

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

IT(TP)A No.1434/Bang/2010
Assessment year : 2006-07

M/s. Mindtree Ltd., (Previously known as M/s. Aztecsoft Ltd., now merged with M/s. Mindtree Ltd.), Global Village, RVCE Post, Mysore Road, Bengaluru-560 059. PAN: AABCA 2122R	Vs.	Deputy Commissioner of Income Tax, Circle-12(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Chytanya K. K, Advocate
Revenue by	:	Smt. Preethi Garg, CIT-DR

Date of hearing	:	03.01.2017
Date of Pronouncement	:	31.03.2017

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of the CIT(A)
mainly on the following grounds:

1. *That the orders of the authorities below, the order of the Transfer pricing officer (TPO) and the directions of the Dispute Resolution Panel (DRP) in so far as it is against the appellant is against the law, facts, circumstances, natural justice, equity, without jurisdiction, bad in law and all other known principles of law.*
2. *The directions of the Learned DRP u/s 144C of the Act are clearly unsustainable in law in as much as they have been issued in a mechanical manner without considering the relevant materials, evidences and data and without application of mind. Consequently the additions based on such directions requires to be deleted.*
3. *The Learned Authorities below erred in making an assessment on non-existent company ignoring the decisions of the Supreme Court in the case of Marshall Sons & Co. (India) Ltd. - 223 ITR 809 and Saraswathi Industrial Limited vs. CIT - 186 ITR 278 and various Benches of the Income Tax Appellate Tribunal.*
4. *The Learned Authorities below failed to appreciate that consequent to approval of the scheme of merger/amalgamation the company ceases to exist in the eye of law from the date the merger/amalgamation is made effective, in this case the effective date is 01.04.2009. Hence, the order and proceedings are bad in law requires to be quashed.*
5. *That the total income computed and the total tax computed is hereby disputed.*
6. *That the communication / order of the Transfer Pricing Officer is without jurisdiction, against the law, facts, circumstances, natural justice, equity and all other known principles of law.*
7. *The Learned Authorities below erred in bringing to tax a sum of Rs.11,21,88,319/- under section 92CA of the Act as per the communication/order of the Transfer Pricing Officer and directions of DRP.*
8. *That no copy of the reasons recorded before for making the reference to the TPO has been furnished nor copy of the approval obtained for making the reference has been*

- furnished to the appellant.*
9. *That the findings, reasons, conclusions of the TPO are a bundle of contradictions and clearly unsustainable in law and the order u/s 92CA is totally against the circular and legislative intent.*
 10. *No opportunity was given to the assessee before making the reference and before according the approval by the CIT. This is against the principles set out by the Hon'ble Supreme Court in Rajesh Kumar vs. DCIT - 287 ITR 91 and Sahara India (Firm) v CIT - 300 ITR 403 (SC).*
 11. *That the learned authorities below erred in not allowing the deduction u/s 10A for the adjustment made in respect of business carried on by the undertaking eligible for deduction u/s 10A. The appellant prays for allowing of the deduction as per law.*
 12. *The TPO/AO erred in ignoring the method followed by the appellant. The TPO/AO ought to have adduced cogent reasons for rejecting the method Followed by the appellant before substituting and prescribing a new method.*
 13. *The onus is on the department to establish there is any tax avoidance and it is essential that incontrovertible evidences are in the possession of the AO before a reference is made as held by the Supreme Court in 131 ITR 597 and further has erred in not relying on the circular.*
 14. *The Transfer Pricing Officer / Assessing Officer erred in ignoring the fact that the amount incurred towards marketing expenditure is in the nature of administrative help and the profit margin paid was very much reasonable having regard to the commercial activity and the law on the subject.*
 15. *The TPO / AO erred in holding that there is no requirement to incur marketing expenditure and thereby erred in making adjustment for the entire expenses.*

16. *The TPO erred in ignoring the fact that before making an adjustment neither a comparable transaction entered into has been identified nor has the enterprise which has entered such a transaction been identified. Unless these two are identified as explained in Rule 10B(2) no further proceedings are possible. In this case, in view of non-identification, the entire order requires to be vacated.*
17. *The TPO/AO erred in refusing to recognize that there was no method prescribed under the Act or the Rules, having regard to the nature of transaction entered into by the assessee. Consequently, as per law no uncontrollable Arm's Length transaction could be identified.*
18. *The authorities below have failed to identify a comparable in terms of Rule 10B(3).*
19. *The authorities below failed to make the necessary adjustment as is required in terms of Rule 10B(2).*
20. *The Learned Authorities below erred in not following his own order rendered for the previous year i.e., AY 2005-06 when the issues involved re similar, thereby ignoring the decision of the Madras High Court in 110 ITR 453.*
21. *The Learned Authorities below erred in reducing telecommunication expenses of Rs.1,27,00,473/- from the export turnover and thereby reducing claim made u/s 10A of the Act.*
22. *Without prejudice, the learned Authorities below, while computing the deduction under Section 10A of the Act, erred in not excluding the above amount from the expression "total turnover", a denominator in the mathematical formula prescribed for computing the deduction under the section.*
23. *The Income computed under the head Business by the learned Assessing Officer is not as per law and requires to be rejected.*

24. *The appellant denies liability for interest u/s 234B on the adjustment made u/s 92CA of the Act and relies on the decision of the Supreme Court in the case of Kwality Biscuits Ltd Vs CIT reported in 284 ITR 434.*
25. *The appellant denies the liabilities for interest u/s 234 B. Further prays that the interest if any should be levied only on returned income.*
26. *No opportunity has been given before levy of interest u/s 234B & 234D of IT Act.*
27. *Without prejudice to the appellant's right of seeking waiver before appropriate authority the appellant begs for consequential relief in the levy of interest u/s 234B & 234D.*
28. *For above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered.*

2. During the course of hearing, the learned counsel for the assessee has also raised the additional grounds which are also reproduced herein under:

"GROUND 29

The Learned ACIT, Circle 11 (1) is not justified in making reference to Learned TPO under Section 92CA (1), by wrongly assuming the jurisdiction over the Appellant, when the jurisdiction over Appellant vested with the Learned DCIT, Circle 12 (1).

"GROUND 30

The reference made under Section 92CA (1) is bad in law as the prior approval has been obtained from the non-jurisdictional Commissioner of Income Tax-I, when the jurisdiction over Appellant vested with the learned Commissioner of Income Tax-III.

"GROUND 31

The Order of the Honourable DRP is invalid as there was "conflict of interest", as one of the Members of the DRP was the authority who granted approval for making reference under Section 92CA.

GROUND 32

Without prejudice to above, the Learned Assessing Officer has made reference under Section 92CA (1) without satisfying the conditions of Section 92CA (1).

GROUND 33

The Honourable DRP is not justified in refusing to allow the standard deduction +/- 5% as per the second proviso to section 92C (2) of the IT Act.

GROUND 34

The Honourable DRP is not justified in upholding the action of the Learned Assessing Officer in setting off of loss of non-STPI unit of Rs. 90,74,111/- against the income of STPI unit even before allowing deduction under Section 10A of the IT Act.”

3. During the course of hearing, the learned counsel for the assessee has invited our attention to the fact that assessment was framed in the name of M/s. Aztecsoft Ltd., whereas this company has been merged with M/s. Mindtree Ltd., w.e.f. 1.4.2009. Therefore the assessment framed in the name of the merging company is not sustainable in the eyes of law hence deserves to be quashed. In support of his contention the learned counsel for the assessee has placed the reliance upon the judgment of the jurisdictional High Court in the case of CIT Vs. Intell Technologies India Pvt. Ltd., reported at 2015-TIOL-748-HC-Kar-IT and the judgment of Delhi High Court in the case of CIT Vs. Dimention Appeals Pvt. Ltds., reported at 2014-IT-TIOL-185-Del-IT.

4. The learned DR on the other hand has submitted that notice under section 143(2) was issued before the effective date upon the assessee i.e., M/s. Aztecsoft Ltd. After the merger the representative of the Mindtree Ltd., the present assessee has appeared and represented the case. The AO has also taken the cognizance of

these facts and completed the assessment in the name of M/s. Aztecsoft Ltd., (now merged with M/s. Mindtree Ltd.). The assessee itself has filed the objection before the DRP in the name of M/s. Aztecsoft Ltd., even at that stage he did not raise any objection that the draft assessment order cannot be issued in the name of M/s. Aztecsoft Ltd., which has been merged with M/s. Mindtree Ltd. Thereafter the DRP has also passed an order in the name of M/s. Aztecsoft Ltd., mentioning in the bracket "*now merged with M/s. Mindtree Ltd.*". Therefore, the AO has taken the cognizance of all these facts but inadvertently in the assessment order name of the assessee was mentioned as M/s. Aztecsoft Ltd., in place of M/s. Mindtree Ltd. But in bracket he has also mentioned that "*Now merged with M/s. Mindtree Ltd.*" Therefore, the assessment cannot be held to be void only for the reasons that name of M/s. Mindtree Ltd., was not mentioned as an assessee.

5. In oppugnation, the learned counsel for the assessee has contended that in the assessment order, the PAN number was also the given of M/s. Aztecsoft Ltd., and not the M/s. Mindtree Ltd. Therefore it cannot be said that assessment was framed in the name of M/s. Mindtree Ltd., in which earlier assessee M/s. Aztecsoft Ltd., has been merged.

6. Having carefully examined the orders of the lower authorities in the light of the rival submissions, we find that undisputedly the assessment proceeding was started before 1.4.2009, the effective date for the merger/amalgamation. In response thereto, the representative of the merging company i.e., M/s. Aztecsoft Ltd., was

appeared and after merger the representative of the merged company also appeared. The facts of merger was brought to the notice of the AO. The AO accordingly completed the draft assessment in the name of the merging company i.e., M/s. Aztecsoft Ltd., but in bracket he mentioned the fact that this company has been merged with M/s. Mindtree Ltd. Before the DRP, the assessee did not raise the legal objection. He however filed an appeal in the name of M/s. Aztecsoft Ltd., giving its PAN number. He however mentioned in bracket that M/s. Aztecsoft Ltd., has been merged with M/s. Mindtree Ltd. Accordingly, the DRP has also passed an order in the name of M/s. Aztecsoft Ltd., (now merged with M/s. Mindtree Ltd.,). Even before the Tribunal, the assessee has filed an appeal in the name of M/s. Aztecsoft Ltd., (now merged with M/s. Mindtree Ltd.,).

7. In the light of these facts, we are of the view that for mistake in passing the order in the name of M/s. Aztecsoft Ltd., the AO is not only responsible but the assessee is also equally responsible for not pointing out the legal complication of the assessment. It appears that the assessee was simply waiting for the assessment order to be passed in the wrong name and thereafter take a plea before the Tribunal. Under the given facts and circumstances of the case, we are of the view that undisputedly, the assessment order should have been passed in the name of merged company i.e., M/s. Mindtree Ltd., against its PAN number and not in the name of the merging company. The assessment was framed in the name of the merging company giving its PAN number whereby the liability accrued against the merged company after the merger. Therefore, the assessment order framed is not sustainable in the eyes of the law but for this effect the revenue cannot be held

responsible alone. We accordingly set aside the order and restore the matter to the file of the AO with a direction to pass a fresh order in the name of the merged company after affording an opportunity of being heard to the assessee. Since we have restored the matter to the AO for passing a fresh order, the other grounds raised in this appeal becomes academic and we accordingly decline to adjudicate the same.

8. In the result, the appeal of the assessee is allowed for statistical purpose.

Pronounced in the open court on this 31st day of March, 2017.

Sd/-
(S. JAYARAMAN)
Accountant Member

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Bangalore.
Dated: 31st March, 2017.
/NS/

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.