IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI
(ACCOUNTANT MEMBER)
AND
SHRI PAVAN KUMAR GADALE
(JUDICIAL MEMBER)

ITA 530/Mum/2018
(Assessment year: 2013-14)

Accenture Solutions Private Limited (ASOL) (As a Successor to Accenture Services Private Limited (ASPL) which has merged into ASOL with an effective date of 1 December, 2016), Plant-3, Godrej & Boyce Complex, Phirojshah Nagar, Vikhroli West, Off. L.B.S. Marg, Mumbai-400 079 PAN : AAACH3235M	vs	The Deputy Commissioner of Income-Tax, Circle 14(1)(1), Mumbai
APPELLANT		**RESPONDENT**
Appellant by		Shri Nishant Thakkar / Hiten Chande / Rohit Biyani , Advocates
Respondent by		Shri Yogesh Kamat CIT DR

Date of hearing	01-12-2021
Date of pronouncement	04-01-2022

O R D E R

Per Prashant Maharishi (AM)

01 This appeal is filed by the assessee against the order of the learned Deputy Commissioner of Income-tax-14(1)(1), Mumbai (Ld. AO) passed under section 143(3) r.w.s. 144C (13) of the Income-tax Act, 1961 (the Act) on 28/04/2017 in pursuance to the direction of the Learned Dispute Resolution Panel-1, Mumbai (the Ld. DRP) for

assessment year 2013-14 raising, in all thirteen grounds of appeal, as under:-

> "Based on the facts and in the circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the Deputy Commissioner of Income-tax-14(1)(1) ['Learned AO'], under Section143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 ('the Act')('Assessment order'), in pursuance to the Directions issued by Dispute Resolution Panel-1 ('Hon'ble DRP'), Mumbai, on the following grounds:
>
> **General Ground**
>
> 1. Erred in assessing the total income of the Appellant at Rs 1424,94,70,020 against a total income of Rs 1337,19,10,332 as computed by the Appellant in its revised computation of income.
>
> **A. Transfer Pricing Grounds**
>
> ***Reference made to the Transfer Pricing Officer (' TPO')***
>
> 2. Erred in making a reference of the Appellant's case to the Learned TPO under Section 92CA(I) of the Act, without satisfying the conditions specified therein.
>
> ***Disallowance of royalty payment***
>
> 3. Erred in determining the arm's length value of the royalty paid by the Appellant for AY 2012-13 and AY 2013-14 to be Nil disregarding the benefits accrued to the Appellant by accessing Accenture's portfolio of intellectual property.
>
> ***Quantum of TP adjustment to be restricted to value of international*** *transaction*
>
> *4.* Erred in making an adjustment of Rs 87,75,59,686 in respect of the international transaction of payment of royalty disregarding the fact that the actual royalty payment for the year was only Rs. 61,89,82,900.
>
> ***CUP Method is more appropriate as compared to TNMM***
>
> 5. Erred in rejecting the economic analysis undertaken by the Appellant using CUP method and instead applying TNMM to determine the arm's length price for the royalty transaction.
>
> 6. Without prejudice to ground 5 above, erred in considering incorrect margins for the third party consulting segment, while benchmarking the royalty transaction using TNMM.

7. Erred in rejecting all the external royalty agreements from public database that were relied upon by the Appellant to determine the arm's length price under the CUP method, by giving adhoc and arbitrary reasons.

8. Without prejudice to the Ground 7 above, the learned TPO erred in not accepting the three agreements submitted by the Appellant which were only for 'Licensing of Brand' with an average royalty rate of 3.3%

Double disallowance in the hands *of the Appellant*

9. Erred in adding the entire transfer pricing adjustment of Rs 87,75,59,686 in respect of the royalty transaction to the Appellant's total income for AY 2013-14, disregarding the fact that the Appellant had suo-moto disallowed royalty to the extent of Rs 46,46,62,518 in its ROI for the year under considerations

B. <u>Non Transfer Pricing grounds</u>

10. Erred in not granting credit of taxes deducted at source of Rs 39,41,986 claimed by the Appellant in its return of income.

11. Erred in not granting credit for advance tax of Rs 28,70,000 and self-assessment tax of Rs 7,48,43,660 claimed by the Appellant in its return of income

12. Erred in law and in facts by levying interest under Section 234B and Section 234C of the Act.

13. Erred in initiating penalty proceedings under Section 271(1 }(c) of the Act

Each of the above grounds of appeal is without prejudice to and independent of one another. The Appellant craves leave to add, alter, amend or delete the above grounds of appeal at or before the time of hearing of the appeal, so as to enable the Hon'ble Income tax Appellate Tribunal to decide this appeal according to law."

02 Assessee Company is engaged in the business of providing ITES services to its group entities across the globe. It also provides management consultancy and technology outsourcing services. Assessee filed its return of income on 29/11/2013 declaring total income of Rs. 1338,62,60,790/-. The return of income was taken

up for scrutiny. During the course of assessment proceedings, assessee filed a revised return of total income showing total income of Rs. 1337,19,10,332/-.

03 Before ld AO, during the course of assessment proceedings, assessee submitted a letter dated 14/12/2016 stating that Hon'ble Bombay High Court has passed an order dated 20/10/2016 sanctioning the scheme of amalgamation of Accenture Services Pvt Ltd with Accenture Solutions Pvt Ltd. The appointed date of the scheme was 01/04/2015, which has become operative from 01/12/2016. The assessee also specifically requested the Assessing Officer to issue all communication / order of 'Accenture Services Pvt Ltd' in the name of 'Accenture Solutions Pvt Ltd.'

04 The learned Assessing Officer noted that assessee has entered into certain international transactions and, therefore, the matter was referred under section 92CA of the Act to the Transfer Pricing Officer to determine Arm's length price of international Transactions. The learned TPO passed an order under section 92CA (3) proposing an adjustment of Rs. 1211,03,34,497/- to the total income of the assessee.

05 The learned AO examined the claim of the assessee under section 10AA of the Act and he re-computed disallowance at Rs. 8,80,38,78,422/- against the claim made by the assessee of Rs. 8,83,64,26,734/. The ld. AO further restricted the deduction under section 10AA of the Act with respect to intellectual property service agreement and based on the earlier year's order. Resultantly, the claim of the assessee was restricted to Rs. 8,24,67,18,909/-.

06 Accordingly, the draft assessment order was passed on 15/12/2016 determining the total income of the assessee at Rs. 2607,19,52,660/-. This draft order was passed by the ld. AO in the

name of the assessee, "M/s Accenture Services Pvt Ltd (now merged with and known as Accenture Solutions Pvt Ltd)".

07 The assessee, aggrieved by the draft order, preferred objections before the learned Dispute Resolution Panel (Ld. DRP). Such directions were passed on 22/09/2017 in the name of the assessee, "Accenture Solutions Pvt Ltd (ASOL)) (As a Successor to Accenture Services Private Limited (ASPL) which has merged into ASOL with an effective date of 1 December, 2016)."

08 In pursuance to the above direction, the Ld. AO passed an assessment order under section 143(3) read with section 144C (13) of the Act. In the final assessment order, the arm's length price of the international transactions was determined at Rs. 87,75,59,688/- and deduction under section 10AA of the Act was allowed to the assessee of Rs. 8,33,64,26,735/-. Accordingly, total income of the assessee was assessed at Rs. 1424,94,70,020/-. Such assessment order was passed in the name of the assessee, "M/s Accenture Services Pvt. Ltd (now merged with and known as Accenture Solutions Pvt.Ltd)". The assessee is aggrieved by that order and has preferred appeal before us.

09 Assessee has made an application for admission of the additional ground of appeal on 08/01/2019. In the original appeal memo, the assessee has preferred thirteen grounds of appeal whereas in the application for admission of additional grounds of appeal, assessee has raised additional grounds from serial No. 14 to 17 of the appeal.

10 Ground nos. 14 to 16 challenge the transfer pricing adjustment. These are on the merits of the addition. Ground 17 is as under:-

> "17. Without prejudice to the Ground Nos 1 to 16, the Final Assessment order dated 28 November, 2017 passed under Section 143(3) / 144C(13) of the Act is bad in law and liable to be quashed as the assessment order was framed on a non-existing entity as on the date of such order (the said company having merged with

Accenture Solutions Private Limited w.e.f. 01 December 2016)."

11 The learned authorized representative commenced his arguments stating that on the jurisdictional issue, he would like to press ground 17 first. For the admission of the above ground, he relied upon the decision of Hon'ble Supreme Court in case of National Thermal Power Co. Ltd vs CIT 229 ITR 383(SC); Jute Corporation of India 187 ITR 688 (SC) and the decision of the Hon'ble Bombay High Court in case of Ahmadabad Electricity Co. Ltd 199 ITR 351 (Bom). He further stated that the additional grounds of appeal raised by the assessee goes to the root of the matter, is a jurisdictional issue and no further facts are required to be investigated; therefore, additional grounds may be admitted.

12 The learned CIT (DR) vehemently objected and submitted that such ground was not taken before the ld. DRP and assessee has participated in the assessment proceedings, and therefore, the same should not be admitted.

13 We have carefully considered the rival contentions and perused the orders of the lower authorities as well as the additional ground raised by the assessee. We find that the additional ground raised by the assessee goes to the root of the matter. Only Draft assessment order, Directions of ld DRP and Final Assessment orders are required to be seen. No fresh facts need to be investigated. It is a jurisdictional Ground, which can be raised by the assessee at any stage, and, therefore, not raising such grounds before the lower authorities cannot hamper the right of the assessee to raise the same before us. Accordingly, we admit the additional ground.

14 As Such, additional ground raised by the assessee goes to the root of the matter being a jurisdictional issue; it is required to be adjudicated, first.

15 The learned authorized representative of the assessee referred to the paper book No 1 containing 73 pages and second paper book containing pages 74 to 178. He took us to the letter dated 14/12/2016 addressed to the assessing officer wherein assessee referred to the approval of the Hon'ble Bombay High Court to the scheme of amalgamation of the assessee. He also referred to para 5 of that letter stating that now all the notices, etc. as well as orders are required to be made in the name of "Accenture Solutions Pvt Ltd", in the name of resultant entity. He took us to page No. 2 of the draft assessment order wherein the above facts have been recorded by the ld. AO, who passed draft assessment order on 15/12/2016. He submitted that the assessing officer was made aware in whose name, the order was required to be passed. He submitted that despite putting this to the attention of the learned assessing officer, he passed draft assessment order in the name of non-existing company. He further referred to the direction issued by the learned Dispute Resolution Panel wherein the ld. DRP issued the direction in the correct name (in the name of resultant company). He, then took us to the assessment order passed under section 143(3) wherein the learned assessing officer, on page 2 at para No.1, once again described the facts of the amalgamation and despite this, he passed an assessment order in the name of 'Accenture Services Pvt Ltd', instead of 'Accenture Solutions Pvt Ltd'. Therefore, he submitted that the assessment order passed on a non-existent entity is a nullity and therefore, the same is required to be quashed. He further held that such an order passed is without any jurisdiction and deserves to be set aside. For this proposition, he relied upon the decision of the Hon'ble Supreme Court in case of PCIT vs Maruti Suzuki India Ltd 416 ITR 613 (SC) dated 25/07/2019. He further referred to the decision of Hon'ble Supreme Court in Civil Appeal No.

285 of 2014 in CIT vs Spice Infotainment Ltd dated 02nd November 2017 wherein the appeals by the revenue against the decision of the Hon'ble Delhi High Court in ITA No. 475 of 2011 dated 03rd August 2011 were dismissed. He further referred to several decisions of the co-ordinate benches and stated that the assessment order passed by the learned AO on the non-existing entity deserves to be quashed.

16 Countering the submission of the learned counsel, the Ld. CIT (DR) vehemently submitted that the assessee company has merged into another company. He further submitted that the assessee has been issued the notices under section 143(2) correctly and assessee appeared before the assessing officer. It was further stated that assessee is not at all aggrieved by mere mention of the name of the assessee prior to its amalgamation. He further stated that even otherwise the issue is decided by the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communication dated 18/05/2021 where the Hon'ble judges made reference to the larger bench. He specifically referred to paragraph No. 10 of that decision. He further stated that the Hon'ble Delhi High Court has considered the provisions of section 23 of the Companies Act, 1956. In view of this, he submitted that the decision of the Hon'ble Supreme Court in Maruti Suzuki India Ltd (supra) does not apply to the facts of the case.

17 In the rejoinder, the learned authorized representative submitted that there is no decision of the Hon'ble Delhi High Court on this issue. However, Honourable High court has held that there was a difference of opinion between the Hon'ble Judges and it was held that the question of law has to be framed and appeal is to be admitted. He, therefore, submitted that in the present case, the order passed by the Hon'ble Supreme Court squarely covers the issue. With respect to the argument of the learned DR that notice

under section 143(2) was issued in the name of amalgamating company, he referred to paragraph No.1 of the order of the Hon'ble Delhi High Court in case of Spice Infotainment Ltd and, therefore, submitted that the impugned assessment order does not stand the test of the law. He further referred to paragraph No. 11 of that decision, where in it has been held that mere participation in assessment proceedings by the appellant would be of no effect as there is no estoppel against law. He once again re-iterated several judicial precedents already cited by him.

18 We have carefully considered the rival contentions and perused the orders of the lower authorities. We find that the 'Accenture Services Pvt Ltd' is amalgamated with 'Accenture Solutions Pvt Ltd' vide order of the Hon'ble Bombay High Court dated 20th October, 2016 wherein the scheme of amalgamation under sections 391 to 394 of the Companies' Act, 1956 was approved and such scheme became operative from 01-12-2016 with an appointed date of 01st April, 2016. In view of this, it is apparent that 'Accenture Services Pvt Ltd' ceased to exist by virtue of this order with effect from 01st April 2015. This intimation was given to the assessing officer on 14/12/2016. Assessee has also placed the duly acknowledged letter submitted to the assessing officer. The above fact has also been recorded by the learned assessing officer in his draft assessment order passed on 15/12/2016. The assessing officer, even after that, passed draft Assessment order in the name of "Accenture Services Pvt Ltd (Now Merged with and Known as "Accenture Solutions Pvt Ltd"). The learned DRP has correctly mentioned the name of resultant entity in its direction dated 22/09/2017. However, the learned assessing officer, despite the above facts, once again recording the same facts in his assessment order passed final assessment order in the name of 'Accenture

Services Pvt Ltd (now merged with and Known as Accenture Solutions Pvt Ltd)" and not in the name of resultant entity i.e. 'Accenture Solutions Pvt Ltd'. Thus, it is clear that as on the date of passing of assessment order, i.e. on 28/11/2017, "Accenture Services Pvt Ltd' was not at all in existence as it got merged with 'Accenture Solutions Pvt Ltd.' Such an assessment order passed on nonexistent company is invalid.

19 The Hon'ble Supreme Court, while deciding the identical issue in the case of Maruti Suzuki India Ltd (supra), has held that assessment order passed on a nonexistent entity is without jurisdiction and deserves to be set aside. A fact of the case before the Hon'ble Supreme Court clearly shows that the notice under section 143(2) of the Act was issued in the name of amalgamating company and not the name of amalgamated company. In this case, similar notice dated 05/09/2014 was also issued in the name of a nonexistent entity. However, though this notice was issued prior to the 'appointed date', would not make any difference. Even the participation by the assessee in the assessment proceedings would also not make any difference because the facts remains that the assessment order has been passed by the assessing officer in the name of a nonexistent company. Thus, the issue is squarely covered in favour of the assessee by the decision of the Hon'ble Supreme Court in case of Maruti Suzuki India Ltd (supra). The Honourable Supreme court held as under :-

> **"33.** In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the

> appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in ***Spice Enfotainment*** (*supra*) on 2 November 2017. The decision in **Spice Enfotainment** has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in ***Spice Enfotainment*** (*supra*).
>
> **34.** We find no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable."

20 Now we come to the order of the Hon'ble Delhi High Court in case of PCIT vs Sony Ericsson Mobile Communications India Pvt Ltd in ITA No. 115 of 2019 reported in TS-367-HC-2021 dated 18/05/2021. Indeed, there is a difference of opinion between the Hon'ble Judges. However, at the end, in the last paragraph, the Hon'ble High Court has held that the question of law was to be framed and appeal is required to be admitted. Further the facts in those were quiet different as held in para no 16 as under :-

"16. We also do not have before us, the communications dated 6th December, 2013 and 17th February, 2014 by which the Respondent-Assessee is stated to have informed the AO of the change of name and are thus unable to gauge whether they were in

relation to proceedings for assessment of the relevant year or in general."

In the present case, the LD AO in Draft Assessment as well as final assessment order records the intimation.

21 Therefore, issue before the Honourable Delhi High court was on different set of facts. In view of this, we reject the contentions of the learned CIT (DR) that the decision of the Hon'ble Delhi High Court is required to be followed for the reason of distinguishing facts.

22 Thus the issue is squarely covered in favour of the assessee by the decision of Honourable Supreme court in case Maruti Suzuki Limited (supra)

23 In view of this, we adjudicate ground 17 of the appeal of the assessee, which was admitted as an additional ground of appeal, in favour of the assessee holding that assessment order passed by the assessing officer in the name of a non existing company, despite having prior information provided by the assessee and such facts recorded in the draft assessment order as well as the final assessment order, suffers from jurisdictional defect and, therefore, same is set aside. Accordingly, we hold that the assessment order passed by the learned assessing officer is without jurisdiction and hence, quashed.

24 In view of our decision in ground 17 of the appeal, all other grounds of appeal become infructuous and same are dismissed.

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

Order pronounced on 04/01/2022.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	**(PRASHANT MAHARISHI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Date, 04/01/2022

Pavanan
Copy to :

1. Appellant
2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
6. Guard File

By Order

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Asstt. Registrar, ITAT, Mumbai