

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
MS PADMAVATHY S, ACCOUNTANT MEMBER**

IT(TP)A No. 269/Bang/2021
Assessment Year : 2006-07

M/s. Mindtree Ltd. (Successor in interest to M/s. Aztecsoft Ltd.), Global Village, RVCE Post, Mylasandra, Off Mysuru Road, Bengaluru – 560 059. PAN: AABCM8839K	Vs.	The Joint Commissioner of Income Tax (OSD), Central Circle 1 (3), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Tata Krishna, Advocate
Revenue by	:	Shri Sanjay Kumar, CIT- DR

Date of Hearing	:	13-10-2022
Date of Pronouncement	:	28-10-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against the final assessment order dated 22/04/2021 for A.Y. 2006-07 passed by the Ld.JCIT(OSD), Central Circle – 1(3), Bangalore on following grounds of appeal:

“1. The Order of the Learned Assessing Officer in so far as it is prejudicial to the interest of the Appellant is not

justified in law and on facts and circumstances of the case.

2. The Directions of the Learned DRP in so far as the same are prejudicial to the interest of the Appellant are not justified in law and on facts and circumstances of the case.

3. The Final Assessment Order passed by the Learned Assessing Officer is non est and liable to be quashed as having not been passed in conformity with the directions of the Learned DRP as per section 144C (10) r.w.s 144C (13) of the IT Act.

4. As regards subject proceeding is bad and void ab initio being taken up without jurisdiction and thereby TP proceeding is also bad and void ab initio:

4.1. The impugned proceedings are without jurisdiction, time barred and contrary to provisions of the IT Act and hence are liable to be quashed as non est.

4.2. The Learned DRP has failed to appreciate that the Learned Assessing Officer ought to have issued a notice under section 148 read with section 150(1) in the name of the Appellant for the escaped income of M/s. Aztecsoft Ltd., and the subject proceeding without following the due procedure is invalid.

4.3. The Learned DRP is not justified in making perverse allegations on the conduct of the Appellant in coming to the conclusion that section 147 is not attracted in the instant case.

4.4. The Learned DRP is not justified in upholding the action of Learned Assessing Officer of overruling the jurisdictional objections by stating that the same are discussed through order sheet entry when the copy of the same was not made part of impugned order thereby keeping the Appellant dark about how its objections are dealt with.

4.5 The Learned DRP has erred in holding that the subject proceeding falls within the scope of section 153 (3) r.w.s. 153 (4).

4.6 Without prejudice to the above, the action of Learned Assessing Officer and Learned TPO in replicating the orders passed by their respective predecessors by just substituting the name of M/ s. Aztecsoft Ltd., by the name of the Appellant would cover the impugned proceeding under section 153(5) which is barred by time.

4.7 The stand of Lower Authorities being inconsistent with their stand for AYs 2008-09 & 2009-10 in identical fact situation is bad and liable to be quashed.

4.8. *The impugned assessment proceeding being without jurisdiction would render the reference to the Learned TPO and consequent TP proceedings also without jurisdiction.*

5. *As regards TP adjustment of Rs. 11,21,88,319/- directed under section 92CA of the IT Act:*

5.1. *The directions of Learned DRP are invalid being passed without application of mind as is evident from plenty of errors therein and instances indicating copy paste, partly from earlier DRP directions and partly from directions issued in case of some other assessee.*

5.2. *The order of the Learned TPO is bad being without application of mind, by copy pasting the order passed by his Learned predecessor and without considering the submissions filed by the Appellant.*

5.3. *As regards invoking jurisdiction under section 92C(3) of the IT Act without rejecting information and document (TP Document) maintained by Appellant in accordance with the provisions of Section 92D of the Act:*

5.3.1. *Without prejudice to the above, the directions of Learned DRP in paragraphs 4.2 to 4.9 are invalid being passed as copy paste and without application of mind as the observations made therein are extraneous to the grounds of objection raised by the Appellant.*

5.3.2. *Without prejudice to the above, the Learned TPO is not justified in invoking the provisions of section 92C(3) without identifying any of the failures specified therein and without stating how any of the circumstances of section 92C(3) is attracted in the instant case.*

5.4. *As regards making separate addition when Appellant's enterprise level operating margin is found to be at arm's length:*

5.4.1. *Without prejudice to the above, the directions of Learned DRP in paragraphs 4.10 to 4.13 are invalid being passed as copy paste and without application of mind as the observations made therein are extraneous to the grounds of objection raised by the Appellant.*

5.4.2. *Without prejudice to the above, the Lower Authorities are not justified in making a separate addition on payment of marketing support fees when the Appellant's net margin after considering all international transactions including the marketing support fees is found to be at arm's length and their action is inconsistent with stand taken for AYs 2002-03 862005-06.*

5.5. *As regards Transfer Pricing adjustment of Rs.11,21,88,319/- by determining Arm's Length Price (ALP) of marketing services as Nil:*

5.5.1. *Without prejudice to the above, the directions of Learned DRP in paragraphs 4.14 to 4.28 are invalid being passed as copy paste and without application of mind as*

the observations made therein are extraneous to the grounds of objection raised by the Appellant.

5.5.2. The Learned TPO's observations that there is an implied admission that no services are rendered and Appellant did not produce an iota of evidence are perverse.

5.5.3. The Learned DRP is not justified in upholding the perverse finding of the Learned TPO that no services have been rendered by Aztec Inc,USA to the Appellant and determining the arm's length price as 'Nil'.

5.5.4. The Lower Authorities have erred in taking impractical position that the Appellant and its AE need not incur any marketing expenses for carrying business in USA with a turnover of Rs. 126 crores.

5.5.5. The Lower Authorities have failed to appreciate that the marketing cost incurred by the Appellant is less than 10% of the turnover as against a much higher norm of market spend in USA.

5.5.6. The Lower Authorities have failed to appreciate that the marketing cost incurred by the Appellant represents costs incurred by AE with third parties as established from the latter's audited accounts and a mark up of 10% thereon and hence, the incurrence of the same could not have been doubted.

5.5.7. The Lower Authorities have failed to adopt consistent approach when in the earlier assessment years (i.e., AYs 2002-03 86 2005-06) on the similar facts the Learned TPO had accepted the existence of international transaction (i.e., marketing fee paid to AE) and determined the ALP under TNMM.

5.5.8. Without prejudice to the above, if according to TPO, no services are rendered by Aztec Inc to the Appellant, the question of determination of ALP under Chapter X does not arise and therefore, the order passed by the Learned TPO determining nil ALP is bad in law.

5.5.9. The Learned DRP is not justified in upholding the action of the Learned TPO in applying irrelevant tests like benefit test, test of business need and test of inhouse capability for determining the arm's length price as 'Nil'.

5.5.10. The Lower Authorities have erred in determining NIL ALP without adopting any of the methods specified under Section 92C of the Act in breach of statutory provisions of Chapter X and Rules provided therein.

5.5.11. The Learned DRP has failed to appreciate that the Learned TPO erred in trying to benchmark the marketing fee paid by the Appellant with certain companies without carrying out the test of comparability and without show causing the same to the Appellant.

5.5.12. Without prejudice to the above, the Learned DRP is not justified in upholding the action of the Learned TPO

in failing to apply even the average marketing expenditure incurred by the so called comparables.

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

6. As regards exclusion of telecommunication charges of Rs.1,27,00,473/- from the export turnover while computing deduction under section 10A of the IT Act:

6.1. The Learned DRP and Learned Assessing Officer are not justified in excluding the telecommunication expenses of Rs. 1,27,00,473/- from the export turnover, without adducing any reasons for such exclusion.

6.2. The Learned DRP and Learned Assessing Officer have failed to appreciate that the phrase used in the Explanation 2(iv) to section 10A is "does not include" and not "to be reduced by."

6.3. The Lower Authorities have failed to appreciate that the Appellant has not charged its customers separately in respect of telecommunication expenses incurred by it and has neither included the said expenditure in the export turnover nor recovered the same from its customers and therefore, question of exclusion of the same from export turnover does not arise.

6.4. The Learned DRP and Learned Assessing Officer are not justified in excluding the aforesaid expenditure from export turnover when such expenditure is incurred in respect of a standard facility.

6.5. The Learned DRP and Learned Assessing Officer are not justified in failing to appreciate that when the telecommunications expenses incurred by Appellant were not attributable to the delivery of the computer software outside India, no exclusion could have been made from the 'export turnover' of the Appellant.

6.6. Without prejudice to the above, the question of deduction of telecommunication charges would arise only if the same has been incurred in foreign-exchange and if the same has been incurred in Indian rupee, the question of deduction thereof does not arise.

7. As regards identical exclusion of telecommunication expense of Rs.1,27,00,473/- from the total turnover:

Without prejudice to the claim of non-exclusion of telecommunication expenses from export turnover, the said expenses have to be excluded from total turnover.

8. The Learned Assessing Officer has erred in levying interest under section 234B contrary to provisions of the Act.

9. The Learned Assessing Officer has erred in levying interest under section 234D contrary to provisions of the Act.

For the above Grounds and for such other Grounds which may be allowed by the Honourable Members to be urged at the time of hearing, it is prayed that the aforesaid appeal be allowed.”

2. At the outset, the Ld.AR submitted that the final assessment order passed by the Ld.AO being the impugned order before this *Tribunal* is beyond the period of limitation u/s. 153(5) of the Act, and therefore is bad in law. It is submitted that this legal issues is raised by the assessee in Ground nos. 4.5 and 4.6.

The brief facts that leads to this issue raised by assessee in Ground nos. 4.5-4.6 are as under:

2.1 The Ld.AR submitted that in the first round of appeal, the order was passed by the Ld.AO u/s. 143(3) r.w.s. 144C(13) on 22/10/2010 in the name of M/s. Aztecsoft Ltd. which already stood merged with M/s. Mindtree Ltd. during the relevant period. Against that order, assessee filed appeal before this *Tribunal* in IT(TP)A No. 1434/Bang/2010. The *Tribunal* after considering the submissions of the assessee, disposed of the appeal vide order dated 31/03/2017 by observing as under:

“7.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 IT(TP)A No.1434/Bang/2010 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.”

2.2 Subsequently, the Ld.AO issued notice to the assessee being M/s. Mindtree Ltd. on 02/08/2018, 03/09/2018 and 29/07/2019, providing fresh opportunity of being heard and a reference was made to the Ld.TPO. The Ld.TPO vide order dated 11/07/2019 passed order u/s. 92CA r.w.254 in the name of M/s. Mindtree Ltd., determining total income being the proposed adjustment as was determined by the Ld.AO in the final assessment order dated 14/09/2010 passed in the name of the merged entity.

2.3 It is submitted that, before the Ld.TPO the assessee raised objections vide letter dated 28/07/2019, stating that, this *Tribunal* set aside the order dated 14/09/2010 only to pass an order in the name of M/s. Mindtree Ltd. and that the observation of this *Tribunal* cannot be interpreted to say that, the order was set aside for fresh consideration. It was thus submitted by the assessee that the case cannot be treated as a *denovo* assessment.

2.4 The Ld.AR submitted that, the order of the *Tribunal* dated 31/03/2017 was received by the revenue on 18/07/2017 as per the RTI reply received by the assessee in this respect dated 22/09/2022. He submitted that as per section 153(5), the limitation period of 3 months starts from end of the month in which the order is received. For the sake of convenience, the same is scanned and reproduced as under:



भारत सरकार/ GOVERNMENT OF INDIA
 वित्त मंत्रालय/ MINISTRY OF FINANCE
 आयकर विभाग/ INCOME TAX DEPARTMENT
 OFFICE OF THE DEPUTY COMMISSIONER OF INCOME TAX
 CENTRAL CIRCLE 1(3), BLR

AR
 12/10/2022

किरा में/ To, MINDTREE LIMITED PHASE 1 GLOBAL VILLAGE , MYSORE ROAD RVCE POST BENGALURU 560059 , Karnataka India	
---	--

आयकर पत्राची संख्या/ ASK ACK No. : 936582210024	दिनांक/ Dated: 22/09/2022	द.प.स. एवं पत्र संख्या /DIN & Letter No: ITBA/ASK/F/73/2022-23/1045811989(1)
--	------------------------------	---

महोदय/ महोदया/ मैमर्स,
 Sir/ Madam/ M/s,

ORDER U/s. 7(1) OF THE RIGHT TO INFORMATION ACT, 2005

M/s Mindtree Limited has filed an application under the RTI Act, 2005 on 18/08/2022, the same has been received in this office on 22/08/2022, requesting for the following information:

1. Date of receipt of ITAT's Order in IT(TP) A No. 1434/Bang/2010, dated 31.03.2017 for AY 2006-07, by CIT, Central Circle.

2. The reply to the RTI application in respect to the above query is as under:

Reply: As per this office record, the order of Hon'ble ITAT in IT(TP) A No. 1434/Bang/2010, dated 31.03.2017 for AY 2006-07 was received on 18.07.2017 in the o/o Pr. Commissioner of Income Tax, Bangalore-4, Bangalore.

3. This order is appealable and the applicant can file an appeal against the said order if the assessee so desires, before the 1st Appellate Authority i.e., The Addl. Commissioner of Income tax, Central Range- 1, Bengaluru, 3rd Floor, C.R. Building, Queen's Road, Bengaluru within 30 days of receipt of this order.

Note: If digitally signed, the date of digital signature may be taken as date of document.
 CENTRAL REVENUE BUILDING, QUEENS ROAD, BENGALURU, Karnataka, 560001
 Email: BANGALORE.DCIT.CEN1.3@INCOMETAX.GOV.IN

Note: The website address of the e-filing portal has been changed from www.incometaxindiaefiling.gov.in to www.incometax.gov.in
 * DIN- Document Identification No.

आयकर विभाग - बंगलूरु (केंद्र 1(3))
 (R-3) - 560001
 (TTPA/ASK/F/73/2022-23/1045811989(1))

गुणरु सुधर
 CENTRAL CIRCLE 1(3), BLR

(If user the document is digitally signed please refer Digital Signature at the bottom of the page)

2.5 He submitted that the limited period for giving effect to the Tribunal's order dated 31/07/2017 is 3 months from the end of the month in which the order is received as per section 153(5) of

the Act. He thus submitted that the time limit to pass the order giving effect to the *Tribunal's* order dated 31/03/2017 expired on 31/10/2017.

2.6 The Ld.AR also submitted that though there was no requirement to verify any issue before passing of OGE, however considering the fact that the Ld.AO/TPO issued a notice to the assessee wherein no details were called for. Even, under such situation the time period u/s. 153(3) is to be considered for the facts in present case, as per second proviso to section 153(5), the time limit to pass the assessment order was 9 months from the end of the financial year in which the order is received that expires on 31/12/2018. It is thus the submission of the Ld.AR that the final assessment order dated 22/04/2021 has been passed beyond the period of limitation u/s. 153(5) and therefore the order is bad in law and deserves to be quashed.

2.7 The Ld.AR further submitted that assessee had filed an appeal against the order passed by this *Tribunal* before *Hon'ble High Court* in *ITA No. 421/2017* and the *Hon'ble High Court* passed the order dated 09/08/2017 by observing as under:

"1. The only grievance urged by Sri Chythanya.K.K., learned Counsel appearing for the appellant is that the Income Tax Appellate Tribunal has not expressly stated in the impugned order dated 31.03.2017 that the Assessing Officer has to reconsider the matter in accordance with law before passing a fresh order in the name of the merged company.

2. It is relevant to extract operative portion of the impugned order:

"7. 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."

3. *In our opinion, it is implied that the Assessing Officer has to pass a fresh order in the matter in accordance with the provisions of the [Income Tax Act, 1961](#). With this ITA No.421/2017 clarification, the appeal is disposed of. In view of disposal of the appeal, IA No.1/2017 does not survive for consideration; it stands disposed of accordingly.*

Appeal disposed of."

2.8 The Ld.AR submitted that even going by the receipt of the *High Court* order by the revenue authorities, the impugned order in the present appeal is beyond the period of limitation.

2.9 On the contrary, the Ld.DR submitted that the directions of the *Tribunal* was to pass a fresh order and therefore the procedure adopted by the Ld.AO, by referring the appeal to the Ld.TPO is in accordance with law. He thus supported the orders passed by the authorities below and submitted that the legal plea raised by the assessee should not be entertained.

3. We have perused the submissions advanced by both sides in the light of records placed before us.

The primary issue before this *Tribunal* is to understand whether the order dated 31/03/2017 passed by this *Tribunal* in the first round of litigation was a remand for *denovo* consideration or was simplicitor remand to pass the order in the name of the new company.

3.1 Admittedly, the impugned order before the *Tribunal* in the first round of litigation was passed by the Ld.AO in the name of M/s.Aztecsoft Ltd. which was not an existing company since 01/04/2009. This *Tribunal* in para 7 of the order dated 31/03/2017 very categorically mentions the error on behalf of the Ld.AO in passing the order in the name of non-existing

company however, the order was set aside and restored to the file of Ld.AO with a direction to pass a fresh order in the name of merged company. There is no remand of the entire appeal by this *Tribunal* for a *denovo* consideration. Thus, in our view there is no direction to redo the assessment and therefore the limitation to pass an order as per the direction in para 7 (reproduced hereinabove) is to be considered as per the provisions of section 153(5) of the act and there is no extended time period for completing the assessment as envisaged u/s. 153(3) of the act.

3.2 Now the issue that needs to be looked into is whether, the impugned order in the present appeal is passed within the period of limitation as per section 153(5) of the Act, to which in our opinion, the answer is negative. Section 153(5) requires an OGE to be passed within a period of 3 months from the end of the month in which the order is received, either from this *Tribunal* or from *Hon'ble High Courts* or *Hon'ble Supreme Court* as the case may be.

3.3 In the present facts of the case, the RTI reply of the Revenue, filed by the assessee before this *Tribunal* reveals date of receipt of the orders passed by this *Tribunal* as well as *Hon'ble High Court* by the revenue authorities. The receipt of the order passed by this *Tribunal* has already been scanned and reproduced hereinabove and the details regarding the receipt of the order passed by *Hon'ble High Court* is scanned and reproduced as under:



भारत/ सरकार/Government of India

आयकर विभाग / Income Tax Department

प्रधान आयकर आयुक्त का कार्यालय/Office of the Pr. Commissioner of Income Tax
(केन्द्रीय) केन्द्रीय राजस्व भवन, क्वीन्स मार्ग, बंगलोर -560001.
(Central), Central Revenue Building, Queen's Road, Bengaluru-560 001.

AR
13/10/2022

फ.स/ F.No.24/RTI/Pr. CIT(C)/2022-23

दिनांक/Dated: 24.08.2022

सेवा में/To,

Sri. Prithvi Gurunath,
Mindtree Limited,
Global Village,
RVCE Post,
Bengaluru-560 059.

Sir,

Sub : Your RTI Application filed online vide Regn No. CCITB/R/E/22
/00158 dated 17.8.2022 received in this office on 23.8.2022 from
the O/o. Commissioner of Income Tax (Admn & TPS), Bengaluru -Reg.
* * * * *

Please refer to the above.

Vide your RTI application dated 17.8.2022, you have requested to provide the date of receipt of the Karnataka High Court order in ITA No. 421/2017 dated 9.8.2017 in the case of **M/s. Mindtree Limited (Previously known as M/s. Aztecsoft Ltd, now merged with M/s. Mindtree Limited)**, Bengaluru-560 059 pertaining to AY 2006-07, in the O/o. Pr. Commissioner of Income Tax (Central), Bengaluru.

In this connection, I am directed to intimate that the Karnataka High Court order in ITA No. 421/2017 dated 9.8.2017 in the case of **M/s. Mindtree Limited (Previously known as M/s. Aztecsoft Ltd, now merged with M/s. Mindtree Limited)**, pertaining to AY 2006-07 was received in the then O/o. Pr. Commissioner of Income Tax, Bengaluru-4, Bengaluru, on 10.9.2017. The High Court order was later transferred vide letter date 25.9.2017 to the O/o. Pr. Commissioner of Income Tax (LTU), Bengaluru, which was received by them on 27.9.2017, under whose charge the jurisdiction over the case vested, as on that date. The present jurisdiction over the case vests with the DCIT, Central Circle-1(3), Bengaluru.

Based on the above information provided, the RTI application dated 17.8.2022 filed by you is hereby treated as closed. This is for your information.

Yours faithfully,

(T.N. CHANDRASHEKAR)
Income Tax Officer (HQ) &
Central Public Information Officer,
for Pr Commissioner of Income-tax,
(Central)(I/C), Bengaluru.



3.4 Admittedly, the order of this *Tribunal* was received by the revenue on 18/07/2017 and order passed by *Hon'ble High Court* was received by the revenue on 27/07/2017. Going by both these dates, the impugned order in the present appeal is passed beyond the period of limitation, and therefore is bad in law and deserves to be quashed. We thus quash the impugned order dated 22/04/2021 and bad in law as it is passed beyond the statutory period of limitation u/s. 153(5) of the Act.

Accordingly, ground 4.5 and 4.6 raised by assessee stands allowed.

4. As we have decided the legal issue in **Ground nos. 4.5-4.6** in favour of assessee, all other issues raised on merits are kept open academic at this stage. We also note that assessee has challenged the validity of the impugned order passed on other legal propositions, which in our view is not applicable to the present facts of the case and accordingly not adjudicated.

Accordingly, the appeal filed by the assessee stands allowed on the legal issue raised in Ground nos. 4.5 and 4.6.

In the result, the appeal filed by the assessee stands allowed on Ground nos. 4.5 & 4.6.

Order pronounced in the open court on 28th October, 2022.

Sd/-
(PADMAVATHY S)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 28th October, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore