IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI

BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

I.T.A. No. 6587/DEL/2016 (A.Y 2008-09)

(THROUGH VIDEO CONFERENCING)

Genpact India Pvt. Ltd. (Formerly Known as Empower Research Knowledge Services Pvt. Ltd.) {(erstwhile Genpact India) (erstwhile Genpact Infrastructure (Hyderabad) Pvt. Ltd.)} DLF City, Phase V, Sector 53, Gurgaon-122002, Haryana, India **(APPELLANT)**	Vs	DCIT Circle-10(1) New Delhi **(RESPONDENT)**

Appellant by	**Sh. Vishal Kalra, Adv & Ms. Reema Malik, Adv**
Respondent by	**Sh. M. Barnwal, Sr. DR**

Date of Hearing	**01.10.2020**
Date of Pronouncement	**03 .11.2020**

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 28/12/2011 passed by CIT(A)- 37, New Delhi for Assessment Year 2008-09.

2. The grounds of appeal are as under:-

GROUNDS OF APPEAL

"1. That on the facts and the circumstances of the case and in law, the order passed by the Hon'ble Commissioner of Income Tax (Appeals) ('CIT(A)')/ Ld. AO is bad in law.

2. That on the facts and circumstances of the case and in law, while

acknowledging that the assessment proceedings undertaken by the Ld. AO were not in accordance with the scheme of Section 144C of the Act and considering that the assessment order giving effect to DRP directions was not passed within the permitted time period, the Hon'ble CIT(A) erred in not explicitly quashing the impugned assessment proceedings, being void ab initio.

3. The Ld. AO erred on facts and in law in enhancing the income of the Appellant by INR 83,857,011 holding that the international transactions pertaining to provision of Information Technology enables Services ('ITeS') and cost reimbursements do not satisfy the arm's length principle envisaged under the Act and in doing so have grossly erred by:

a. *not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case;*

b. *imputing a mark-up on the international transaction pertaining to reimbursement of expenses received from Associated Enterprise ('AE'), ignoring the fact that such reimbursements are mere noncore, non-value adding pass through transactions; thereby treating such cost reimbursement transaction as part of the core transaction of the Appellant and re-computing the Profit Level Indicator ('PLI') after considering the same as part of the operating revenue and operating cost;*

c. *rejecting the adjustment for unutilized capacity made by the Appellant to its profit to even out the impact of unutilized capacity on its profitability when it is being compared to old established companies in the industry;*

d. *rejecting the Transfer Pricing ('TP') documentation maintained by the Appellant under section 92D of the Act and Rule 10D of the Rules and disregarding the ALP as determined by the Appellant in the TP documentation;*

e. *disregarding multiple year/ prior years' data used by the Appellant in the TP documentation and holding that current year (i.e. Financial Year ('FY') 2007-08) data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of*

preparing its TP documentation;

f. rejecting comparability analysis undertaken by the Appellant in the TP documentation/ fresh search and conducting a fresh comparability analysis based on application of the following additional/ revised filters in determining the ALP:

i. *exclusion of companies whose data for FY 2007-08 was not available;*

ii. *exclusion of companies with related party transactions greater than 25% of their sales;*

iii. *exclusion of companies with export sales that are less than 25% of their total revenue;*

iv. *exclusion of companies with diminishing revenues/ persistent losses for last three years upto and including FY 2007-08;*

v. *exclusion of companies having different financial year ending (i.e.not March 31, 2008);*

and rejecting, in particular, the following filters applied by the Appellant in its fresh search:

vi. companies havingother operating income (i.e. income other than manufacturing and trading income) to sales greater than 50% were accepted;

vii. companies having research & development costs to sales less than 3% were accepted;

viii. companies with net worth less than zero were rejected;

ix. companies having advertising, marketing and distribution costs to sales less than 3% were accepted.

3.1. *including high-profit making companies in the final comparables set for benchmarking a company that is in its initial year of business operations and is still in the set-up and a nascent stage such as the Appellant (disregarding judicial pronouncements on the issue), thus demonstrating an intention to arrive at a pre-formulated opinion without complete and adequate application of mind with the single-minded intention of making an addition to the returned income of the Appellant;*

3.2. *including certain companies having significantly higher turnover vis-a-vis*

the Assessee;

3.3. *including certain companies that are not comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*

3.4. *resorting to arbitrary rejection of low-profit/ loss making companies based on erroneous and inconsistent reasons;*

3.5. *excluding certain companies on arbitrary/ frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*

3.6.*Collecting selective information of the companies by exercising power granted to section 133(6) of the Act that was not available to the Appellant in the domain and relying on the same for comparability purposes (and to the sent of completely ignoring reliable data available in public domain/ annual reports in numerous cases)*

a. and further in doing so violating the fundamental principles of natural justice by not sharing with the Appellant, in case of a number of comparables, the information/ reply received by the Ld. TPO/ Ld. AO u/s 133(6)

3.7. exclusion of certain cost such as provision for doubtful debts and foreign exchange loss or gain from the cost base in computation of mark-up of comparable companies;

4. The Ld. AO erred on facts and in law in enhancing the income of the Appellant by Rs. 8,551,748 and in doing so have grossly erred by treating outstanding receivables from AE as loan facility and imputing interest at 17.26% and in doing so have grossly erred by:

a. *disregarding the intercompany pricing arrangement and not appreciating the fact that unlike a loan or borrowing, outstanding receivable is not an independent transaction which can be viewed on standalone basis and needs to be examined with the commercial transaction as a result of which the debit balance has come into existence;*

b. *not appreciating the contractual arrangement of the Appellant with its Associated Enterprises ,("AEs") and re-characterizing the outstanding receivables from overseas AEs as loan facility and imputing interest;*

c. *ignoring the fact that working capital adjustment takes into account the impact of outstanding receivables on profitability and therefore, no further imputation of interest is warranted;*

d. *not appreciating the fact that the credit period provided by the Appellant to its AE is within the timeline permitted by the relevant Reserve Bank of India guidelines and therefore, cannot be challenged;*

e. *without prejudice to other contentions of the Appellant, not appreciating that as per the judicial precedence, the imputation of interest has to be seen on amount outstanding for more than six month as on date of balance sheet;*

f. *without prejudice to other contentions of the Appellant, not appreciating that if at all interest is to be imputed, instead of an ad-hoc rate of 17.26%, the LIBOR rate for the FY 2007-08 should be applied for imputing interest since receivables outstanding were in foreign currency;*

g. *without prejudice to other contentions of the Appellant, not appreciating that a noninvestment or non-finance company such as the Appellant would not invest its recovered earnings in risky loan deals, rather park the funds in short term risk free liquid schemes such as fixed deposits until redeployment of funds into the business, thereby earning an income on the outstanding receivables at a rate applicable to short term deposits and not the rate applicable to loans.*

5. The Ld. AO have grossly erred by disregarding judicial pronouncements in India in undertaking the TP adjustment.

6. *The Ld. AO has grossly erred on facts and in law by levying interest under section 234A, 234B and 234C of the Act mechanically and without recording any satisfactory reasons for the same.*

The above grounds of appeal are without prejudice to each other."

ADDITIONAL GROUNDS

" That on the facts and circumstances of the case and in law, the orders passed by the Commissioner of Income Tax (Appeals)/AO")/ Transfer Pricing Officer ("TPO") are bad in law and void ab initio as the same have been

passed on a non-existent entity, namely Genpact Infrastructure (Hyderabad) Pvt. Ltd."

3. The assessee Company is engaged in the business of providing IT and IT Enabled Services to different clients. The assessee also received the reimbursement of expenses from its Associated Companies in Bermuda. The assessee also got substantial amounts outstanding from AE Genpact International Inc (Hungarian Branch), which has been outstanding for a very long time. The assessee filed e-return of income on 8/10/2008 declaring income of Rs. 5,65,511/-. Genpact Infrastructure (Hyderabad) Pvt. Ltd., erstwhile company amalgamated with Genpact India w.e.f. April 1, 2010, vide order dated November, 19, 2010 passed by the Hon'ble Delhi High Court. The Assessing Officer was informed about the scheme of amalgamation vide letter dated 24/1/2011. The Assessing Officer passed the assessment order, u/s 143 (3) of the Income Tax Act, 1961 on December, 28, 2011, in the name of erstwhile company i.e. Genpact Infrastructure (Hyderabad) Pvt. Ltd. As per the scheme of merger approved by the Hon'ble Delhi High Court, three companies namely Genpact Infrastructure (Hyderabad) Pvt. Ltd., Genpact Infrastructure (Bhopal) Pvt. Ltd., Genpact Infrastructure (Kolkata) Pvt. Ltd., got merged with Genpact India.

4. Being aggrieved by the assessment order, the assessee filed appeal before us.

5. The Ld. AR has argued on the additional ground that the assessment order passed is bad in law and void ab initio as the same have been passed on a non-existent entity namely Genpact Infrastructure (Hyderabad) Pvt. Ltd. The Ld. AR submitted that the impugned assessment proceedings were continued in the name of non-existent merge entity i.e. "Genpact India" and final assessment order was also passed in the name of non-existent entity. Thus, the grievance of the assessee is related to the validity of the assessment order

framed u/s 143(3) read with Section 144C(1). Genpact Infrastructure (Hyderabad) Pvt. Ltd., erstwhile company amalgamated with Genpact India w.e.f. April 1, 2010, vide order dated November, 19, 2010 passed by the Hon'ble Delhi High Court. The Ld. AR submitted that the Assessing Officer was informed about the scheme of amalgamation vide letter dated 24/1/2011 addressed to ACIT, Circle – 1, Jaipur as well as to Addl. CIT, Range 12, New Delhi and also to ACIT, Circle 12(1), New Delhi. The Ld. AR relied upon the following decisions of the various High Court and the Apex Court as well as the Tribunal:

i) Maruti Suzuki India Ltd. vs. DCIT ITA No. 902/Del/2017 dated 06.04.2017

ii) PCIT vs. Maruti Suzuki India Limited (2019) 416 ITR 613 (SC)

iii) Genpact Infrastructure (Bhopal) Pvt. Ltd. (Now merged with Genpact India) v. DCIT (ITA No. 199/Del/2015 dated 27.04.2018 Tri.

iv) Genpact Infrastructure (Kolkata) Pvt. Ltd. (Now merged with Genpact India) v. DCIT (ITA No. 198/Del/2015 dated 27.04.2018 Tri.

v) PCIT v. Genpact India (previously known as Genpact Infrastructure (Bhopal) Private Limited)(ITA 168/2019, CM Appl. 40543/2019 order dated 17.09.2019) Delhi High Court

vi) PCIT v. Genpact India (previously known as Genpact Infrastructure (Kolkata) Private Limited)(ITA 172/2019, CM Appl. 40541/2019 order dated 17.09.2019) Delhi High Court

vii) PCIT v. Transcend MT Services (P.) Ltd. (2019) 109 taxmann.com 421 (Del.)

viii) DCIT vs. Mapsa Logistics (P.) Ltd. ITA Nos. 2666, 2667 & 2669/Del/2017 Tri.

ix) V3S Infratech Ltd. vs. DCIT ITA Nos. 6514 & 6515/Del/2016

x) Spice Entertainment Ltd. vs. CIT 280 ELT 43 (Del)

xi) CIT vs. Spice Infotainment Ltd. Civil Appeal 285 of 2014, Judgment dated November 2, 2017 (SC)

xii) CIT vs. Dimension Apparels (P) Ltd. (2014) 370 ITR 288

xiii) PCIT vs. Maruti Suzuki India Limited (2017) 397 ITR 681 (Del)

xiv) PCIT vs. Maruti Suzuki India Limited (SLP(C) Diary No. 14106 of 2018)

xv) CIT vs. Micra India (P.) Ltd. (2015) 231 Taxman 809

xvi) PCIT vs. Nokia Solutions and Networks India Pvt. Ltd. 402 ITR 21 (Del. HC)

xvii) CIT vs. Micron Steel (P.) Ltd. (2015) 372 ITR 386

xix) BDR Builders and Developers Pvt. Ltd. vs. ACIT (2017) 397 ITR 529 (Del. HC)

6. The Ld. DR submitted that notice u/s 143(2) was validly served on the amalgamating company. The Ld. DR further submitted that the claim of the assessee of having given the assessee information of approval dated 19/11/2020 of the Hon'ble Delhi High Court to the Assessing Officer at Jaipur could not be established and it cannot be claim that the Assessing Officer could any way had the information of the merger. Genpact Infrastructure (Hyderabad) Pvt. Ltd., cannot be called as non found company and can very much said to exist at the common address under the shadow and umbrella of the Genpact India Pvt. Ltd. to provisions to Section 170(1)(a) required to frame an assessment in the case of the predecessor entity i.e. erstwhile Genpact Infrastructure Hyderabad Pvt. Ltd. in respect of its income up to date of succession.

7. We have heard both the parties and perused the material available on record. The additional ground is a legal ground which goes to the root of the matter relating to sustainability of the assessment order itself, therefore, we are admitting the said ground. The Assessing Officer was very well aware that the company got amalgamated w.e.f 1st April, 2010. The said facts were brought on record by assessee before the Assessing Officer vide letter dated 24/1/2011 which was filed on 3rd February, 2011. This said letter was also mentioned in the decisions of the Hon'ble Delhi High Court in cases of other entities of Genpact India. The reliance upon the decision of the Hon'ble Supreme Court

in case of Maruti Suzuki India Ltd. (Supra) by the Ld. AR is apt in the present case. The Hon'ble Supreme Court observed in para 19 as follows:

"19. .....

(iii) Thirdly, the consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating company ceased to exist. In Saraswati Industrial Syndicate Ltd., the principle has been formulated by this Court in the following observations:

"5. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation of scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more 30 [2019] 260 Taxman 412 (Del.) 31 (2019) 261 Taxman 137 (Guj) existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: Halsbury's Laws of England (4th edition volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."

(iv) Fourthly, upon the amalgamating company ceasing to exist, it cannot be regarded as a person under Section 2(31) of the Act 1961 against whom assessment proceedings can be initiated or an order of assessment passed;

(v) Fifthly, a notice under Section 143 (2) was issued on 26 September 2013 to the amalgamating company, SPIL, which was followed by a notice to it under Section 142(1);

(vi) Sixthly, prior to the date on which the jurisdictional notice under Section 143 (2) was issued, the scheme of amalgamation had been approved on 29 January 2013 by the High Court of Delhi under the Companies Act 1956 with effect from 1 April 2012;

(vii) Seventhly, the assessing officer assumed jurisdiction to make an assessment in pursuance of the notice under Section 143 (2). The notice was issued in the name of the amalgamating company in spite of the fact that on 2 April 2013, the amalgamated company MSIL had addressed a communication to the assessing officer intimating the fact of amalgamation. In the above conspectus of the facts, the initiation of assessment proceedings against an entity which had ceased to exist was void ab initio.
……"

In the present case also the amalgamating company i.e. Genpact India was not in existence at the time of conducting assessment proceedings as well as on the date of passing Assessment Order. Once it is found that assessment is framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B of the Act. Thus, in light of the decision of the Maruti Suzuki passed by the Hon'ble Apex Court is relevant in the present case as well and hence additional ground is allowed. Hence, the Assessment order itself is void ab initio. Therefore, assessment order is set aside. There is no need to give any finding relating to the merits of the case as the assessment order itself is void ab initio. and bad in law. The appeal of the assessee is allowed.

8. In the result, appeal of the assessee is allowed.

Order pronounced in the Open Court on this 03rd Day of November, 2020

Sd/-	Sd/-
(N. K. BILLAIYA)	**(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 03/11/2020
R. Naheed *

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI