the AO. Aggrieved, the assessee is in appeal before us.

4. At the ime of hearing, the learned Counsel for the assessee submitted that though the assessee has raised as many as 17 grounds of appeal, the assessee is pursuing only grounds of appeal Nos. 1,7,9,12,13 and15 to 17.

5. As regards grounds of appeal 1 to 7 and 9 are concerned, the learned Counsel for the assessee submitted that the assessee is the parent company which had entered into international transactions with its AEs in US and that the assessee had both AE as well as non-AE transactions for software

development services. He submitted that the assessee had adopted the internal TNMM in its T.P. study to arrive at the ALP and also to hold that the assessee's transaction with its AE was at ALP. He submitted that the TPO has rejected the internal TNMM of the assessee and has adopted various other incomparable companies as comparables and has arrived at an adjustment towards the shortfall in the ALP of software development services. He submitted that this issue had arisen in the earlier A.Ys also in the assessee's own case and for the A.Ys 2006-07, 2007-08 and 2008-09 and the Tribunal has held that the internal TNMM cannot be ignored. He has filed the copies of the orders before us. He further submitted that the AO has also passed consequential orders by adopting the internal TNMM by which the ALP of comparables was within the margin of + or -5% of assessee's margin and therefore, there was nil adjustment made to the software development services. Copies of the consequential orders were also filed before us.

6. The lea ned DR, however, supported the orders of the authorities below

7. Having regard to the rival contentions and the material on record, we find that the Tribunal in ITA No.1495/Hyd/2010 for the A.Y 2006-07 in the assessee's own case at Para 10 to 15, has held as under:

> *"10. The learned counsel for the assessee also submitted that there are errors in computing the net margin of the assessee. He submitted that the TPO computed the adjustments considering the total cost of the assessee (including the cost of transactions with non-AEs). An analysis under TNMM considers only the profit that is attributable to particular controlled transactions. The TPO should*

have determined the ALP for the international transaction with AE considering only the operating cost allocable to the AE segment. For this proposition, he relied on several decisions cited in its written submissions which includes the case of IL Jin Electronics (I)(P) Ltd. vs. ACIT reported in 30 SOT 227.

11. The learned counsel for the assessee submitted that the TPO rejected the segmental financials prepared by the assessee company for transactions with the AEs. The assessee company computed the operating margin for the transaction with the AEs and non AEs by apportioning the expenses in proportion to sales. However, the TPO not approved the aforesaid apportionment and segmental financials. That resulted in allocating the bad debts and other certain costs, viz, R & D to the AE Segment which is clearly in respect of the third party transaction only and not with the AE's transaction. The learned counsel for the assessee also submitted that the DRP also not made any observation upon the app oach of the TPO. The TPO computed the adjustment considering the total cost of the assessee including the cost of transaction with the non AEs. The TPO should have determined the ALP only for the international transaction with the AE after considering the allocable operating cost to the AE Segment. Alternatively, it is submitted that even if the TP adjustment is to be made, it is to be made only on the transactions with the AEs and not on the total transaction. He relied on the several decisions placed in the paper book including that of IL Jin Electronics (supra).

12. The learned co nsel for the assessee also submitted that since the assessee company enjoys tax holiday benefit in India under section 10A of the Act, and the tax rates in the AE's jurisdiction is higher than the Indian tax rate, there is no motive to shift the profit from the parent company to the subsidiary company. It is also submitted that the nature of reimbursement transaction has not been analysed and included in the operating cost for transaction with the AE. Such reimbursements are in respect of payment to consultant for the work undertaken for AEs. Hence, the same should not be included in the operating cost. It is also submitted that even if any of the grounds on the comparables and the filters is allowed by this Tribunal, the assessee's margin would fall within the range of ALP. It is also submitted that the TPO has also not justified in selecting the software product companies, higher turnover companies and higher margin companies as comparables. In the rejoinder, the learned counsel for the assessee submitted that the assessee company vide its submissions before the TPO dated 16-9-2009 has worked out margins separately in respect of AE and non-AE transactions and the TPO simply rejected the claim of the assessee company for the reason that those segmental details are not audited and no books of accounts are maintained separately. It is also submitted that TPO himself followed the segmental

financials in respect of comparables like Infosis. Therefore, it is submitted that the plea of segmental financials to be adopted was taken both before the TPO as well as DRP.

13. On the other hand, the learned departmental representative while relying on the order of the AO and directions of the DRP, submitted that the assessee company has not taken the specific ground in the grounds of appeal stating that segmental financials prepared by the assessee company is to be adopted for the purpose of arriving ALP. It is also submitted that the TPO rightly rejected the multiple year data adopted by the tax payer in its TP study. As per Rule 10B[4], the data relating to the financial year in which the international transaction has been entered into to be used in analysing the comparability of an uncontrolled transaction with an international transaction. With regard to the issue of turnover criteria and high margins comparables, he relied on the decision of the Mumbai Tribunal in the case of Symantec Software Solut ons rendered in ITA No.7894/Mum and submitted that the issue is squarely covered in favour of the department and hence the turnover criteria should not be applicable for the company which operates on cost plus model. A comparable company cannot be rejected simply because it has high margins.

14. It is submitted that the assessing officer has to follow only the provisions of the Act and the ssessing officer need not go into the intention/motive of the assessee. The TP Provisions have been introduced to protect the tax base of the company in India. He relied on the decision of the Bangalore ITAT in the case of SAP Labs India in ITA No.398/Bang/2008 to support his contention. He also filed written submissions on the issue of plus or minus 5% variation as per sectio 92C(2) of the Act and submitted that the amendment to he afor said section is prospective in nature for which he relied on the judgment of the apex court in the case of Gold Coin Limited 999(304 ITR 308).

15. We have considered the rival submissions and perused the material on record. First, we will take up the issue relating to the adjustments made by the assessing officer in respect of the international transactions with its associated enterprises in the software development services. It is the contention of the assessee that bad debts incurred by the assessee company are in respect of transactions, which are not related to associated enterprises. This contention of the assessee has not been controverted by the Revenue by bringing any material on record before us. It is the contention of the learned counsel for the assessee that such bad debts cannot be taken into account for computing the margin of the assessee from the transactions with the associated enterprises in respect of software development services. The learned counsel for the assessee has also filed before us a comparative chart explaining

the computation of Net Margin, excluding the bad debts and clearly demonstrated before us that if the bad debts/reimbursements are excluded for the purpose of computing the margins on the transactions relating to the associated enterprises, the net margin comes to 19.07%, which is well comparable with the Arms Length Margin of 19% determined by the Transfer Pricing Officer. In our considered view, for computing the net margin of the assessee for the purposes of transfer pricing, only the cost related to the transaction with the Associated Enterprises has to be considered and accordingly, we approve that segmental financials is to be considered for the purpose of arriving at the net margin on the international transaction with the assessee's enterprise in respect of software development services. In that process, bad debts/reimbursements has to be excluded and segmental profitability has to be adopted. We find support in this be alf from various decisions of the Tribunal relied upon by the learned c unsel for the assessee duly filing copies thereof in the paper-bo k, which have been noted hereinabove. That being so, the TPO should have determined the Arms Length Price for the internation l transactions with associated enterprises considering only the operating cost allocable to the Associated Enterprises segment. Since the assessing officer had no occasion to verify t e veracity of the segmental financials prepared by the assessee company, for limited purpose, we direct the assessing officer to verify the segmental financials prepared by the assessee company and adopt the same for arriving at the net margin on the international transaction with AEs in respect of software development services. We direct accordingly".

8. Further for the A.Y 2007-08 in ITA No.1903/Hyd/2011, the Tribunal at Para 10 has held as under:

***"10.** We have heard the parties and perused the material on record. On perusal of the TP order it is to be seen that in para 2.4.1 the TPO has admitted that the assessee has submitted segmental financials separately in respect of AE and non-AE transactions. As per the aforesaid segmental financials (reproduced at page 4 of TP order), the margin in respect of transactions with AEs is 39.26% as against margin of 6.30% in respect of non AE transactions. Therefore, when segmental details have been furnished by the assessee the TPO should have considered them properly instead of rejecting them with broad and sweeping allegations. It seems, the TPO has not properly allocated the segmental expenditures. If the bad debts etc. are not related to AE transactions they cannot be considered as part of operating cost for determining ALP of the transactions with AE. Similarly, reimbursement on cost to cost basis also cannot be included in the operating cost. Unfortunately, the DRP without dealing with this issue at depth has finished its job by simply commenting that TPO has dealt with the issue appropriately. In this context, it is to be noted that when*

identical issue was agitated by the assessee before the Tribunal for the assessment year 2006-07, a coordinate bench of this Tribunal in ITA No. 1495/Hyd/10 dt. 09/09/2011 held as under:

"15. We have considered the rival submissions and perused the material on record. First, we will take up the issue relating to the adjustments made by the assessing officer in respect of the international transactions with Four Soft Limited, Hyderabad vs Assessee on 9 September, 2011its associated enterprises in the software development services. It is the contention of the assessee that bad debts incurred by the assessee company are in respect of transactions, which are not related to associated enterprises. This contention of the assessee has not been controverted by the Revenue by bringing any material on record before us. It is the contention of the learned counsel for the assessee that such bad debts cannot be taken into account for computing the margi of the assessee from the transactions with the associated enterp ises in respect of software development services. The learned counsel for the assessee has also filed before us a comparative chart explaining the computation of Net Margin, excluding the bad debts and clearly demonstrated before us that if the bad debts/reimbursements are excluded for the purpose of computing the margins on the transaction relating to the associated enterprises, the net margin comes to 19.07%, which is well comparable with the Arms Length Margin of 19% determined by the Transfer Pricing Officer. In our considered view, for computing the net margin of the assessee for the purposes of transfer pricing, only the cost related to the transaction with the Associated Enterprises has to be considered and accordingly, we approve that segmental financials is to be considered for the purpose of arriving at the net margin on the international transaction with the assessee's ent rprise in respect of software development services. In that process, bad debts/reimbursements has to be excluded and segmental profitability has to be adopted. We find support in this behalf from various decisions of the Tribunal relied upon by the learned counsel for the assessee duly filing copies thereof in the paper-book, which have been noted hereinabove. That being so, the TPO should have determined the Arms Length Price for the international transactions with associated enterprises considering only the operating cost allocable to the Associated Enterprises segment. Since the assessing officer had no occasion to verify the veracity of the segmental financials prepared by the assessee company, for limited purpose, we direct the assessing officer to verify the segmental financials prepared by the assessee company and adopt the same for arriving at the net margin on the international transaction with AEs in respect of software development services. We direct accordingly."

Respectfully following the aforesaid observation of the coordinate bench in assessee's own case, we remit this issue back to the file of the Assessing

Officer/TPO to determine the ALP in terms with the direction of the coordinate bench extracted hereinabove. Another contention of the ld. AR is while making TP adjustment and computing working capital adjustment under TNMM, the TPO has considered margins at the entity level. It was therefore contended that the TP adjustment has to be restricted only to transactions with AE. We find force in the contentions of the ld. AR. The Assessing Officer/TPO is directed to determine the ALP only considering the receivables and payables in respect of transactions with AEs only".

9. In ITA No.1686/Hyd/2012 for the A.Y 2008-09 vide M.A. No.19/Hyd/2017, the Tribunal directed the AO to consider the internal TNMM also for benchmarking of the assessee's international transactions. In view of the above decisions in the assessee's own case, we direct the AO to consider only the segmental results of the AEs transactions and also consider the internal TNMM for the purpose of bench marking assessee's transactions of software development services before arriving at the ALP. Ground of appeal No.1 is accordingly treated as allowed and Ground Nos. 7 and 9 are also remanded to the file of the AO with a direction to reconsider the same in accordance with the directions as above. G ounds of appeal Nos. 1, 7 and 9 are thus treated as allowed for statistical purposes.

10. As regards Ground No.12, we find that this issue also is covered in favour of the assessee by the decision of the Coordinate Bench in the assessee's own case for the A.Ys 2006-07 and 2007-08 wherein it has been held that the reimbursement of expenses on cost to cost basis does not require any mark up. It is clarified by the learned Counsel for the assessee that in the earlier A.Y, the TPO had included the reimbursement of cost to the operating cost of the international transaction for arriving at the ALP, but in the relevant A.Y, the AO treated it as a separate

international transaction and has added a markup of 10% to make the adjustment. We find that, before the TPO, the assessee has made detailed submissions that the reimbursement of the expenditure is done both by the assessee as well as its AEs without any in markup and therefore, there should not be any adjustment on such account. He submitted that this reimbursement of expenditure is mostly on the travel cost of the deputed employees both of the assessee as well as its AEs.

11. In view of the decision of the Coordinate Bench in the assessee's own case in the earlier A.Ys on s milar set of facts, we hold that the reimbursement of expend ture cannot be treated as a separate international transaction with a markup on the same. Therefore, the adjustment on account of such transaction is deleted.

12. As regards Ground No.13, the learned Counsel for the assessee submitted that the corporate guarantees cannot be considered as an international transaction as it is not covered under the definition of international transaction u/s 92B of the Act for the relevant period. He placed reliance upon various decisions of this Tribunal wherein it has been held that prior to the amendment of section 92B by the Finance Act of 2012, corporate guarantee cannot be treated as an international transaction.

13. The learned DR, however, relied upon the orders of the authorities below.

14. Having regard to the rival contentions and the material on record, we find that this issue is covered in favour of the assessee by the decision of the various Benches of the Tribunal and particularly in the case of Rain Cements in ITA No. 222/Hyd/2014 & others, dated 26th April, 2015, wherein it has been held that the amended provision is applicable only w.e.f. A.Y 2013-14 and not for the period prior thereto. Both of us i.e. A.M and JM are signatory to the said decision. Therefore, we allow this ground of appeal and delete the addition/adjustment made on account of corporate guarantee fee.

15. As regards Ground No.15 for allowance of TDS credit as claimed in its return of income, we remit this ground to the file of the AO with a direction to allow the same in accordance with law after verification of the assessee s claim.

16. As regards G ound No.16, brief facts are that the net income from sale of 3 d party licenses was credited to the P&L A/c. The AO observed that the profit derived from trading of 3rd party license is not the profit derived from the software development and export, the same is eligible for deduction u/s 10A and is therefore, to be excluded from the profit eligible for deduction u/s 10A of the Act. Consequently, he excluded the same from the export turnover as well as from the total turnover for the purpose of computing the income. Aggrieved, the assessee is in appeal before us. Except for relying on the contentions made before the AO, the learned Counsel for the assessee has not been able to demonstrate as to how it will be eligible for deduction u/s 10A of the Act or as to how it is derived from software

development and export. Since the same has been excluded both from the export as well as from the total turnover, the net result is "Nil" and there is no prejudice caused to the assessee. In view of the same, we do not see any reason to interfere with the order of the AO on this issue and the assessee's ground of appeal No.16 is rejected.

17. Ground No.17 is against the initiation of penalty proceedings u/s 271(1)(c) of the Act. We reject the same as it is premature in nature.

18. In the result, assessee's appeal for A.Y 2009-10 is partly allowed.

ITA No.268/Hyd/2015 A.Y 2010-11

19. In this appeal against the assessment order u/s 143(3) r.w.s. 144C of the Act, all the grounds raised by the assessee are similar to the grounds raised for the A.Y 2009-10 and for the detailed reasons given in our order even dated, for the A.Y 2009-10, the grounds of appeal of the assessee for the A.Y 2009-10 i.e. Ground 1 against rejection of internal TNMM and Grounds 5 & 6 against incomparable companies taken as comparables are treated as allowed for statistical purposes.

20. As regards Ground No.7 against error in computation of margin of the comparables by considering the provision for bad and doubtful debts as non-operating in nature, we find that this

issue is also covered in favour of the assessee by the decision of the Tribunal in the earlier A.Ys as reproduced in Para 8 above, and for the reasons mentioned therein, this ground is also remitted to the file of the AO and is treated as allowed for statistical purposes. Ground No.8 is also remitted to the file of the AO.

21. With regard to Ground No.9 against mark up on reimbursement of expenses received by the assessee, we hold that this ground is similar to the assessee's grounds of appeal No.12 for the A.Y 2009-10 and for the detailed reasons given therein, this ground of appeal is allowed.

22. With regard to Ground No.10 against computation of ALP on Corporate Guarantee, we have already held for A.Y 2009-10 that prior to the amendment of section 92B by the Finance Act of 2012, corporate guarantee is not an international transaction. Therefore, this ground of appeal is allowed.

23. As regards grounds 11 against levy of interest u/s 234B being consequential in nature, the AO is directed to give the consequential relief, if any, to the assessee in accordance with law.

24. As regards ground No.12 against initiation of penalty proceedings u/s 271(1)(c), 271AA and 271BA of the Act, it is dismissed as a premature ground.

25. As regards Ground No.13 against the disallowance of bad debts written off, we find that there is some discrepancy in the figure of bad debts written off by the assessee for the A.Ys 2009-10 and 2010-11 and the figure taken by the AO, and it appears that the AO has taken the figure of A.Y 2009-10 for making the disallowance in the A.Y 2010-11. In view of the same, we deem it fit and proper to remand the issue to the file of the AO for verification and adjudication in accordance with law after giving the assessee a fair opportunity of hearing. This ground is therefore, treated as allowed for statistical purposes.

26. With regard to Ground No 14, we direct the AO to verify the claim of the assessee of TDS credit and allow the same in accordance with law.

27. In the result assessee's appeal for the A.Y 2010-11 is treated as partly allowed.

28. To sum up, Revenue's appeal for A.Y 2009-10 is dismissed and assessee's appeals for A.Ys 2009-10 & 2010-11 are partly allowed.

Order pronounced in the Open Court on 30th November, 2017.

Sd/-	**Sd/-**
(S.Rifaur Rahman)	**(P. Madhavi Devi)**
Accountant Member	**Judicial Member**

Hyderabad, dated 30th November, 2017.
Vinodan/sps

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3 DRP Hyderabad 500004
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5 Director of Income Tax (International Taxation) IT Towers, 10-2-3 AC Guards, Hyderabad 50004
6 The DR, ITAT Hyderabad
7 Guard File

By Order