

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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS KAVITHA RAJAGOPAL, JM

ITA No. 5538/MUM/2012
(Assessment Year 2007-08)

DCIT CIR 3(3) [Now Commissioner
Of Income Tax - 10(3)]
Room No. 450, 4th Floor, Aayakar
Bhavan, M.K. Road, Mumbai-400
020
(Appellant)

Vs.

SS Oral Hygeine Products Private
Ltd (Now Merged With Colgate -
Palmolive (India) Ltd
Colgate - Palmolive (India)
Limited, Colgate Research Centre,
Main Street, Near Hiranandani
Gardens, Powai, Mumbai- 400 076
(Respondent)

ITA No. 5677/MUM/2012
(Assessment Year 2007-08)

ITA No. 774/MUM/2013
(Assessment Year 2008-09)

SS Oral Hygeine Products Private
Ltd [Now Merged With Colgate -
Palmolive (India) Ltd]
Colgate Research Centre,
Main Street,
Near Hiranandani Gardens, Powai,
Mumbai- 400 076
(Appellant)

Vs.

DCIT CIR 3(3)
[Now Commissioner Of Income Tax
- 10(3)]
Room No. 450, 4th Floor, Aayakar
Bhavan, M.K. Road, Mumbai-400
020
(Respondent)

PAN No. AADCS4028C

Assessee by : Shri Madhur Agrawal, AR
Revenue by : Shri Manoj Mishra, CIT DR/
Ms. Samruddhi Dhananjay Hande,
SR AR

Date of hearing: 11.01.2023
Date of pronouncement : 31.01.2023

ORDER

PER BENCH:

01. ITA No. 5677/Mum/2012 is filed by SS Oral Hygiene Products Private Ltd merged with Colgate - Palmolive (India) Ltd. for A.Y. 2007-08,



against the appellate order passed by the learned Commissioner of Income tax (Appeals)-15, Mumbai dated 11 June 2012. ITA No.5538/Mum/2012 for AY 2007-08, is filed by the Dy. Commissioner of Income Tax, Circle 10(3), Mumbai [the learned Assessing Officer] against the same appellate order.

02. At the time of hearing of the appeal an additional ground was put to our attention which was filed by the assessee on 9th June, 2023, stating as under:-

“1. On the facts and the circumstances of the case and in law, the learned Assessing Officer (AO), Ld. Transfer Pricing Officer (Ld.TPO) and the Commissioner of Income-tax (Appeals) (CIT (A)) erred in passing order in the name of ‘S.S. Oral hygiene Private Limited, an entity which is not in existence on the date of passing the impugned orders on account of its amalgamation with the Appellant.

It is the humble prayer of the Appellant that the transfer pricing order, assessment order and CIT (A)’s order be held as bad in law, illegal, null and void-ab-initio and as such deserves to be quashed. ”

03. The petition states as under:-

“In this connection, we are enclosing herewith an additional ground of appeal, in triplicate. We have given below our petition for admission of the additional ground before Yours Honours:

- 1. ‘S.S. Oral Hygiene Private Limited’, incorporated on 5 September, 1989, is engaged in the business of manufacturing and sale of toothpaste.*
- 2. With effect from 1 April 2008, ‘S.S. Oral Hygiene Private Limited’ (amalgamating company) was amalgamated into ‘Colgate-Palmolive (India) Limited’ (amalgamated company or appellant) pursuant to the scheme of amalgamation sanctioned by the Hon’ble Andhra Pradesh High Court vide order dated 24 February, 2009.*



3. *The aforesaid fact of amalgamation was intimated to the Assessing Officer on 11 June 2009, as well as the Transfer Pricing Officer on 4 February, 2010 during the course of the transfer pricing and assessment proceedings.*
4. *However, the transfer pricing order dated 30 April, 2010 was passed in the name of 'S.S. Oral Hygiene Private Limited' i.e. the amalgamating company.*
5. *The assessment order dated 31 January, 2011 was passed by the Assessing Officer in the name of 'S.S. Oral Hygiene Private Limited' i.e., the amalgamating company after the date of amalgamation.*
6. *The CIT (A) passed its order dated 11 June, 2012 in the name of 'S.S. Oral Hygiene Private Limited'- the amalgamating company.*
7. *It is reiterated that the impugned assessment order dated 31 January 2011 and CIT order dated 11 June 2012 was passed after the date of amalgamation.*
8. *In this regard, the Appellant wishes to submit that recently the Hon'ble Supreme Court of India in the case of PCIT vs Maruti Suzuki India Ltd (107 taxmann.com 375) (SC) has held that assessment order passed in the name of non-existing company i.e., amalgamating company, which ceased to exist, is a substantive illegality and invalid.*
9. *Accordingly, the Appellant wishes to raise an additional ground to contest that the impugned orders are void-ab-initio, illegal and bad in law and deserve to be quashed as such orders are passed in the name of 'S.S. Oral Hygiene Private Limited', an entity which is not in existence on the date of passing the impugned orders.*

10. The Appellant hereby submits that the aforesaid additional ground of appeal is purely legal in nature and does not require any verification of facts and, hence the Appellant humbly submits that the ground of appeal should be admitted in the interest of justice.

11. The wishes to rely on the Hon'ble Supreme Court decision in the case of NTPC Ltd. vs. CIT (1998) 229 ITR 383 (SC) (NTPC') wherein it was held that a question of law can be raised before the Tribunal for the first time which has a bearing on the tax liability of an assessee notwithstanding the fact that the same was not raised before the lower authorities.

At the sake of repetition, we crave leave of Your Honours to rely upon the following decisions in support of our plea for admission of additional ground and adjudication of the enclosed additional ground of appeal:

Jute Corporation of India Ltd. [187 ITR 688 (SC)]

In this case, the Hon'ble Apex Court at page 693, observed as under:

"Even otherwise, an appellate authority while hearing the appeal against the order of a subordinate authority, has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers, which the subordinate authority may have in the matter.

Is the decision, a three-member bench of the Hon'ble Apex Court while discussing the scope of Section 31(3)(a) of the Indian Income-tax Act, 1999, which is almost identical to section 25(1)(a) the Act, observed as under:



The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his powers is conterminous with that of the Income-tax Officer. He can do what the Income-tax Officer can do and can also direct him to do what he has failed to do."

CIT vs. S. Nelliappan [66 ITR 722 (SC)]

In this case, the Hon'ble Apex Court held as under:

"In hearing an appeal the Tribunal may give leave to the assessee to urge grounds not set forth in the memorandum of appeal, and in deciding the appeal the Tribunal is not restricted to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal.

Ahmedabad Electricity Co. Ltd. and Godavari Sugar Mills Ltd. vs. CIT [199 ITR 351 (Bom)]

In the aforesaid case, the Hon'ble Bombay High Court at page 369, has observed as under.

"We do not find anything in section 254(1) of the Income Tax Act which limits the jurisdiction of the Appellate Tribunal in any manner. For reasons which we have set out earlier, the phrase "pass such order thereon" does not in any way restrict the jurisdiction of the Tribunal but, on the contrary, confers the widest possible jurisdiction of the appellate Tribunal including jurisdiction to permit any additional ground of appeal if, in its discretion, and for good reason, it thinks it necessary or permissible to do so.

It, therefore held as under:

"it is quite clear that the Appellate Tribunal has jurisdiction to permit additional grounds to be raised before it even though these may not arise from the order of the Appellate Assistant Commissioner, so long as these

grounds are in respect of the subject- matter of the entire tax proceedings."

Inaroo Ltd. vs. CIT [204 ITR 312 (Bom)]

Following its decision in case of Ahmedabad Electricity Co. Ltd. (supra), the Hon'ble Bombay High Court in the aforesaid case has held that the Tribunal has jurisdiction to entertain the assessee's additional ground, even though the claim has not been made before either the Ineme Tax Officer or the Appellate Assistant Commissioner

Ashok Vardhan Birla vs. CWT [208 ITR 958 (Bom)]

In this case, following its decision in case of Ahmedabad Electricity Co. Ltd. (supra) and the decision of the Apex Court in case of Jute Corporation of India Ltd. (supra), the Hon'ble Mumbai High Court, in the context of the Wealth-tax Act, 1957, observed that the powers of the appellate authorities are the same as the powers of the assessing authority and hence additional grounds can be entertained so long as they relate to the subject-matter of the proceedings which were before the assessing officer or the appellate authority. It further held that, the Tribunal had jurisdiction to permit additional grounds to be raised even though these did not arise out of the order of the Appellate Assistant Commissioner.

In light of the above decisions and in the interest of substantial justice, we pray that the Hon'ble Members be pleased to admit the additional ground and adjudicate the same for which we shall remain most grateful.

Thank you.

04. The learned Authorized Representative reiterated the contentions raised in the application.



05. The learned Departmental Representative vehemently objected the same stating that same ground has not been raised before the lower authorities.
06. We have carefully considered the rival contentions and perused the prayer of the assessee for admission of additional ground. It is a jurisdictional ground and it can be taken at any stage of appeal, it does not require any further investigation of facts, therefore, it is admitted.
07. The fact shows that assessee is a company engaged in the business of manufacture of toothpaste and shaving cream. It filed its return of income on 31 October 2007 at Rs Nil. Subsequently, return was revised on 6th May, 2008 declaring income of ₹5,81,04,617/-. The return was picked up for scrutiny.
08. The assessee has entered into international transactions and therefore, reference was made to Transfer Pricing Officer. The learned Transfer Pricing Officer vide order u/s 92 CA (3) of The Act dated 30th April, 2010, proposed a total adjustment of ₹5,02,99,706/-. Several other disallowances were made by the learned Assessing Officer. The addition of ₹19,55,313/- was made under Section 145A of the Income-tax Act, 1961 (the Act) and further, ₹5,93,750/- were disallowed under Section 40(a) (ia) of the Act. The total income was determined at ₹11,09,53,450/- by assessment order passed u/s 143(3) of the Act on 31st January 2011 .
09. Assessee preferred the appeal before the learned CIT (A). The appellate order was passed on 11th June, 2012. In the appellate order, the appeal of the assessee was partly allowed, accordingly, both the parties were aggrieved and therefore, cross appeals are filed.
010. The fact shows that assessee company S.S. Oral Hygiene Private Limited with effect from 1 April 2008, amalgamated into 'Colgate-Palmolive (India) Limited' pursuant to the scheme of amalgamation sanctioned by the Hon'ble Andhra Pradesh High Court vide order dated 24 February 2009. The fact of the amalgamation was intimated to the learned Assessing Officer on 11 June 2009 as well as to the learned Transfer Pricing Officer on 4 February 2010. The learned Transfer Pricing Officer passed an order under Section 92CA (3) of the Act on 30 April 2010, in the name of S.S. Oral Hygiene Private Limited. The assessment order under Section 143(3) of the Act was also passed by the learned Assessing Officer on 31 January 2011 in the name of S.S. Oral Hygiene

Private Limited. On appeal before the learned CIT (A), the appellate order was also passed in the name of S.S. Oral Hygiene Private Limited.

011. The assessee has submitted that Hon'ble Supreme Court has categorically held that assessment passed in the name of non-existing amalgamating company, which ceased to exist from the date of amalgamation, it is illegal and invalid. To show that assessee has intimated the fact of amalgamation to the lower authorities well in advance and prior to the Assessment order was passed, The learned Authorized Representative

- i. Submitted a copy of letter dated 22 April 2009, addressed to the Commissioner of Income Tax-3, Hyderabad, wherein the details of the amalgamation was submitted. It was stated that assessee company has amalgamated with Colgate-Palmolive (India) Limited with effect from 1 April 2008 and PAN number allotted to that company was surrendered. It was also submitted to register this fact in the record and take necessary action. Copy of such letter was also given to Dy. Commissioner of Income Tax, Circle-3(2), Hyderabad. He submitted that the intimation was available to the learned Assessing Officer before he passed the assessment order on 31 January 2011.
- ii. Referred to the order passed by the Addl. Director of Income tax, Transfer Pricing, Hyderabad, wherein at Para no.2.1, it is mentioned that the company is amalgamated with the Colgate-Palmolive (India) Limited with effect from 1st April, 2008. Despite this, the learned Transfer Pricing Officer passed the order in the name of S.S. Oral Hygiene Private Limited.
- iii. learned CIT (A) had the order of the learned Transfer Pricing Officer, wherein the above information with respect to the amalgamation is already mentioned, despite that the learned CIT (A) also passed the order in the name of non-existing entity i.e. S.S. Oral Hygiene Private Limited.
- iv. He also referred to page no. 89 of the Paper Book which is a letter dated 4th February, 2008, wherein at page no. 90, the factum of amalgamation was specifically drawn in the notice of the learned Transfer Pricing Officer.

Accordingly, it was submitted that the assessment order is passed in the name of a non-existing entity despite fact known to the lower authorities, hence assessment order is invalid.

012. The learned Departmental Representative vehemently submitted that the issue is also covered by the decision of Hon'ble Supreme Court in case of PCIT (Central-2) Vs. Mahagun Realtors Pvt. Ltd, in favor of the Revenue.
013. We have carefully considered the rival contentions and perused the orders of the lower authorities. The facts clearly suggest that S.S. Oral Hygiene Private Limited has amalgamated with Colgate-Palmolive (India) Limited effective from 1st April, 2008 as per the order of the Hon'ble Andhra Pradesh High Court dated 26th March, 2009. This fact was intimated by the assessee to the Commissioner of Income-tax-III, Hyderabad, as well as to the Dy. Commissioner of Income Tax, Circle 3(2), Hyderabad, vide letter dated 22nd April, 2009, submitted on 11th June, 2009 enclosing the order of the Hon'ble High Court as well as requesting for the surrender of Permanent Account Number (PAN) in the name of S.S. Oral Hygiene Private Limited as well as the TAN number of that entity. The learned Transfer Pricing Officer was also intimated all the above facts vide letter dated 4th February, 2010. The copy of the order of Honourable High Court was also submitted to the learned Transfer Pricing Officer. Even the submissions were also made before him by Colgate-Palmolive (India) Limited. This is evident by the letter dated March 12, 2010, placed at page no.173 of the Paper Book as well as letter dated 12th April, 2010, placed at page no.328 of the Paper Book. Further, the learned Transfer Pricing Officer in his order dated 30th April, 2010, at paragraph no.201 at page no.2 has categorically stated the fact of amalgamation of the assessee company with Colgate-Palmolive (India) Limited with effect from 1st April,2008. Despite this, the learned Transfer Pricing Officer passed order in the name of S.S. Oral Hygiene Private Limited and same the learned Assessing Officer passed an order in the name of non-existing entity. The issue is squarely covered by the order of the Hon'ble Supreme Court in PCIT , New Delhi V Maruti Suzuki India Limited [2019] 107 taxmann.com 375 (SC) has been held that assessment order passed in the name of non-existing entity pursuant to amalgamation in the name of amalgamating company instead in the name of amalgamated company is illegal order. It held that :-



"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 Entotainment (supra)* on 2 November 2017. The decision in *Spice Entotainment* 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 Entotainment (supra)*."

014. The decision of the Hon'ble Supreme Court relied up on by the Id DR of PCIT V Mahagan Realtors Limited [2022] 137 taxmann.com 91 (SC) has held that Where post amalgamation, no indication was given to AO during search conducted at premises of assessee-amalgamating company about amalgamation and return filed pursuant to notice issued under section 153A suppressed fact of amalgamation, since conduct of assessee reflected that it consistently held itself as assessee, assessment order passed in name of assessee-amalgamating company was valid.
015. Ratio of 9decision relied up on by the Id DR does not apply on the facts of the case because in this case, the fact of amalgamation was brought to the notice of the learned Assessing Officer, the Id TPO, Id Jurisdictional CIT and further the Assessee also mentioned before the learned CIT (A) in the form no.35 as well as in the statement of facts. Despite this, the assessment order, transfer pricing order and notice under Section 156 of the Act was passed in the name of non-existing company.
016. Thus we hold that Assessment order passed in the name of non existing amalgamating entity, instead of amalgamated company, despite due notice to all the authorities in time , is invalid and hence, quashed.



017. Accordingly, the additional ground raised by the assessee is allowed.
018. The other grounds raised by the assessee remain unadjudicated, Appeal of The Assessee is allowed.

ITA No.5538/Mum/2012
For A.Y. 2007-08

019. In view of our decision in ITA No.5677/Mum/2012 quashing the assessment order itself, the appeal of the learned Assessing Officer in ITA No.5538/Mum/2012 is dismissed.

ITA No. 774/Mum/2013
For A.Y. 2008-09

020. ITA No. 774/Mum/2013, is filed by the assessee for A.Y. 2008-09 against the assessment order passed by the Dy. Commissioner of Income Tax, 10(3), Mumbai, under Section 143(3) read with section 144(13) of the Income-tax Act, 1961 (the Act) on 26th November, 2012. The assessee filed its return of income on 26th September, 2008, declaring total income of ₹5,56,81,732/-. The return was picked up for scrutiny. Assessee has entered into international transaction as per form no. 3CEB, reference was made to the learned Transfer Pricing Officer to determine the Arms Length Price. The order under Section 92CA (3) of the Act was passed on 9th September, 2011, proposing an assessment of ₹3,32,07,006/-. The Transfer pricing officer in his order in paragraph no. 2.1. has categorically mentioned that the above company has amalgamated with Colgate-Palmolive (India) Limited effective from 1st April, 2008. Despite the above fact, the order was passed by the learned Transfer Pricing Officer in the name of S.S. Oral Hygiene Private Limited. The assessment order was passed in the name of S.S. Oral Hygiene Private Limited and (the learned Assessing Officer also mentioned that 'successor in interest as Colgate-Palmolive (India) Limited'). Draft order was passed under, determining the total income of the assessee at ₹8,88,88,738/- on 19th December, 2011.
021. The assessee preferred the objection before the learned Dispute Resolution Panel-2, Mumbai, who recorded the fact in its direction at Para no.3.2 that S.S. Oral Hygiene Private Limited got amalgamated with Colgate-Palmolive (India) Limited with effect from 1st April, 2008. The learned Dispute



Resolution Panel, passed the direction on 24th September, 2012 in the name of S.S. Oral Hygiene Private Limited.

022. Pursuant to that direction final assessment order was passed on 26th November, 2012, in the name of S.S. Oral Hygiene Private Limited [successor in interest M/s Colgate-Palmolive (India) Limited]. The income was determined at ₹8,88,88,738/-, the assessee is aggrieved with that order.
023. Identically, assessee has filed a petition for admission of additional ground of appeal vide letter dated 9th June, 2023, stating that the assessment order passed in the name of non-existing entity is illegal, null and void. The petition was identically worded as for A.Y. 2007-08. We find that identical issue has been decided in the case of the assessee for A.Y. 2007-08, wherein the assessment order was held to be illegal. We find that the facts are also identical. Accordingly, we do not have any hesitation in quashing the orders for A.Y. 2008-09 also. Accordingly, additional ground filed by the assessee is allowed and the assessment order is held to be quashed. Accordingly, the appeal of the assessee for A.Y. 2008-09, is allowed.
024. In the result, appeals of the assessee are allowed and appeal of the learned Assessing Officer is dismissed.

Order pronounced in the open court on 31.01.2023.

Sd/-
(KAVITHA RAJAGOPAL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 31.01.2023

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

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

BY ORDER,

True Copy//



Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai