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

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.629/Del/2021
Assessment Year: 2016-17

Honda Cars India Ltd. (A successor in interest of Honda Motor India Pvt. Ltd.), Plot No.A-1, Sector 40-41, Surajpur Kasna Road, Noida	**Vs.**	DCIT, Circle-10(1), New Delhi
PAN :AABCH7526E		
(Appellant)		**(Respondent)**

Appellant by	Sh. Deepak Chopra, Advocate Sh. Harpreet S. Ajmani, Advocate Ms. Manasvini Bajpai, Advocate
Respondent by	Sh. Surender Pal, CIT(DR)

Date of hearing	23.12.2021
Date of pronouncement	23.03.2022

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeal has been filed by the assessee assailing the final assessment order dated 12.02.2021 passed under

section 143(3) read with section 144C(13) read with section 144B of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment year 2016-17, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Substantive grounds raised by the assessee are as under:

1. *That on the facts and in the circumstances of the case and in law, the order dated 30.04.2021 passed by the Deputy Commissioner of Income Tax, Circle-10(l), New Delhi, National e-Assessment Centre, Delhi ("DCIT") under section 143(3) read with section/s 144C(13) and 144B of the Income-tax Act, 1961 ("Act"), to the extent prejudicial to the Appellant, is bad in law and void ab-initio.*

2. *That on the facts and in law, the DCIT ought to have appreciated that in terms of section 144B of the Act read with S.O. No. 1434(E) dated 31.03.2021 issued by the Central Board of Direct Taxes ("CBDT"), assessment order could only be passed by the relevant income-tax authority designated as an "Assessing Officer", while passing the order, failing which the assessment framed would be non-est and void in terms of section 144C(13) read with section 143(3) of the Act.*

3. *That without prejudice on the facts and in law, the DCIT erred in assuming jurisdiction as an Assessing Officer, without appreciating that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all.*

A. Assessment framed on an entity no longer in existence

4. *That without prejudice to the other grounds on merits, the DCIT ought to have considered that an assessment framed on "Honda Motor India Private Limited" being a non-existent entity is nullity in the eyes of law.*

5. *That the DCIT erred in not appreciating that since Honda Motor India Private Limited had merged with Honda Cars India Ltd. w.e.f. 01.04.2018, the assessment framed on the erstwhile entity, which was no longer in existence was a nullity in the eyes of law and hence liable to be quashed.*

6. *That without prejudice, DCIT ought to have considered that the order dated 24.10.2019 passed by the Transfer Pricing Officer ("TPO") under section 92CA(3) of the Act on a non-existent entity i.e., Honda Motor India Private Limited was a nullity in the eyes of law.*

7. *That without prejudice, it ought to be considered that once the order dated 24.10.2019 passed by the TPO under section 92CA(3) of the Act is treated as non-est and there is no variation in the returned income on account of transfer pricing adjustment, then the Appellant could no longer be regarded as an 'eligible assessee' as per section 144C(15)(b) of the Act.*

8. *That without prejudice, the DCIT erred in not appreciating that in terms of binding precedent by jurisdictional High Court in Honda Cars India Ltd. v. DCIT [2016] 67 taxmann.com 29 (Delhi), framing an assessment whilst passing a draft order in case of a non-eligible assesse is bad in law, void and nullity.*

9. *That without prejudice, the DCIT ought to have considered that the time limit for framing an assessment in case of non-eligible assessee expired on 31.12.2019 and consequentially, final assessment order dated 30.04.2021 passed under section 143(3) read with sections 144C(13) and 144B of the Act is barred by limitation.*

B. Transfer pricing additions

10. *That the TPO / DRP has erred in law in rejecting the transfer pricing documentation maintained by the Appellant and thereby re-determining the arm's length price of the impugned transactions, without appreciating that the circumstances necessitating such redetermination as mentioned in sub-section (3) of section 92C did not exist.*

11. *That the Authorities below grossly erred on facts and in law in rejecting the combined transaction approach adopted by the Appellant for benchmarking the operating profitability for the period under consideration.*

12. *That the Authorities below grossly erred in law in rejecting the Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) for benchmarking the operating profitability of the Appellant for the year under consideration.*

Adjustment of INR 18,90,90,000 on import of components and spare parts from AE's.

13. *That the TPO grossly erred in making an adjustment of INR 18,90,90,000 in respect of the import of components and spare parts being the difference between the gross profit margins between the AE and Non-AE segment.*

14. *That the Authorities below grossly erred in characterising the Appellant as a 'distributor' of "spare parts" and hence concluding that 'Resale Price Method' (RPM) was the preferred method for determining the arm's length price of the international transaction relating to purchase of spare parts from the AE's.*

15. *That the Authorities below grossly erred in law in not appreciating that the necessary requisites for applying the RPM as MAM were lacking in the present case and hence, only the residual method viz. the TNMM method on a combined transaction approach, was the correct approach for benchmarking the operating profits of the Appellant.*

16. *That the Authorities below grossly erred on facts and in law in not appreciating that while the Appellant was a 'routine distributor' for the imported spare parts, it assumed the role of a 'value added distributor' for the locally procured parts and hence, there was no question of treating these two segments as comparable there being vast difference in the functional profile in the two segments.*

17. *That without prejudice, the Authorities below also completely failed to appreciate that the operating margins submitted by the Appellant of the two segments were un-comparable given the fact that the operating margins in the imported related party segment suffered from various handicaps/business compulsions which handicaps/compulsions were absent in the domestically procured spare parts segment.*

18. *That without prejudice, the Authorities below also erred in ignoring the geographical differences (like cost of labour and capital in the market, overall economic development and level of competition and whether the markets are wholesale or retail) that exist between the related parties operating outside India and the unrelated parties operating locally in India.*

19. *That the Authorities below also failed to appreciate that to compare the operating margins of these segments necessary adjustment had to be given in terms of Rule 10B(l)(b)(iv) of the Income Tax Rules, 1962 (Rules) to account for the differences in the functional and risk profile including the difference in the working capital positions of the two segments since such*

adjustments materially affected the amount of gross profit margin in the open market.

20. *That the Authorities below also grossly erred on facts and in law in not giving adjustments in terms of Rule 10B(3) of the Rules for marine freight & insurance charges and handling charges which are costs borne by the Appellant for import of goods in the related party segment and are not incurred for the purchase of domestic goods in unrelated party segment and such adjustments materially affected the price of such parts in the open market.*

Adjustment in respect of payment of Royalty— INR 44,31,78,460/-

21. *That the TPO grossly erred in applying the "benefit test" for the purposes of determining the ALP of the international transaction relating to payment of royalty at 1 % against the revenue from Non-AE segment and at NIL against the revenue from AE segment.*

22. *That the DRP further erred in enhancing the adjustment on account of payment of royalty from INR 27,29,48,460 (as determined by the TPO in respect of the AE segment) to INR 44,31,78,460 (to include the payment of royalty in respect of the Non-AE segment also).*

23. *That approach of the TPO/DRP to carve out the payment of royalty as a separate international transaction and benchmarking the same was wholly erroneous and without any basis.*

24. *That the TPO/DRP completely failed to appreciate that the combined transaction approach adopted by the Appellant for benchmarking its operating profitability was the correct approach and there was no justification for treating the payment of royalty as a separate international transaction.*

25. *That the TPO/DRP grossly erred on facts and in law in making an adjustment in respect of payment of Royalty by the Appellant under the Technical Know-how agreement dated 01.09.2010 between the Appellant and Honda Motors Japan for acquiring the technical know-how for manufacture of parts.*

26. *That the TPO/DRP grossly erred in dwelling into the realm of 'commercial expediency' for determination of the arm's length price for the payment of royalty against the mandate of chapter X of the Act.*

27. *That the TPO/DRP grossly erred in rejecting the comparables identified by the Appellant on baseless grounds i.e., different geographical location / product / date of commencement of agreement in contravention to the provisions of section 92C of the Act read with Rule 10B(l)(a) of the Income Tax Rules, 1962.*

28. *That the TPO/DRP grossly erred in rejecting Bharat Petroleum Corporation Limited as a comparable on baseless ground that the payment of royalty is in respect to a different product and the royalty calculation methodology is different in contravention to the provisions of section 92C of the Act read with Rule 10B(l)(a) of the Income Tax Rules, 1962.*

29. *The TPO/DRP erred in not appreciating that the determination of the arm's length price is in respect to the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction and what is being benchmarked is the "payment of royalty" as an international transaction between two AE's and not the underlying "product".*

30. *That further without prejudice, the TPO grossly erred in making an adjustment in respect of payment of royalty without applying any prescribed method under the provisions of the Act and Rules.*

Adjustment in respect of outstanding receivables - INR 47,753/-

31. *That the TPO/DRP erred in treating the receivables from the AE as an international transaction in terms of Explanation (i) (c) to section 92B of the Act.*

32. *That the TPO/DRP grossly erred on facts in not appreciating that as per the uniform credit policy of the Appellant, no interest was charged from the AE's as well as the Non- AE's in the event of delay in payments.*

33. *The TPO/DRP erred in fact and in law by re-characterising the outstanding receivables as unsecured loan extended by the Applicant to its AE and benchmark the same as a separate transaction by purported application of Comparable Uncontrolled Price ("CUP") method by applying 6 months LIBOR Plus 400 basis.*

C. - Corporate tax addition

Disallowance of payment of Royalty amounting to INR 17,02.30,009/-

34. *That the Final Assessment order is patently bad in law since it miserably fails to consider that given the enhancement made by the DRP qua the TP adjustment relating to royalty payments,*

there arose no question of making a double disallowance under section 37 of the Act.

35. *That the DCIT grossly erred in disallowing the royalty under section 37 of the Act amounting to INR 17,02,30,000/- paid by the Assessee to Honda Motor Japan ('HMJ') under the license agreement dated 01.09.2010.*

36. *That the DCIT grossly erred in fact and in law while coming to the conclusion that the Agreement between the Assessee and HMJ was only to facilitate transfer of profit to parent entity, which is a perverse finding given the high profitability of the Appellant, a finding not disturbed by the TPO.*

37. *That the DCIT has erred in initiating penalty proceedings under Section 271(1)(c) of the Act.*

38. *That the DCIT has erred in levying interest of INR 16,49,35,582/- under section 234B of the Act on the Appellant.*

39. *That the DCIT has erred in levying interest of INR 15,00,833/- under section 234C of the Act on the Assessee.*

3. At the time of hearing, Sh. Deepak Chopra, learned counsel appearing for the assessee, took up the preliminary legal issue raised in ground nos. 4 to 9, wherein, the assessee has challenged the validity of impugned assessment order.

4. Drawing our attention to the assessment order, he submitted, the Assessing Officer has passed the order in the name of a non-existent entity, viz., 'Honda Motor India Pvt. Ltd.' He submitted, much prior to the passing of the assessment order, 'Honda Motor India Pvt. Ltd.' got merged with another entity and was no longer in existence. Thus, he submitted, the assessment order passed in respect of a non-existent entity is invalid. In

support of his contention, learned counsel for the assessee relied on the following decisions:

1. *PCIT Vs. Maruti Suzuki India Pvt. Ltd., (2019) 107 taxmann.com 375 (SC)*
2. *M/s. Vedanta Ltd. Vs. ACIT (ITA No. 9495/Del/2019, dated 24.12.2020)*
3. *PCIT vs. M/s. Quantech Global Services Ltd. (ITA No. 439/2018, judgment dated 04.02.2021) (Karnataka High Court)*

5. Without prejudice, learned counsel for the assessee submitted, the Transfer Pricing Officer (TPO), though, was aware of the amalgamation of 'Honda Motor India Pvt. Ltd.' with 'Honda Cars India Ltd.', however, he proceeded to complete the proceeding under section 92CA(3) of the Act in the name of former company. Therefore, the order passed by the TPO is a nullity in the eyes of law. He submitted, once the order of the TPO is treated as non-est, then there could not have been any variation in the return of income on account of transfer pricing adjustment, hence, the assessee could no longer be regarded as an eligible

assessee under section 144C(15)(b) of the Act. Therefore, the Assessing Officer could not have proceeded to pass the draft assessment order under section 143(3) read with section 144C of the Act, which is a nullity. That being the case, he submitted, the time limit for assessment in case of non-eligible assessee, having expired on 31.12.2019, the final assessment order passed under section 143(3) read with section 144C(13) on 30.04.2021 is barred by limitation. In support of such contention, he relied on the decision of the Hon'ble Delhi High Court in its own case, citation being, Honda Cars India Ltd. Vs. DCIT, (2016) 67 taxmann.com 29 (Del).

6. Vehemently opposing the contentions of learned counsel for the assessee, learned Departmental Representative submitted, after intimation of amalgamation on 27.11.2019, the draft assessment order was passed by mentioning the correct name of the assessee. He submitted, while objecting to the draft assessment order, the assessee did not raise any objection before learned DRP that the TPO has passed the order in the name of non-existing entity. He submitted, even, while complying with the directions of learned DRP, the TPO has passed his final order on 30.04.2021 mentioning the correct name of the assessee. He

submitted, in the final assessment order also, the Assessing Officer has mentioned name of both the amalgamated company and the amalgamating company and has also mentioned the PAN of both the entities. However, he submitted, since, the final assessment order was made at National e Assessment Centre, a technical error has crept into the order while mentioning the name and PAN of the assessee. He submitted, the error in the initial order of TPO as well as the final assessment order are of the nature covered under section 292B of the Act and would not make the orders invalid. Proceeding further, he submitted, the decision rendered by the Hon'ble Supreme Court in case of PCIT Vs. Maruti Suzuki India Ltd. (supra) would not apply to the facts of the present appeal, as, the Hon'ble Supreme Court dealt with a matter , wherein at the time of assuming jurisdiction for initiating assessment proceeding, the entity, in whose name the notice was issued, had already merged. Whereas, he submitted, in the present case, amalgamation took place after initiation of proceeding by the TPO.

7. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. Undisputed facts are, by virtue of order dated 02.08.2018 of

NCLT, Allahabad, scheme of amalgamation of 'Honda Motor India Pvt. Ltd.' with 'Honda Cars India Ltd.' was approved and amalgamation was made effective from the appointed date on 01.04.2018. On 28.12.2018, the assessee filed a letter before the TPO informing him about the approval of scheme of amalgamation alongwith copy of the scheme and the order of NCLT. On 25.09.2019, assessee furnished the scheme of amalgamation and the order of NCLT before the Assessing Officer intimating about the approval of scheme of amalgamation. In spite of timely intimation of amalgamation of 'Honda Motor India Pvt. Ltd.' with 'Honda Cars India Ltd.', the TPO passed the order in the name of 'Honda Motor India Pvt. Ltd.' mentioning its PAN (AABCH7526E).

8. Thus, it is evident, despite prior intimation, the TPO passed the order under section 92CA(3) proposing transfer pricing adjustment in the name of a non-existent entity. Based on the order of the TPO, the Assessing Office proposed the draft assessment order on 31.12.2019. Interestingly, in the draft assessment order, the Assessing Officer mentioned the name and address of the assessee and PAN as under:

F.No: ACIT/LTU-2/2019-20/953 **M/s Honda Cars India Ltd.**
(As successor in interest of erstwhile Honda Motor India Private Ltd.)
AY 2016-17

Ministry of Finance,
Income Tax Department
Office of the Assistant Commissioner of Income Tax, Circle-2 LTU,
NBCC Plaza, Pushp Vihar, Sector-V, New Delhi-110017

1.	**Name and Address of the Assessee**	:	M/s Honda Cars India Ltd. [AAACH1765Q] [As Successor in interest of erstwhile Honda Motor India Private Limited (PAN AABCH7526E) since amalgamated] 409, Tower B, DLF Commercial Complex, Jasola, New Delhi-110025
2.	**PAN/GIR No.**	:	AAACH1765Q-After Amalgamation AABCH7526E- Before Amalgamation

9. Against the draft assessment order, the assessee raised objection before learned DRP and learned DRP passed its direction on 22.03.2021, mentioning the name and address of the assessee and PAN as under:

DISPUTE RESOLUTION PANEL-2
NEW DELHI

1	Name & Address of the assessee	M/s Honda Cars India Limited (successor in interest of Honda Motor India Private Limited) 409, Tower B, DLF Commercial Complex, Jasola, New Delhi – 110025
2	PAN	AAACH1765Q – After Amalgamation AABCH7526E – Before Amalgamation
3	Status	Company
4	AY	2016-17
5	Objection No. & Date	173/19-20, Dated: 29.01.2020
6	Present for the assessee	Sh. Rishabh Jain & Sh. Raghav Hari
7	Present for the department	None
8	Date of hearing	24.02.2021
9	Date of order	22.03.2021

10. However, while completing the assessment under section 144C(13) in pursuance to the directions of learned DRP, the Assessing Officer has passed the order on 12.02.2021 mentioning the PAN and name of the assessee as under:

Name of the assessee : 'Honda Motor India Pvt. Ltd.'

PAN : AABCG7526E.

11. Thus, it is patent and obvious from the name of the assessee and PAN, as mentioned in the final assessment order, for all intent and purpose, the final assessment order has been passed in the name of 'Honda Motor India Pvt. Ltd.', the erstwhile entity, which after amalgamation lost its existence. The fact that the departmental authorities were conscious of the amalgamation of 'Honda Motor India Pvt. Ltd.' with the present assessee, viz., 'Honda Cars India Ltd.' from the very initial stage of proceeding before the TPO would be evident from the following observations of the Assessing Officer in the draft assessment order passed under section 143(3) read with section 144C of the Act on 31.12.2019:

".....It is pertinent to mention here that consequent to scheme of amalgamation as approved by the Hon'ble National Company

Law Tribunal (NCLT), Allahabad Bench, Allahabad vide its order dated 02.08.2018, in Company Petition No. 189/ALD/2018 and connected with Company Application No. 90/ALD/2O18 the company Honda Motor India Pvt. Ltd (PAN AABCH7526E) (Transferor company) got amalgamated with Honda Cars India Ltd (AAACH1765Q) (Transfree company) with Appointed date 01.04.2018. The Hon'ble National Company Law Tribunal (NCLT), Allahabad Bench, Allahabad directed as under:

(i) "Consequent upon the approval and sanction of the Scheme, all the assets, properties, entitlements, rights, benefits and advantages, liabilities and obligations of the Transferor Company be transferred without further act or deed to the Transfree Company and do become the assets, properties, entitlements, rights, benefits, advantages liabilities and obligations of the Transferee Company, in accordance with the Scheme.

(ii) That all suits and appeals and/or proceedings, of whatsoever nature now pending by or against the Transferor Company, if any, be continued by or against the Transfree Company, by the Scheme.

(iii) That the Transferor Company stands dissolved without winding up.

(iv) Notwithstanding the above, while sanctioning the scheme, we further clarify that this order should not be construed as an order in any way granting exemption from payment of stamp duty, taxes or any other charges, if any, payment in accordance with law or in respect to any permission/compliance with any other requirement which may be specifically required under any law. The petitioner companies shall make payments of stamp duty, taxes or any other charges as applicable. "

Since the company M/s Honda Motor India Private Limited was amalgamated with assessee company M/s Honda Cars India Ltd., the PAN was transferred to Circle-1, LTU, Delhi. Subsequently the PAN AABCH7526E was transferred to Circle-2, LTU, Delhi from Circle-1, LTU, Delhi consequent to diversion of Circle-1, LTU, Delhi as ReAC-4(l)(4), Delhi. Further, the proceeding pending against the amalgamating company are to be continued against the amalgamated company as per the directions of the Hon'ble NCLT and judgements of various High Courts and Hon'ble Supreme Court of India in this regard

2. In view of the above, subsequent notices u/s 142(1) of the act have been issued in the name of the ©listing entity i.e. M/s Honda Cars India Ltd. [AAACH1765Q][As Successor in interest of erstwhile Honda Motor India Private Limited (PAN AABCH7526E) since

amalgamated] 409, Tower B, DLF Commercial Complex, Jasola, New Delhi-110025 for the assessment proceeding under consideration. In view of the same, the draft assessment order for AY 2016-17 is being passed in the name of the amalgamated entity M/s Honda Cars India Limited [PAN: AAACH1765Q] [As Successor in interest of erstwhile Honda Motor India Private Limited (PAN AABCH7526E) since amalgamated]. For the sake of clarity, it is again submitted that 'the assessee' in this entire order refers to M/s Honda Cars India Limited [PAN: AAACH1765Q][As Successor in interest of erstwhile Honda Motor India Private Limited (PAN AABCH7526E) since amalgamated]……"

12. Keeping in perspective the factual aspect of the issue, we need to examine the legal position. In case of PCIT Vs. Maruti Suzuki India Ltd.(supra), in pursuance to a scheme of amalgamation approved in the court of law, 'M/s. Suzuki Powertrain India Ltd.' merged with 'M/s. Maruti Suzuki India Ltd.'. However, in the notice initiating assessment proceeding as well as final assessment order, the Assessing Officer mentioned the name of the assessee as under:

"M/s. Suzuki Powertrain India Ltd." (amalgamated with 'M/s, Maruti Suzuki India Ltd.'

13. The issue arising for consideration before the Hon'ble Supreme Court was, whether the assessment order passed by mentioning the name of the assessee, as above, would be a valid order. While deciding the issue, the Hon'ble Supreme Court

upheld the decision of the Tribunal and Hon'ble Delhi High Court holding that the assessment order having been passed in the name of a non-existent entity, is invalid. Further, the Hon'ble Court held that such a jurisdictional error cannot be considered to be a mere procedural irregularity to be protected under section 292B of the Act. Following observations of the Hon'ble Supreme Court in this regard are relevant:

> *"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 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."*

14. There is no difference in facts, insofar as the present appeal is concerned. In spite of intimation to the TPO and the Assessing Officer regarding the amalgamation of 'Honda Motor India Pvt. Ltd.' to 'Honda Cars India Ltd.', not only the order under section 92CA(3) of the Act was passed in the name of the amalgamated company, but even the final assessment

order was also passed in the name of erstwhile company, viz., 'Honda Motor India Pvt. Ltd.' and mentioning its PAN. Thus, there cannot be any manner of doubt that the impugned order has been passed in the name of an entity which after amalgamation was not in existence. That being the factual position, applying the ratio laid down in the judicial precedents cited before us, it has to be held that the final assessment order, having been passed in the name of a non-existent entity, is invalid in the eyes of law. As regards the contention of learned Departmental Representative that the assessee has not come with clean hands, having not raised this issue in its objection before learned DRP, we do not find any merit in such submission.

15. As observed by Hon'ble Supreme Court in case of PCIT Vs. Maruti Suzuki India Ltd. (supra), mere participation in the proceeding before the departmental authorities, cannot operate as an estoppel against law.

15. In view of the aforesaid, we quash the impugned assessment order. In view of our decision, hereinabove, various other grounds raised by the assessee, including the

grounds on merits, having become academic, are not adjudicated upon.

16. In the result, the appeal is allowed, as indicated above.

Order pronounced in the open court on 23rd March, 2022

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 23rd March, 2022.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi